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appears to me to be simply an acknowledgment of liablity, and as such to be sufficiently stamped with one anna. I would accordingly reverse the decision and remand the suit for retrial on the merits. A day should be fixed for the hearing, and the Judge, after taking such evidence as the parties may tender, should proceed to determine whether this money is justly due by the defendant to the plaintiff. For this purpose I do not think that any amendment of the plaint is necessary, but if it were, it seems to me to be a case in which it might properly be allowed. Costs should follow the result.

Rule made absolute.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1897
December 6.

IN RE MAHA'RA'NA SHRI JASWATSANGJI FATESANGJI.*

Criminal Procedure Code (Act X of 1882), Sec. 133—River—Obstruction in a public river—Meaning of 'obstruction' as used in the section.

Section 133 of the Code of Criminal Procedure (Act X of 1882) contemplates not only that the way, river, or channel where an unlawful obstruction is made, must be one of public use, but also that the obstruction must be of that public use.

Where a dispute arose between the proprietors of two tálukdári villages situate on the banks of a river about the diversion of the course of the river by means of a dam and a trench made by one of them in the current of the river, and each tálukdár claimed the river as his own private property,

Held, that the Magistrate had no jurisdiction to interfere under section 133 of the Criminal Procedure Code (Act X of 1882).

THIS was an application under section 435 of the Criminal Procedure Code (Act X of 1882).

The applicant was the Thákor of Limdi, and proprietor of the tálukdári village of Wadhela in the Ahmedabad District.

The river Utavali separates the lands of this village from those of another tálukdári village called Návda, which belongs to one Latifkhan. The river forms the boundary between these two villages for some distance. It then bifurcates, one branch pass-

* Criminal Revision. No. 297 of 1897.

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ing through Wadhela, the other through Návda, until both are lost in marshy swamps.

On the 20th April, 1883, the Thákor obtained a decree establishing his right to have the water of the river Utavali flow freely at all times and in all seasons towards his village of Wadhela, and directing the Tálukdár of Návda to remove the obstruction he had caused by erecting a dam across the river.

The proceedings in execution of this decree lasted till June, 1896.

On the 28th September, 1896, the Tálukdár of Návda made a complaint to the Collector of Ahmedabad, stating that the Tálukdár of Wadhela had dug a trench and erected a dam in the bed of the river, and thereby diverted the water from his channel, to the great injury of the people of Návda, who were his tenants. The material portion of this complaint was as follows:—

"My village of Návda is within the jurisdiction of the Dhandhuka Taluka. The river of that village is named Utavli, and its water is used for all purposes by the inhabitants of that village. No one has a right except myself to use the water of the river for crops and produce. Therefore, on payment to me of the fixed amount and obtaining my permission, people of the opposite side as well as others use it. In the meantime the Limbdi Darbár put us several times indirectly to great loss. The matter was many times enquired into and finally determined by the High Court. Several execution proceedings have taken place in the matter. The land on the opposite side of the river has been broken for cultivation. But as the current of the water is on this side, the water remains on this side. I have now received reliable information from my men that a number of men were engaged by the Limbdi Darbár, the land dug, and the earth therefrom thrown into the current of the river, and the flow of the water obstructed, and steps taken to divert it to the opposite side. By these means the persons residing in my village and my *girás* have undoubtedly suffered, and will suffer an immense loss. I bring all the facts to your notice and request your Honour to avert this loss."

On receipt of this complaint the Collector made an inquiry into the matter, and directed the Assistant Public Prosecutor to institute criminal proceedings against the Tálukdár of Wadhela.

Thereupon the Public Prosecutor laid information against the tálukdár before the First Class Magistrate of Ahmedabad, who issued the following notice to the accused under section 133 of the Code of Criminal Procedure:—

"The river Utavli flows towards Návda along the border of your village Wadhela. The people of Wadhela and other villages named in the margin have, by your

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order, performed some digging in the current of that river, and, in order to stop the water flowing towards Návda, have raised a mound by filling in earth and thereby diverted the flow towards Wadhela; they have thus caused obstruction to the cultivators of Návda and other villages who maintained themselves by cultivation with the help of the water. It has been shown to me that the obstruction still continues.

"I hereby, therefore, do order and enjoin you that you should, within the period of 10 days, abstain from the work of diverting the flow of the water, remove the obstructions caused by you to the usual flow of water, and restore the channel to its original condition; otherwise you should appear in my Court on the 5th July, 1897, to show cause why the order should not be enforced."

