

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of His Highness The Gaekwar Sarkar of Baroda and The Bombay, Baroda, and Central India Railway Company v. Gandhi Kachrabhai Kasturchand, from the High Court of Judicature at Bombay ; delivered the 10th February 1903.*

---

Present at the Hearing :

LORD MACNAGHTEN.

LORD LINDLEY.

SIR ARTHUR WILSON.

SIR JOHN BONSER.

[*Delivered by Lord Macnaghten.*]

The Respondent, who was Plaintiff in the suit, is the owner of lands in the village of Kokta and its neighbourhood. He complained that since the making of the Mehsana-Viramgaum Railway his lands had been flooded in the rainy season. The railway which was constructed by the Gaekwar of Baroda was finished in 1891. Ever since it has been under the control and management of the Bombay Baroda and Central India Railway Company by whom it is still worked. The Respondent brought his suit against the Gaekwar with the consent of the Governor-General in Council as required by Section 433 of the Civil Procedure Code and also against the Railway Company. His case was that the mischief of which he complained was occasioned by the negligent manner in which the works of the railway had been constructed and maintained. He claimed damages and an injunction.

The Subordinate Judge of Ahmedabad and the High Court of Judicature at Bombay both found in favour of the Respondent on the question of negligence and concurred in awarding damages and an injunction, though the damages assessed by the Subordinate Judge were reduced in amount by the High Court. Both Defendants appealed to His Majesty. But the Railway Company did not lodge a case or appear by counsel to support their Appeal.

The concurrent finding of the two Courts was hardly disputed before this Board. The negligence proved appears to have been of a very gross character. Before the railway was made the surface water of a district four miles distant from Kokta which was abundant in the rainy season used to pass away to the westward without coming near the Respondent's lands. The railway which there runs north and south was constructed on an embankment. The embankment was designed with so little skill that no proper provision was made for the passage of the surface water. The greater part of it being obstructed by the embankment flowed down by the east side of the line and drowned the Respondent's lands. The mischief was increased by the fact that a series of excavations or burrow pits, as they are called, from which earth had been taken to form the embankment were turned into a continuous channel by the action of the water washing away the barriers left between them. A similar thing happened on the other side of the railway and some of the water that did pass through the embankment ran down a channel formed on the western side of the line and also found its way on to the Respondent's lands.

The railway was constructed under the Indian Railway Act 1890 and is subject to the provisions of that Act.

The Act of 1890 provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the provisions of the Land Acquisition Act 1870. It also provides that the Governor-General in Council is to determine in case of difference what accommodation works are required for the convenience of adjoining owners.

In these circumstances their Lordships were much surprised to hear the arguments addressed to them at the Bar. The leading Counsel who appeared for the Gaekwar contended, first, that inasmuch as the Act of 1890 authorised the undertakers to construct all necessary embankments this embankment as constructed was an authorised work and that the statutory authority conferred by the Act of 1890 (though in fact no statutory authority was required by the Gaekwar for the construction of an embankment on his own land) actually protected the Gaekwar from any claims connected with or arising out of negligent or defective construction. In the second place he contended that although the statutory authority of the Act of 1890 might have been abused or exceeded, no suit would lie and that the Respondent's only remedy was by proceeding for compensation under the Land Acquisition Act 1870. And lastly he gravely argued that what the Respondent really required in order to protect himself from the mischief caused by the negligence of the Appellants was some additional accommodation works or something in the nature of accommodation works which it was the Respondent's business to define and submit for the approval of the Governor-General in Council.

It would be simply a waste of time to deal seriously with such contentions as these. It has

been determined over and over again that if a person or a body of persons having statutory authority for the construction of works (whether those works are for the benefit of the public or for the benefit of the undertakers or, as in the case of a railway, partly for the benefit of the undertakers and partly for the good of the public) exceeds or abuses the powers conferred by the Legislature, the remedy of a person injured in consequence is by action or suit and not by a proceeding for compensation under the statute which has been so transgressed. Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others. They are granted on the condition sometimes expressed and sometimes understood—expressed in the Act of 1890, but if not expressed always understood—that the undertakers “shall do as little damage as possible” in the exercise of their statutory powers.

Their Lordships are therefore of opinion that the Appeal must be dismissed, but they think that it will be better that the injunction should be in general terms restraining the Defendants from flooding the lands of the Respondent or causing or permitting them to be flooded by the works of the Mehsana-Viramgaum Railway. It would be inconvenient if the Court were to direct the execution of specified works which it has no power to supervise, which might not be approved by the paramount authority, and which after all might not effect the object in view.

Their Lordships will therefore humbly advise His Majesty that with this variation the Order appealed from should be affirmed and the Appeal dismissed. As regards costs the Order will be against both the Appellants.

*Lawrence v. Great Northern Railway Company*, 1851, 16 Q.B. 643.

*Broadbent v. The Imperial Gas Company*, 1857, 7 D. M. & G. 436, 456.

*Bagnall v. London and North-Western Railway Company*, 1861, 7 H. & N. 423, 1 H. & C. 544.

*Ricket v. Metropolitan Railway Company*, 1867, 2 E. & I. A.C. 175, 202.

*Geddis v. Proprietors of the Bann Reservoir*, 1878, 3 A.C. 430, 455.