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therefore, be reversed, and the judgment of the District Judge will stand.

The appellant ought to have his costs of both hearings in this Court.

Appeal decreed.

Before Mr. Justice Ainslie and Mr. Justice Lawford.

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Sept. 14.

RAM LALL SINGH AND OTHERS (DEFENDANTS) *v.* LILL DHARY MUHTON (PLAINTIFF).*

Maintenance of Bunds—Prescriptive Right—Escape of Water—Injury to Neighbouring Properties—Vis Major.

Where a defendant shows a prescriptive right to maintain a bund, and uses all reasonable and proper precautions for its safety, he cannot be made liable for damage caused by the escape or overflow of water on to the lands of others and the consequent injury of the crops thereon, if the escape or overflow be caused by the act of God, or *vis major*.

THIS was a suit brought by a ryot of one village against the owner of another for damages caused by the penning back of water, on the ground that the plaintiff had a right to cut the bund of the defendants under certain circumstances, and that the defendants wrongfully restrained him from exercising that right whereby his (the plaintiff's) lands became submerged, and thereby caused him damage.

The defence set up was, first, that the complaint ought to come from the proprietor, and not from individual ryots of the estate; and secondly, that the bund was one which the defendants had, for a long series of years, maintained for irrigation purposes; that they had acquired a prescriptive right to maintain it; that it was unchanged; and that there was no right in the plaintiff to cut it down at any time.

It was proved by the evidence that the bund was a long established one, and it was not said that any change in its condition had been recently made. Evidence was offered by the plaintiff that he had, for two continuous years, entered and cut the bund, but this the Munsif disbelieved.

*) Special Appeals, Nos. 618, 619, 620, 621, 622, and 623 of 1877, against the decree of E. Grey, Esq., Officiating Judge of Zilla Patna, dated the 22nd of December 1876, reversing the decree of Moulvi Abdool Azeez, Munsif of Behar, dated the 29th of July 1876.

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On the 29th July 1876 the Munsif decided that the bund had been long established, and that there had been no change in its condition; that the plaintiff had entirely failed to prove his right to cut the bund, and even a right to regulate its height; and accordingly dismissed the plaintiff's suit. On this the plaintiff appealed to the District Judge, who reversed the Munsif's decision. Whereupon the defendants appealed specially to the High Court.

Mr. *Branson* (with him Mr. *M. L. Sandel* and Baboo *Chunder Madhub Ghose*) for the appellant contended, that the defendants had acquired a right to interfere with the natural stream in the nature of an easement, and claimed a prescriptive right to such easement: Gale on Easements, ss. 202, 203. Further, that the right of penning back the waters of a natural stream so as to overflow the land of the higher riparian proprietors might be acquired by prescription—Angell on Watercourses, s. 372; the extent of the right being determined by user commensurate with the actual enjoyment—Angell on Watercourses, ss. 379, 380; that the defendants claimed nothing further than their original right to maintain the bund at its original height: *Steles* v. *Hooker* (1). The learned counsel further, on the authority of the *Madras Railway Company* v. *The Zemindars of Carvatenagarum* (2) and *Nichols* v. *Marsland* (3), argued that the defendants could not be held responsible for the overflowing of the watercourses by the acts of others, or caused by any unforeseen circumstances, as was the case in the present suit; and that it was for the person who complained of the bund being detrimental to his interest to show a prescriptive right to come in and interfere with it.

Mr. *Piffard* (with him Moonshee *Mahomed Yussuf*) for the respondent contended, that the respondent had a prescriptive right to regulate the height of the bund; and, moreover, that it was an interference with the flow of the stream above his lands to such an extent as to injure them and entitle him to bring a suit for damages, or to enter and abate the nuisance: Blackstone's Commentaries, Vol. III. That the case of the *Mad-*

(1) 7 Cowen, 266. (2) L. R., 1 In. App., 364. (3) 2 L. R., Ex. D., 1.

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vas Railway Company v. *The Zemindars of Carvatenagarum* (1) did not apply, inasmuch as that case related to artificial reservoirs, whereas the present case dealt with a natural stream; and the question of right to be decided, therefore, here related, not to the owner of an artificial reservoir, but to the riparian proprietors—Broome's Commentary, p. 83, 3rd edition; and that the respondent having given evidence in the Munsif's Court that the bund had been for two continuous years cut by him; the defendants, if they ever possessed a prescriptive right to maintain the bund, had lost it; and cited *Chumroo Singh* v. *Mullick Khyrut Ahmed* (2) as showing that, unless the defendants could prove a prescriptive right, they had no right to intefere with the flow of the water to the injury of others.

The judgment of the Court was delivered by

AINSLIE, J. (who, after stating the facts case, continued):—There is no evidence to show that, by agre or otherwise, the accumulation of water is limited to a certain ntity; and that when the water rises to a given height, the defendants, or the plaintiff, or the plaintiff's zemindar, is bound or entitled to open a passage for the escape of the surplus.

