

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Baboo Rameshur Pershad Narain Singh v. Baboo Koonj Behari Pattuk and another, from the High Court of Judicature at Fort William, in Bengal; delivered Tuesday, 3rd December 1878.

Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

IN this suit the Appellant (Plaintiff below), the owner of Mouzah Chahul and four other mouzahs, complained of the diversion of water which, as he alleged, ought to flow from an adjoining estate belonging to the Defendant, called Mouzah Mahooet, to his own.

Mahooet lies to the south of the Plaintiff's mouzahs, and the land falls in a northerly direction from Mahooet towards them.

A large reservoir, called Mahooet Tal, formed by artificial embankments, has existed for a long time in the Defendant's mouzah. It appears to be fed partly by water which is brought from a natural river by artificial channels, and partly by the collection of the rainfall on the adjoining land, and was undoubtedly created for irrigating purposes. A large khonwa (overflow channel) has been cut on the eastern side of this tal running in a northerly direction, by which, and by other channels, water from this tal has flowed to another and lower tal constructed at the northern extremity of Mouzah Mahooet, and mainly upon it, called Chahul Tal, from which last tal the water is carried by several channels to Mouzah Chahul and the other mouzahs of the Plaintiff, for the purpose of irrigating them.

According to the evidence in the case, this system of irrigation has existed beyond living memory.

The complaint of the Plaintiff is that the Defendant has placed two grandees or dams in the

khonwa above described, and has also cut a new channel from the northern part of the khonwa, the effect of which is to prevent the water in the khonwa from flowing to the Chahul Tal, and to divert it altogether from his mouzahs. He also complains that the Defendant has prevented the water issuing from the tal on its western side from flowing to his land as it had formerly done, and has carried it into or in the direction of the River Ponwar.

The Plaintiff does not dispute the right of the Defendant to use the water of the Mahooet Tal for irrigating that mouzah, but, subject to that use, claims, as a right, that the overflow water of the tal and the surplus water, after irrigating the Defendants' mouzah, shall be allowed to flow in the accustomed manner to his mouzahs.

The defence, as their Lordships understand it, is twofold. In the first place, the Defendant denies the Plaintiff's right to any of the water flowing from the tal; and, secondly, he contends that if any right exists, it is to the overflow of the tal only, and that he has not infringed this limited right.

The Subordinate Judge passed a decree in favour of the Plaintiff, declaring him to have the right to irrigate the lands of his mouzahs with the water of the Mahooet Tal, and giving relief against what he found to be wrongful diversions of the water in the manner which will be hereafter commented upon.

Upon appeal to the High Court this decree was reversed. The Judges of that Court seem to have considered that the Plaintiff had put his claim in such a way that, if affirmed, it would deprive the Defendant of the use of the water of Mahooet Tal for irrigating his own mouzah. Their Lordships, however, do not understand the claim to be so extensive as it was thus assumed to be. It does not very distinctly appear whether the Judges of the High Court meant to decide that the Plaintiff had not such a right as they considered him to have claimed, or that he had established no right whatever to the flow of any of the water issuing from Mahooet Tal. They rested their judgment, however, in a great degree on the fact that the tal and khonwa are artificial works erected on the Defendant's own mouzah.

There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through

an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case, each successive riparian proprietor is, *primâ facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. The above distinction seems to be now clearly established, for, although it was said by the Court of Queen's Bench, in the case of *Major v. Chadwick* (11 A. & E., 586), that it was no misdirection to tell the jury "that the law of watercourses is the same, whether natural or artificial," it was held in a subsequent case, which appears to their Lordships to be correctly decided (*Wood v. Waud*, 3 Exch., 748), that this expression is to be considered as applicable to the particular case, and that, as a general proposition, it would be too broad. On the other hand, it appears to their Lordships that the proposition that a right to the use of water flowing through an artificial channel cannot be presumed from the time, manner, and circumstances of its enjoyment, is equally too broad and untenable.

It was said by the Court, in *Wood v. Waud*, p. 777 :—

"We entirely concur with Lord Denman, C. J., that the proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible; but, on the other hand, the general proposition that, *under all circumstances*, the right to watercourses, arising from enjoyment, is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation, or alteration of, a person's property, and presumably of a temporary character, and liable to variations."