In answer to the above notice, the Tálukdár of Wadhela pleaded that the river was not a public river, but his private property so far as it flowed within the limits of his village; that he had caused no obstruction to the public and had done nothing so as to cause a public nuisance; that this was a private dispute between two neighbouring tálukdárs, and the Magistrate had no jurisdiction to interfere under section 133 of the Code of Criminal Procedure.

The Magistrate overruled these objections, and passed an order under section 140 of the Criminal Procedure Code (Act X of 1882) directing the Tálukdár of Wadhela to remove the obstruction complained of.

In his judgment the Magistrate remarked as follows:—

"The principal contention of the respondents is that the place where the alleged obstruction has been caused, is not public, and that the river where the obstruction is said to have been caused is of the private ownership of the Tálukdár of Wadhela, *i. e.*, the Limbdi Thákor. On this point also the evidence of the Taláti of Návda, the Bandh Kárkún, the Aval Kárkún, the Mámlatdár (R. S. Chagganlal,) and the late Mámlatdár of Dhandhuka and now Deputy Collector, Mr. Parmanandas Surajrám, is corroborative throughout. They each and all allege that the river is public and that it does not belong to any particular individual. All the villages by which the river passes make use of the water, and in a survey map of Wadhela the Utavli river has not been shown at all, though it has been in the map of the village of Návda. The evidence of the above witnesses is quite consonant with the principle that every riparian holder has the right to use the water flowing past his land. He cannot, however, interfere, as the Tálukdár of Wadhela (Limbdi Thákor) has done in the present case, with the rights of other holders in his neighbourhood and cause such a serious loss as that now inflicted upon the neighbouring Návda Tálukdár.

"The artificial filling and digging made by the Wadhela Tálukdár forces the water in the direction of his village and checks its free flow towards Návda. No one in the present case disputes the right of the Wadhela Tálukdár to use the water flowing naturally past his land, but he must remain content with that, and that only, and not try to get more by sensibly diminishing, by artificial means, the supply of water to his neighbours above and below the stream."

Under these circumstances the Tálukdár of Wadhela made the present application to the High Court under its revisional jurisdiction to set aside the Magistrate's order under section 133 of the Code of Criminal Procedure.

Anderson (with him Ráo Bahádur *Vasudeo J. Kirtikar* and *Ramdutt V. Desai*) for the applicant:—The Magistrate had no jurisdiction to pass the order in question. The dispute is one of a purely civil nature between two neighbouring tálukdárs, each of whom claims the bed of the river to be his own private property. The obstruction complained of, affects the interests of the Návda Tálukdár alone. It is on his complaint that the present proceedings were instituted. The public have no cause for complaint and do not complain of any public nuisance. The two tálukdárs have been disputing with each other in the Civil Court for years about this river. A dispute of a private nature relating to private property does not give jurisdiction to the Magistrate to proceed under section 133 of the Code of Criminal Procedure—*Empress* v. *Prayag Singh*(1); *Basaruddin* v. *Bahar Ali*(2); *Askar Mea* v. *Sabdar Mea*(3); *Luckhee* v. *Ram Kumar*(4). Where a *bonâ fide* question is raised as to whether the way, road or channel is public or private property, section 133 does not apply—*Queen-Empress* v. *Bissessur Sahu*(5). Here both the tálukdárs assert that the river where the alleged obstruction was caused is a private and not a public river. The river is neither a tidal nor a navigable river. We submit that the Magistrate has acted without jurisdiction.

Lang, Advocate General (with him *G. K. Parekh*) for the opponent:—The Magistrate has found as a fact that the river is a public river and that the obstruction complained of affects a large

(1) I. L. R., 9 Cal., 103.
(2) I. L. R., 11 Cal., 8.
(3) I. L. R., 12 Cal., 137.
(4) I. L. R., 15 Cal., 564.
(5) I. L. R., 17 Cal., 562.

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number of people. The whole evidence shows that the river does not belong to the rival tálukdárs or to any other private individual. All the villages by which it passes, use the water of this river. No member of the public can be restrained from using it. It is then a river "which is, or may lawfully be used by the public" within the meaning of section 133 of the Code of Criminal Procedure, and it is this public user which has been obstructed by the dam erected across the river by the Thákor of Limbdi. His acts amount to a public nuisance. The Magistrate had, therefore, jurisdiction to interfere and remove the obstruction under section 133 of the Code.

