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[481] FULL BENCH.

AJODHYA NATH KOILA v. RAJ KRISHTO BHAR.*

[24th November, 1902.]

Embankment, addition to—"Shall add to"—*Bengal Embankment Act (Bengal Act II of 1882) ss. 76, cl. (a), 79.*

The words "shall add to any existing embankments" in s. 76, cl. (a) of Act II of 1882, include an addition to the height of an embankment.

Goverdhan Sinha v. The Queen Empress, (1) overruled.

[Ref. 46 Cal. 825=23 C. W. N. 572=29 C. L. J. 328=50 I. C. 669; 93 Cal. 413; Fol. 13 C. L. J. 133.]

REFERENCE to Full Bench.

In this case a complaint was made to the Deputy Magistrate of Midnapore, at the instance of the Executive Engineer of the Cossye Division, by the complainant, Raj Krishto Bhar, that a private embankment, known as the Kolonda-Koptipur embankment, situated on the west side of the river Keleghai, had been raised up in height by the petitioner, Ajodhya Nath Koila, without the permission of the Collector, and that it was interfering with, or impeding and obstructing the public embankment at Gokulpur, which was on the other side of the river. That the raising up in height of the embankment had been done with a view to divert the current of the water. The petitioner denied having raised the embankment, but admitted having repaired it.

The petitioner was convicted, on the 9th April 1902, by the Deputy Magistrate, of an offence under s. 76, clause (a) of the Bengal Embankment Act, II of 1882, and was sentenced to pay a fine of Rs. 50, or in default to one month's simple imprisonment.

On the 28th April the petitioner obtained a Rule calling upon the District Magistrate of Midnapore to show cause why his conviction and sentence should not be set aside, on the ground [482] that no addition was made to an existing embankment within s. 76, clause (a) of Bengal Act II of 1882, as interpreted in the case of *Goverdhan Sinha v. The Queen-Empress* (1).

On the Rule coming on for hearing, the Judges composing the Criminal Bench of the High Court (HARINGTON AND BRETT, JJ.), doubting the correctness of that decision, referred the matter to a Full Bench on the 13th July 1902.

The order of reference was as follows :—

On April 9th, 1902, Ajodhya Nath Koila was convicted before the learned Deputy Magistrate of Midnapore of an offence under section 76 (a) of Act II of 1882 (Bengal Embankment Act, 1882), and was fined Rs. 50, or in default one month's simple imprisonment.

Section 76 is in the following terms :—

"Every person who, in any of the territories to which this Act extends, without the previous permission of the Collector, shall erect, or cause or wilfully permit to be erected, any new embankment, or shall add to any existing embankment, or shall obstruct or divert, or cause or wilfully permit to be obstructed or diverted, any watercourse, if such act is likely to interfere with, counteract, or impede any public embankment or any public watercourse.....shall be liable, on conviction, to a fine not exceeding five hundred rupees, or in default of payment to imprisonment of either description for a period not exceeding six months."

* Reference to Full Bench in Criminal Revision No. 428 of 1902.

Full Bench: Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Banerjee, Mr. Justice Hill and Mr. Justice Stephen.

(1) (1885) I. L. R. 11 Cal. 570.

The judgment of the Deputy Magistrate is as follows :—“ Briefly, the facts of this case are to this effect :—Between two villages Gokulpur and Kolonda the river Keleghai passes. The village Gokulpur lies to the east of the river, while Kolonda and Koptipur lie to the west of it. Towards the Gokulpur side, there is the public embankment known as the Gokulpur embankment, and on the other side there is the private embankment known as the Kolonda-Koptipur embankment. The complaint made at the instance of the Executive Engineer, Cossye Division, is that the private embankment has been raised up in height and it has been done without the permission of the Collector, interfering with or impeding and obstructing the public embankment at Gokulpur, and it has been done with a view to divert the current of the watercourse whereon there are public embankments. In his examination Ajodhya denies having raised the private embankment. He admits having repaired the same.

“ From the sketch of the plan, as well as from the cross section of the private embankment prepared by Raj Kristo Bhar, and whose correctness has not been questioned by the other side, it appears that at the highest points the height of the Kolonda embankment stood at 56'00, but it has been raised to 58'74. The Gokulpur embankment at the same line has a height of 56'24, and at another point where the Gokulpur embankment stands 56'80 and the other at 56'00, the Kolonda embankment has been raised to 58'40. If this is correct, and it seems to be so, then there is no doubt that the embankment on the west of the Keleghai river has been raised. If so, is it likely to divert and obstruct a water course which will impede [483] the public embankment of Gokulpur? This would certainly be the case, if the private embankment had been raised in height. Raj Krishto Bhar further deposed that there are trees which point to the former height over the Kolonda embankment. He says that the raising of the embankment would turn away the flow of water in high flood time in the opposite direction, viz., towards the direction of the Gokulpur embankment. Gurai Singha has also given evidence to the same effect. He has deposed that for the last 20 or 22 years water has passed over the Kolonda embankment, and the raising of the height would impede the water-course and make it flow in the opposite direction. Godadhar and Pachu also speak as to the raising of the embankment known as 'the Kolonda-Koptipur embankment'. So there is nothing to disbelieve the evidence of persons who have local knowledge and live in the locality.