In a case which occurred soon after this decision, *Greatrex v. Hayward* (8 Exch., 281), Baron Parke shortly states the principle thus :—

"The right of the party to an artificial watercourse, as against

the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created."

In the case then in question the Court considered that the watercourse was of a temporary nature only, and that no right had been acquired by an enjoyment of twenty years.

In a subsequent case, the Court of Queen's Bench directed a new trial, on the ground that the jury might have been misled by the direction of the learned Judge who tried the cause, to the effect that if the stream were an artificial one no right whatever could have been acquired in it. The Court held the direction was incorrect, "because (in the words of the Court) "although it may have "been an artificial watercourse, it may still have "been originally made under such circumstances, 'and have been so used, as to give all the rights "that the riparian proprietors would have had, had "it been a natural stream."—(*Suteliffe v. Booth*, 32 Law Journal, 2 B., 136.)

What, then, is the character of the reservoir and watercourses now in dispute, and what are the circumstances under which they were presumably created, and have been actually enjoyed? In the first place, as a question of fact, the Mahooet Tal appears to be of a permanent nature. Next, the construction of the Chahul Tal, which receives the surplus water of the upper tal, by means of the khonwa and other channels, indicates that a permanent and connected system of irrigation for what are now the Plaintiff's and Defendant's mouzahs, beneficial to both estates, was by these means provided. The fact that this lower reservoir, which seems to have acquired the name of the Chahul Tal, was built mainly on the Defendant's mouzah, leads irresistibly to the conclusion that it was constructed by, or with the consent of, the then owner of that mouzah; and it is evident, from its situation, that its main, if not only, use was to store water for the convenient irrigation of the Plaintiff's mouzahs. Then it is proved that the water has been used and enjoyed for irrigating these mouzahs from a time beyond living memory. It appears to their Lordships that, from all these facts, a presumption fairly arises that this enjoyment had an origin which conferred a right.

It may be that at the time when this system of irrigation was adopted the mouzahs now belonging to the Plaintiff and the Defendant formed one

estate, and if so, on severance, the right to the continued flow of the water in the accustomed channels would arise and subsist (*see* on this point *Watts v. Kelson*, 2 Ch., App. 166); or, if the mouzahs were always separate, it may be that, by the construction of the Mahooet Tal, water was intercepted which would naturally have flowed to Chahul, and that this or some other consideration existed, which led to an agreement between the proprietors respecting the use of the water.

Other circumstances were proved which support the presumption of a legal right to the enjoyment of the water.

In 1831 proceedings were taken in the Criminal Court of Zillah Berar by the owners of Chahul against some ryots of Mahooet in consequence of their having closed the khonwa from Mahooet Tal to Chahul Tal, which led to a razinamah being come to, dated 6th April 1831, between the Elakadars of the two mouzahs. In that agreement the khonwa is described as being then an ancient one. It recites that disputes arose respecting "the closing of a long standing kunwa of water of the tal of Mouzah Mahooet." The arrangement come to is thus expressed:—

"Now between our client aforesaid, and the said Rajah Saheb, a compromise has been made in this manner: that when the water of the 'tal' of Mouzah Mahooet aforesaid is about to overflow, and there happens to be any necessity for discharging the same, at that time our client aforesaid shall discharge the water of the said 'negar' towards the 'tal' of Mouzah Chahul, &c., through the course of the long standing 'negar,' which the Elakadar of Chahul, &c., declares to be a 'kunwa'; that they shall not open it towards the river Ponwar or in any other direction. And that the power of closing and opening the 'negar' of the 'tal' of Mouzah Mahooet aforesaid, rests with the Elakadar of the said Mahooet.

"As Moulvi Kasim Ali, 'Elakadar' of Mouzah Mahooet, has acknowledged the 'kunwa' of 'tal' Mahooet towards the Mouzah Chahul, &c., therefore a mutual adjustment has been effected, and the contents of the razinamah are true."