PARSONS, J.:—In this case the Magistrate has ordered the applicant, who is the Thákor of Limbdi and the owner of the village of Wadhela, to remove an obstruction from the river Utavli. The real point for our decision is whether the obstruction is such as could be the subject of an order under section 133 of the Code of Criminal Procedure. The river Utavli is said to have its rise in Káthiáwár, to run through the lands of several villages, and after a course of some 25 miles to come to the villages of Wadhela and Návda. It forms their boundary for some short distance. It then bifurcates; and the two streams end by absorption into the soil of the respective villages. The Thákor of Limbdi has, to use the words of the Magistrate, performed some digging in the current of the river and has raised a mound by filling in earth, and has thereby diverted the flow towards Wadhela; in other words, he has, by means of a trench and a dam, diverted the course of the river, so that now the greater portion of the water of the river flows into Wadhela and little or no water runs into Návda, whereas before the water was pretty evenly distributed between the two. Návda is like Wadhela a tálukdári village and was owned by one Latifkhan, who made the original complaint in the matter (Exhibit 8) on the 28th September, 1896. There had been prior to this a long standing litigation between the two tálukdárs relative to the water of the river. In 1877, a suit was filed by the owner of Wadhela against the owner of Návda, because the latter had erected a dam which prevented the water flowing into Wadhela. It was decided in 1883 by this High Court, which declared the plaintiff entitled to have a

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free flow of water into Wadhela. The proceedings in execution of this decree were not finally concluded till 1896. (See Printed Judgments, 1896, page 480.) It must have been very soon after this that the acts now complained of were done.

Section 133 of the Code deals only with an obstruction in a way, river, or channel which is, or may be, lawfully used by the public. These words seem to imply not only that the river or channel must be one of public use, but that the obstruction must be of that public use.

The questions, therefore, that arise are:—1. Whether the Utavli is a river which is, or may be, lawfully used by the public. 2. If so, whether there has been any unlawful obstruction caused to that use by the acts of the applicant. The best definition of the word "river" that I can find is given in the Tagore Law Lectures, 1889 (Riparian Rights), *viz.*:—"A running stream of water arising at its source by the operation of natural law and by the same law pursuing over the earth's surface a certain direction in a defined channel, being bounded on either side by banks, shores, or walls until it discharges itself into the sea, a lake or a marsh." This, however, says nothing about size, and, therefore, ought, I think, to be supplemented by the definition in Webster's Dictionary, *viz.*:—"A large stream of water flowing in a channel on land towards the ocean, a lake, or another river; a stream larger than a rivulet or brook." This so-called river, the Utavli, is scarcely shown to come within this definition. It seems to be merely a collection of rain water in hollow ground which has a certain flow owing to the low level and porous nature of the soil in Návda and Wadhela. There is no evidence of its condition in the dry weather, and no one says that it flows the whole year round. I do not even know whether it flows wholly in one direction. The map shows it to be broadest in the middle part of its course and to dwindle away on each side. Further inquiry, however, would be necessary in order to be able to properly answer this part of the question. Assuming, however, that the Utavli is a river, it is clear that no user of it by the public, either actual or possible, is proved. Apparently it is nowhere even alleged to be a public river. At common law all rivers above the flow and reflow of the tide are *primâ facie* deemed

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to be private. A public river would be one that was intended for the use of the public, subjected, that is to say, by law to a kind of servitude in favour of all members of the State. The Utavli is neither tidal nor navigable. It is not the property of the State. It is used by the inhabitants of the villages through which it runs, but they make no other use of it than that of ordinary riparian occupants, and the tálukdárs, who are the parties to this proceeding, expressly claim it as their private property, because it runs through their land. In his complaint, Latifkhan calls Návda his village, and says that "the river of that village is named Utavli and its water is used for all purposes by the inhabitants of that village. No one has a right, except myself, to use the water of the river for crops and produce. Therefore, on payment to me of the fixed amount and obtaining my permission, people of the opposite side as well as others use it." A similar claim was made in the civil suit by the Tálukdár of Wadhela. Each riparian proprietor claims the stream as his own and the use of the water for his benefit alone. It is, therefore, impossible to answer the first question otherwise than in the negative.