Now the defence is chiefly directed to the fact that both the public embankment and the private embankment stand on the same height, but I have shown that the private one has been raised a little, and I have also shown that in such a case the result would be that water would flow over the Gokulpur public embankment, thus diverting the current of the water-course and otherwise obstructing it. It is absurd to suppose that both the embankments should be of the same height, for no such damage was done to the Gokulpur embankment, as it was the case with the private embankment where there was extraordinary flood last year and the damages and partly washing off the same show in which direction the water flowed.

That being so, the Court comes to the conclusion that the raising of the Kolonda embankment is such as to interfere with the public embankment at Gokulpur and impede the water-course and that no permission has been taken to do so. The Court, therefore, finds Ajodhya Nath Koila guilty under section 76 (a) of the Embankment Act, and directs him to pay a fine of Rs. 50, or in default, one month's simple imprisonment. Under section 73 of the said Embankment Act, I direct that within the period of one month the raised portion of the Kolonda embankment should be removed.”

On April 28th, a Rule was granted calling upon the District Magistrate to show cause why the conviction and sentence should not be set aside on the ground that no addition was made to an existing embankment within clause (a), section 76 of Bengal Act II of 1882, as interpreted in the case of *Goverdhan Sinha v. The Queen-Empress* (1).

In that case the learned Judges say that the words 'shall add to existing embankments' are not intended to mean any repair to an existing embankment, even if the effect of the repair be to make the embankment higher or broader. These words only mean an extension in the length of an existing embankment.

With all respect to the learned Judges who decided this case, we are unable to agree in the view that the words 'add to' only mean an extension in the length of an existing embankment and do not include an addition to the height of an existing embankment. Taking the ordinary meaning of the word, the expression 'shall add to' would include any addition to an embankment whether in length, breadth

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or heights, and the section makes the adding to an existing embankment an offence if such act is likely to interfere with, counteract or impede, any public embankment or public water course.' If [484] an addition is made to a private embankment on one side of a stream which has the effect of making it higher than the public embankment on the other so that some of the water which would otherwise have flowed over the top of the private embankment is caused to flow over the public embankment, it seems to us that the public embankment is, by the addition to the height of the private embankment, interfered with or counteracted. In view therefore of the object of the section, we are of opinion that any addition to an existing embankment is an offence under section 76 if such addition is likely to interfere with, counteract or impede any public embankment or any public water-course.

The question which we refer to the Full Bench is :—

Do the words ' shall add to any existing embankment ' in section 76 (a) of Act II (B. C.) of 1882 include an addition to the height of an embankment ?

Mr. P. L. Roy (Babu Sarat Chandra Dutt with him) for the petitioner. The words "add to" in s. 76 of Bengal Act II of 1882 can only mean an extension in the length of an existing embankment, and do not include an addition to its height. If they are held to mean addition in height, then it would be impossible to repair an embankment because such repair would necessarily effect some change in the height and breadth, and if any ordinary repair is not included, how is the line of demarcation to be drawn? If the section is construed in the way in which the learned referring Judges have construed it, there would be considerable difficulty in the application of the provisions of s. 79, under which the convicting Magistrate is only entitled to direct the removal of the embankment or obstruction. In the case of *Goverdhan Sinha v. The Queen-Empress* (1) their Lordships observed that "If throwing additional earth on an embankment means an addition to an existing embankment within the meaning of clause (b), it would be almost impossible for the convicting Magistrate to define the quantity of earth to be removed from the embankment in order to carry out the provisions of section 79. This case is entirely in favour of my contentions.

Deputy Legal Remembrancer (Mr. Douglas White) for the Crown was not called upon.

MACLEAN, C. J. I think the question submitted to us ought to be answered in the affirmative. I do not think I can usefully add anything to what has been said by the learned Judges who have referred this case.

[485] PRINSEP, J. I am of the same opinion.

BANERJEE, J. I am of the same opinion.

HILL, J. I concur.

STEPHEN, J. I concur.

30 C. 485.

CRIMINAL REVISION.

NARAYAN CHANGA v. EMPEROR.* [21st August, 1902.]

Trial by jury—Procedure—Delivery of verdict—Verdict, partial record of—Criminal Procedure Code (Act V of 1898) ss. 300, 301, 303—Prejudice—New trial.

Where after the delivery of an unanimous verdict of the jury, convicting the accused of the charge of rioting in connection with certain land and the crops thereon, possession of which was claimed by the complainant as well as by the accused, the foreman of the jury attempted to add that "the land and the crops are all theirs" (meaning that they belonged to the accused),

* Criminal Revision No. 755 of 1902, against the order of J. C. Mitter, Sessions Judge of Dacca, dated 19th May 1902, affirming the order passed by S. C. Dhar, Assistant Sessions Judge of Dacca, dated 8th March 1902.

(1) (1885) I. L. R. 11 Cal. 570.