The Munsif found that the plaintiff had entirely failed to prove any right to cut the bund: and we must say that, in our opinion, it would require very strong evidence to establish such a claim as that put forward here, not on the part of the zemindar acting on behalf of the cultivators of his estate, but on behalf of each individual ryot according to his own judgment, to cut down the bund of a neighbouring zemindar, seeing that it is well known that the consequence of so doing would be that, when the water once begins to flow over the bund, the bund must give way, and the accumulation of water, which is absolutely necessary for the cultivation of land, must be lost.

The Judge has gone off from the facts of the case, and has based his judgment upon a construction of law derived entirely from English text-books. Now, the law as laid down in English text-books is, no doubt, a very useful guide; but it must not be

(1) L. R., 2 Ex. D., 1. (2) 18 W. R., 525.

taken to override the customs of this country—customs arising from the extreme necessity of preserving water and thereby preserving the means of cultivating large tracts of land which would otherwise lie waste.

In the present case we have a long established bund unchanged in its condition with certain outlets for excess water. *Primâ facie* the defendants have a right to maintain the bund in its usual condition, and the right of the plaintiff to cut that bund down is one which we think must be proved most unmistakeably. The Judge does not go upon proof at all, but merely upon his view of the law. Now, that view of the law, as it will presently appear, cannot be supported.

The case of the *Madras Railway Company* v. *The Zemindar of Carvatenagarum* (1), decided by the Privy Council, was a case the converse of the present. It was for damage done by the bursting of an artificial reservoir. The principle, however, is the same. Their Lordships there held that storing of water in this country is an act of necessity; that it was not for the benefit of the proprietor of the land only, but also in order to enable a large body of cultivators to live by the cultivation of that land. They further held, that the damage which was caused by an unusual flood and the consequent bursting of the embankment of the tank by which the railway was washed away was not one for which the owner of the tank could be charged.

In addition to this, there is a recent case, *Nichols* v. *Marsland* (2). This was a case perhaps much stronger in point, because it was not even a case in which water was preserved for the benefit of a large section of the public, but merely for the pleasure of a particular owner, who had formed an ornamental piece of water by embanking a stream passing through her own lands, and then through the lands of the plaintiff. Eventually on an unusually heavy storm occurring, and a great rush of water coming into this reservoir, the banks proved insufficient to support the pressure, and the lands of the plaintiff, which lay lower down the stream, were injured in consequence. It was held there by the Court of Appeal that the case was distinguished from that of *Rylands* v. *Fletcher* (3)—also cited in the Madras case before the Privy Council in 1 Indian Appeals, page

(1) L. R., 1 In Ap., 364. (2) L. R., 2 Ex. D., 1. (3) L. R., 3 H. L., 330.

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364—in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir, (which of itself would have been innocuous) causes the disaster.

They also came to the conclusion that, as the jury had found that all reasonable precaution had been taken, the defendant was not responsible for the damage done.

This case seems to us to apply distinctly to the present. It appears from the judgment of the Judge, that the damage in the present instance was caused by an unusual inundation, which he describes as bringing down four times the ordinary quantity of water. It must be taken that the damage was caused by the act of God, and not by the act of the defendants, who are not shown to have failed in making provision for properly dealing with such quantities of water as might reasonably be expected to accumulate.

The suit must therefore be dismissed. We reverse the judgment of the Judge and restore that of the Munsif with costs.

Special Appeals, Nos. 619 to 623, will be governed by this judgment.

*Appeal dismissed.**

* A rule for a review of judgment was obtained by the appellants on 12th January 1878, on the ground that plaintiff had a prescriptive right to regulate the height of the bund; that although the Munsif disbelieved the evidence, there was still a regular appeal open to the petitioner upon the facts and law, and he did so appeal, and the Judge's decision was in his favor. If, therefore, the lower Appellate Court had, according to its view of the law, failed to pronounce an opinion on such evidence, that, although a good reason for remand, was no reason for the dismissal of the plaintiff's suit.

The rule came on for hearing on 15th April (Mr. Branson appearing to show cause against the rule; Mr. J. D. Bell in support of it), and was discharged on 17th April 1878, the Court (Ainslie, J.) being of opinion that the defendants' right to maintain the bund had been proved; and that, inasmuch as the plaintiff had not attempted to go into evidence on the point of the plaintiff having regulated the height of the bund, in the lower Appellate Court, and as there had been no finding on this point, and he had accepted the evidence as found by the first Court, and was content with the lower Appellate Court's decision on the law in his favor, and took no objection to the evidence of no finding on this point in special appeal, and did not file a cross-appeal, the case could not be remanded now to enable him to do so.

Rule dismissed.