

none of the witnesses depose to the fact of Mutty Singh's or his wife's possession, for some of the witnesses at least depose that they were in possession. The case must, therefore, be remanded to decide whether or not Tara Soonduree had the rights of a sharer in the joint ancestral property, and, as such, power to dispose of these lands to the plaintiff.

Costs to follow the result.

The 1st February 1871.

*Present:*

The Hon'ble L. S. Jackson and W. Ainslie,  
*Judges.*

**Butwarra—Reserved rights.**

Case No. 1463 of 1870.

*Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 18th April 1870, affirming a decision of the Sudder Moonsiff of that District, dated the 1st July 1869.*

Gour Sahoy Singh and another (Defendants),  
*Appellants,*

*versus*

Sheo Sahoy Singh (Plaintiff), *Respondent.*

*Mr. Mun Mohun Ghose* for Appellants.

*Baboo Romesh Chunder Mitter* for  
Respondent.

Where parties, by agreement in a butwarra, restricted their rights by the condition that one of their number was to have full use of the water in a reservoir, the others were held not to be at liberty to set up, even on their own lands, an embankment round the reservoir so as to diminish materially the flow of water into it.

*Jackson, J.*—It appears to me that the special appeal in this case cannot be sustained. The learned Counsel who has argued it before us has evidently felt the great

difficulty of bringing the case within the limits of special appeals at all; and, in reality, the tendency of the argument has been to show, either that the plaintiff is to get something which he was not entitled to by the terms of the butwarra, or that he obtained more than he asked for in the plaint.

But it appears to me not to be so. The plaintiff seems merely to desire to get the full advantage which was reserved to him in the butwarra or partition between the parties. The words of the butwarra are that the water of the Puchyaree Ahur, which is one of the three great reservoirs which were included in the subject of partition, shall find its way to the land of the plaintiff through the aperture or *kurbee*, as it is called, of another apparently similar reservoir which is the exclusive property of the defendant. I can attach no other meaning to this stipulation than that the water of the larger reservoir should pass through the smaller on its way to the plaintiff's lands. Consequently, the decree made by the Subordinate Judge is in accordance with the reasonable interpretation of the butwarra.

Then there is another question which relates to the right of the defendant to set up on his own land an embankment running round one or more sides of the reserved *ahur* or reservoir. It is contended by the special appellant that he is entitled to do this on his own land, and we are referred to a case in 13 Weekly Reporter, page 414, where in a case supposed to be similar the learned Chief Justice held that the plaintiff there could not be restrained from doing so.

That case, so far as I can judge from the report, is an entirely different case from the present. There the plaintiff held the land without any reservation; but in this case the parties have by agreement in the butwarra restricted their rights by the condition that the plaintiff was to have full use of the water in the reservoir. Now, if the parties who obtained the lands lying on different sides of that reservoir were to be at liberty to put up an embankment round it, and so to diminish very materially the flow of water into it, the rights reserved to the other co-sharers would become nearly or quite nugatory. Under these circumstances, it appears to me that the injunction against erecting this embankment was properly issued, and that this appeal must be dismissed with costs.

*Ainslie, J.*—I concur.