2. The answer to the second question is given by the Magistrate himself. 'Every riparian holder,' he says, 'has the right to use the water flowing past his land. He cannot, however, interfere, as the Tálukdár of Wadhela (Limbdi Thákor) has done in the present case, with the rights of other holders in his neighbourhood, and cause such a serious loss as that now inflicted upon the Návda Tálukdár.' This, too, was the complaint of the Návda Tálukdár, that his private rights as a riparian proprietor had been infringed. Just as in the former case the Wadhela Tálukdár complained against his neighbour of Návda, so here the Návda Tálukdár complains against him of Wadhela of an obstruction of his private rights as owner of property, a private injury causing private loss. I am of opinion that section 133 cannot extend to such an obstruction. My learned colleague agrees with me in this opinion, and, therefore, we reverse the order of the Magistrate.

RANADE, J.:—A series of decisions on section 133—*Queen-Empress* v. *Bissessur Sahu and another*[1], *Basaruddin* v. *Bahar*—

(1) I. L. R., 17 Cal., 562.

Ali[1]; *Askar Mea* v. *Sabdar Mea*[2], *Luckhee Narain Banerjee and others* v. *Ramkumar Mukherjee*[3]—clearly establish that the Magistrate has no jurisdiction under it where a *bonâ-fide* dispute exists as to whether the place where the obstruction is made is public or private property, though at the same time the Magistrate has power to enquire and determine whether or not the objection is a *bonâ-fide* one. In the present case, the applicant raised the contention in the Court below that the river Utavli was not a public stream, but belonged to him, and it was urged for him by the Government Pleader that the place where the alleged obstruction was caused was not a public place, but belonged to the applicant. The evidence recorded before the Magistrate raises indeed some presumption that the river Utavli is a public stream. It takes its rise in Káthiáwár, and after flowing for 20 miles past some fourteen villages in the Dhandhuka Táluka belonging some to Government and others to different tálukdárs and girássias, it loses itself in the *khári* or marsh of Bawaliari. Such a stream, not being over its whole length the property of any private owner, and being used by all, may be assumed to have some of the characteristics of a public stream. In the view I have taken of the facts of the case, the point is not very material. Section 133 contemplates not only that the river should be public, but that the obstruction must be caused to some public right. The chapter under which this section occurs is headed "Public Nuisances," and the section itself requires that the obstruction to be removed must be in a way, river, or channel, which may be lawfully used by the public. The prosecution, though instituted by the Assistant Government Pleader, was the result of a complaint made by the Tálukdár of Návda, who in his complaint claimed full and sole ownership of the river within the limits of his village. The former complaint was made some eight months after the alleged obstruction. The applicant, who is the Tálukdár of Wadhela, a neighbouring village, also claimed the river at the place where the obstruction has taken place to be his property. The villagers of Návda have no independent rights to the use of the water in the river for irrigation purposes. The loss and advantage in this dispute is solely of the Tálukdár of Návda or

(1) I. L. R., 11 Cal., 8. (2) I. L. R., 12 Cal., 137

(3) I. L. R., 15 Cal., 564.

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of Wadhela. It was on the same footing that the two tálukdárs fought the previous suit in respect of the removal of a dam higher up the river which the Návda Tálukdár had placed, and in which case this Court upheld the applicant's right to the unrestricted flow of water at all seasons into the channel of Wadhela. The present obstruction is in one sense the result of the full execution of that decree, the digging in the channel and the filling up of the bed of the river being intended to ensure a permanent flow of water in the channel.

It is thus clear that the obstruction is not a public nuisance and is not an invasion of a public right. The dispute is really, as before, between two neighbours, owners of private property, on the bank of the river. The Magistrate had thus no jurisdiction to proceed under section 133, but ought to have referred the parties to the remedy of a civil suit.

APPELLATE CIVIL.

1897.
December 8.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

LAKSHMIBAI and another (original Defendants), Appellants, *v.* RAJAJI bin DAJI (original Plaintiff), Respondent.*

Hindu law—Adoption—Specifying a child for adoption does not necessarily prevent the adoption of another if the one specified die or be refused.

Where a husband authorizing an adoption specifies the child he wishes to be taken, but that child dies or is refused by his parents, the authority given warrants (at least in Bombay) the adoption of another child. The presumption is that the husband desired an adoption, and by specifying the object merely indicated a preference.

Second appeal from the decision of Ráo Bahádur Chunilal D. Kavishankar, additional First Class Subordinate Judge of Sátára with appellate powers.

One Bhau bin Bhagoji Patil died on 26th March, 1890, leaving two widows named Tanu, the next friend of the plaintiff (a minor), and Lakshmibai (defendant No. 1). Tanu was the senior widow. The plaintiff alleged that on the 9th June, 1893, he was adopted by Tanu, and sued for a declaration of his status as such.

* Second Appeal, No. 502 of 1897.