The effect of this arrangement seems to be that the overflow of the tal shall be always discharged through the khonwa, and in no other direction. This agreement appears to refer only to the overflow water discharged from the tal through the khonwa (which was then apparently the only matter in dispute); but it is a clear acknowledgment of a right to this overflow. This is made plain by the statement that "the

“ Elakadar of Mouzah Mahooet has acknowledged
 “ the khunwa of Tal Mahooet towards the Mouzah
 “ Chahul.”

It was objected that this razinamah does not bind the proprietor of Mahooet; but although it was apparently made between tenants, it seems to have been subsequently acted on, and may be properly used to explain the character of the enjoyment of the water.

The parties were again before the Criminal Court in 1864; the Elakadar of Mahooet being on this occasion the complainant. What then occurred appears in the following record of the proceedings :—

“ Case in respect of the dispute for the use of the water of Tal Mahooet.

“ It is evident that the property in dispute lies in Mouzah Mahooet, and is known by the name of tal.

“ It appears that both parties claim the right to use the water collected in this tal. The point at issue is this: Whether one party alone has the right to the water, or both the parties are entitled to the use of it? It seems that a protracted period has elapsed, that a dispute had occurred regarding this very tal between the parties concerned in the present case. From the razinamah (deed of compromise) filed by the second party, against the genuineness of which the first party has no reason to object, the above dispute appears to have been decided as follows: That the people of Mouzah Mahooet had entered into an arrangement with the opposite party to allow the water of the tal aforesaid to flow towards the Tal Chahul, and not to allow the same to flow in any other direction. This proves that although the tal is situated within the land of the first party, and although by virtue of the razinamah, the first party is vested with the power of discharging or withholding the water, yet the opposite party is entitled to the use of the said water when it is once discharged. Therefore it is

“ Ordered, that according to Section 320 of the Criminal Procedure, the first party shall not exclusively hold possession of the water, the subject of litigation, till the said first party obtain a decision from a competent Court declaring that he is entitled to hold possession without the participation of any other person.”

The Mahooet proprietors do not seem to have challenged this decision of the magistrate in the Civil Court.

The map produced by the Elakadars of Mouzah Mahooet in the course of the proceedings just referred to, affords strong evidence in support of the claim of the Plaintiff, that the overflow of the tal, and also the surplus water remaining after the irrigation of the Defendant's mouzah, ought to flow to the Chahul Tal, without being diverted by the Defendant, except for irrigating Mouzah Mahooet, and it seems to their Lordships that the Subordinate Judge was correct in attaching great importance to

this map. The witnesses for the Plaintiff, to whom this Judge gave credit, also prove a continuous use and enjoyment of the water.

It is not inconsistent with the Plaintiff's claim that the power of fixing the time for letting off the overflow from the Mahooet Tal should reside with the Defendant. The necessity for this operation would obviously occur in the rainy seasons, and it is apparent upon the evidence that in these seasons a considerable quantity of water is let off, which runs down to the Chahul reservoir, and is stored there.

Their Lordships therefore are of opinion that the Plaintiff has established a right to have the overflow water of the Mahooet Tal discharged into the khonwa, so that it may flow through it towards the Chahul Tal; and also a right to the flow of the surplus water towards the tal as heretofore. But they think that his whole right is subject to the right of the Plaintiff to irrigate the lands of Mouzah Mahooet, and to take by proper channels and other proper means so much of the water as may be proper and requisite for such purpose.

Their Lordships will now consider the evidence of the Defendant's interference with these limited rights.

As to the diversion by means of the two grandees, and the new channel on the eastern side of Mahooet, the Ameen has found, and the evidence (to which credit is given by the Subordinate Judge) supports his finding, that the two grandees, No. 1 and No. 2, obstruct the flow of water from the khonwa into the channels which lead to the reservoir of Chahul, and thus divert the water which would otherwise have flowed to it, and cause it to run into the new channel cut by the Defendant in a north-easterly direction, by which it is ultimately discharged into the river Bahaween.

The Defendant does not deny this diversion, but asserts that it was done to irrigate his own lands.

It is, however, found by the Ameen that neither of the grandees nor the new channel is required for this purpose, and in this also his Report is corroborated by the evidence. The Subordinate Judge of Gya, by whom the Ameen was examined, has adopted his findings, and has also come to the conclusion that these obstructions were made to injure the Plaintiff.

