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The lower appellate Court was in error in making the appellants pay the costs. They were placed in the position in which they are by the testator's own act and in accordance with the usual rule ought to get their costs as between attorney and clients. As to this appeal, however, they must bear their own costs. The respondent will get her costs of this appeal out of this estate.

R. R. *Decree varied.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1905.

February 23.

DINKAR ANANT DONGRE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NARAYAN BHALWAJA LOHAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Easements Act (V of 1882), section 7, illustration (J)—Stream—Usufruct—Riparian owner—Right to use and consume water without material injury to other like owners.

With respect to riparian owners the law is that each such owner has a right to the usufruct of the stream which passes through his land. The right is not an absolute and exclusive right to the flow of the water in its natural state, but to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

Embrey v. *Owen* (1) followed.

Section 7, illustration (J), of the Easements Act (V of 1882) shows that a riparian owner has the right to use and consume water for irrigating the land abutting on a natural stream, provided that he does not thereby cause material injury to other like owners.

SECOND appeal from the decision of H. Page, Acting District Judge of Ratnágiri, reversing the decree of Mahadev Shridhar, First Class Subordinate Judge.

The plaintiffs and defendants were riparian owners and the holding of the defendants was higher up the stream than the plaintiffs'. In the year 1901 the plaintiffs brought the present suit to obtain an injunction restraining the defendants from

* Second appeal No. 703 of 1903.

(1) (1851) 6 Exch. 353.

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erecting a dam higher up than that of the plaintiffs and to recover rupees fifty as damages, alleging that the defendants had, by putting up their dam, diminished the supply of water running up to the plaintiffs' dam and had thereby caused damage and injury to their garden as well as summer crops.

The defendants contended *inter alia* that the dam in dispute was erected by their ancestors about thirty years ago, that the allegation that the dam was put up in November 1897 was not true, that the plaintiffs had not suffered any damage and that the claim was time-barred.

The Subordinate Judge found that the dam in dispute had not been in existence for so long a time as to give the defendants a right to it, that the suit was not time-barred and that the plaintiffs were entitled to recover rupees thirty as damages.

Defendant 4 appealed and the plaintiffs filed cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

The Judge in appeal found that the suit was time-barred under section 15 of the Easements Act (V of 1882) as it was not brought within two years from the date when the obstruction was caused, and that the plaintiffs had not proved their exclusive right to the water of the stream in suit, inasmuch as defendant 4 "would merely appear to have been exercising the ordinary rights of a riparian holder of taking water from the *parya* (stream) and that without in any way interfering with the similar rights enjoyed by the plaintiffs." He therefore reversed the decree. In his judgment the Judge, relying on the decision in *Govind Babaji* v. *Naiku Joti*, [1] held that defendant 4 was not bound by the decree, which the plaintiffs had obtained in the Mamlatdar's Court in the year 1892 against defendants 1-3 who were tenants of defendants 4-5 for the removal of the dam which defendants 1-3 had then recently erected because he (defendant 4) was not a party to that suit.

The plaintiffs preferred a second appeal.

Mahadhev R. Bodas appeared for the appellants (plaintiffs) :— Our dam has been in existence for a long time ; therefore, the onus ought to have been put on the defendants to show that

[1] (1885) 10 Bom. 78.

they had the right to interfere with the supply of water which we had been receiving. Further, the defendants' land does not abut on the stream and water is carried to their land by means of a *pát* (water-course). Therefore they cannot claim the rights of a riparian owner.

Mahadhev V. Bhat appeared for the respondent 4 (defendant 4) :—The contention that we are not riparian owners is now raised for the first time. The Judge in appeal has found as a fact that we have been exercising the ordinary rights of a riparian holder without in any way interfering with the rights enjoyed by the plaintiffs. It was incumbent on plaintiffs to prove that we used the water in such a manner as to destroy or render useless or materially diminish or affect the supply of water received by the plaintiffs, see section 7, illustration (J), of the Easements Act (V of 1882).

JENKINS, C. J.:—From the finding of the lower Appellate Court it is clear that this is simply a contest between two riparian owners and the law is that each such owner has a right to the usufruct of the stream which passes through his land. That means not an absolute and exclusive right to the flow of the water in its natural state, but to the flow of the water and the enjoyment of it subject to the similar right of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. See *Embrey* v. *Owen*.[1]

The right claimed by the defendant No. 4, the principal defendant in this suit, is that of irrigation, and the limits of that right in this Presidency are aptly described in illustration (J) to section 7 of the Easements Act, which shows that a riparian owner has the right to use and consume the water for irrigating the land abutting on a natural stream, provided that he does not thereby cause material injury to other like owners.

Now the finding of the lower Appellate Court here is that the right has been exercised without in any way interfering with the similar rights enjoyed by the plaintiffs. There therefore has been no user by defendant No. 4 of which the plaintiffs can complain.

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It has been objected before us that defendant No. 4 is not a riparian owner, and that the water is taken by him to land which cannot be described as part of the riparian tenement. If that had been made out, the objection would have been sound: *McCartney* v. *Londonderry and Lough Swilly Railway Co.* (1)

But we find no suggestion of this kind in the lower Court, nor is it objected in the grounds of appeal that the land of defendant No. 4 does not fall within the description of abutting on the stream. Therefore no effect can now be given to this contention.

We agree with the District Judge that the order passed by the Mamlatdar cannot affect defendant No. 4 in this suit.

The result is that the decree of the lower Appellate Court must be confirmed with costs.

G. B. R. *Decree confirmed.*

(1) (1904) A. C. 301.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1905.
March 7.

HAJI HASAM JANOO AND OTHERS (PLAINTIFFS) v. CHOONILAL CHOTALAL AND ANOTHER (DEFENDANTS).*

Marine Insurance—Policy of insurance—Memorandum in a policy, office of—Written conditions—Printed conditions—Particular average loss—Stranding of the ship.

The plaintiffs shipped certain goods from Cochin and Calicut for carriage to Karachi by a craft. The goods were covered by three policies of marine insurance. The three policies were in almost identical terms, with this difference that the following words which occurred in the body of the policy were printed on one of them and written on the other two: "Warranted free from the particular average unless the vessel be sunk or burnt." The memorandum at the foot, after enumerating certain articles, proceeded: "All other goods free from average under three per cent. unless general or occasioned by the ship's being stranded." And then there was added a note in Gujrati, which as translated ran: "Dhanji Madat Rahman Nakhwa Osman from the seaport town of Cochin and

* Small Cause Court Reference in Suit No. 153/5765 of 1904.