The judgment of the High Court does not disturb

the above conclusions of fact, and indeed passes them by, the learned Judges being of opinion, as already stated, that the Plaintiff had failed to establish the right he claimed.

The Subordinate Judge has ordered that these obstructions should be abated, and their Lordships agree in this respect with his judgment.

As to the alleged diversion to the west, the Subordinate Judge seems to have considered that the Defendant had made a breach in the western bank of the tal, and cut a new passage to carry the water along the western side of his fields to the River Ponwar, and he has ordered this assumed new passage to be closed. This part of the decree seems to have been made under a misapprehension of fact. The Ameen, as their Lordships understand his Report, finds that no breach had been made in the western bank of the tal, but he does report that two nalas had been formed, which carried the water to the River Ponwar. It is not very clear, upon the Ameen's Report, whether these nalas were cut by the Defendant or were naturally formed. He does, indeed, also find that there is a passage for the water to go "to the west of the River Ponwar." This cut or passage, it is to be observed, is not mentioned in the plaint. Even if it had been complained of, their Lordships think that the evidence of any diversion of water by these means to the west is too obscure to warrant a decree directed against any specific act, and, therefore, the decree of the Subordinate Judge, so far as it directs the closing of the assumed new passage, ought not to stand. If, however, any acts have been done on the western side of Mahooet contrary to the declaration of right which their Lordships will advise Her Majesty to make, the injunction, which they will also advise, will embrace such acts, and enable the Plaintiff to compel their discontinuance.

On the whole case, their Lordships have come to the conclusion that the decree of the High Court cannot be maintained. They are also unable to affirm in its entirety the decree of the Subordinate Judge. In that decree the right is declared in terms which are, in their opinion, too wide and general, and they have already observed that the specific order to close the assumed new western channel is supported neither by allegation nor by sufficient proof.

They also think that it was not correct to insert

in the decree a declaration of the Plaintiff's right to scour the khonwa. *Primâ facie*, and in the absence of evidence to the contrary, such a right is presumed by law to be incident to the right to the flow of the water, but no issue was raised on this point, nor does it appear that any effort of the Plaintiff to cleanse the watercourse has been obstructed by the Defendant.

Their Lordships will, therefore, humbly advise Her Majesty to reverse both the decrees below, and in lieu thereof to direct that a decree be passed in favour of the Plaintiff, declaring that the Plaintiff has a right in the overflow of water discharged from the Mahooet Tal, whenever the same is discharged by the Defendant, and that such overflow ought to be discharged into the khunwa on the eastern side of the said tal, and to flow through the same towards the Chahul Tal in the accustomed manner for the purpose of irrigating Mouzah Chahul and the other four mouzahs of the Plaintiff mentioned in the plaint; and also declaring that after the Defendant's right to the use of the water of the said tal for the purpose of irrigating the lands of mouzah Mahooet by proper and requisite channels and other proper means has been satisfied, and subject thereto, the water which may remain after such use by the Defendant, ought to flow, in the accustomed channels and manner, towards the Chahul Tal for irrigating the said mouzahs of the Plaintiff, without being diverted therefrom, otherwise than by such diversion as may be occasioned by the irrigation of the lands of Mouzah Mahooet in a due and proper manner as aforesaid; and also that by the said decree it be ordered that the grandees marked No. 1 and No. 2 in the Ameen's map be removed, and that the new kurrah from the said khunwa shown in the same map, from the spot marked by the letter *alif* to the spot marked by the letter *ba* be closed; and that it be further ordered that the Defendant be enjoined not to discharge or divert the overflow of the Mahooet Tal, or the water remaining after irrigating Mouzah Mahooet, as aforesaid, in any direction or manner contrary to the above declaration of right.

Their Lordships consider that the Plaintiff is entitled to receive from the Defendant his costs incurred in the Court of the Subordinate Judge of Gya, but as an appeal to amend and limit the

decree of that Court became in their opinion necessary, they think that the parties ought to pay their own costs respectively in the High Court, and they will advise Her Majesty accordingly.

The Appellant will have the costs of the Appeal to Her Majesty.
