

Privy Council Appeal No. 20 of 1932.

Patna Appeals Nos. 47 of 1928 and 20 of 1930.

Naresh Mohan Thakur and others - - - - Appellants.

v.

Brijmohan Misra, since deceased, and others - - Respondents.

Same - - - - Appellants.

v.

Same - - - - Respondents.

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER, 1932.

Present at the Hearing :

LORD WRIGHT.

SIR GEORGE LOWNDES.

SIR DINSHAH MULLA.

[*Delivered by* LORD WRIGHT.]

This appeal raises only one question, which is a very narrow one, though of considerable importance. The sole matter for determination here is whether the High Court at Patna were right in dismissing the appellants' claim to recover damages from the respondents. The claim was dismissed *in toto*, and the respondents have contended before their Lordships that the order of the High Court dismissing *in toto* the claim for damages was correct. The rest of the order of the High Court is not in any way brought in issue before their Lordships. In all other respects, except as to costs, the High Court affirmed the decree of the Subordinate Judge of Bhagalpur.

The appellants and the respondents are riparian owners on the river Belasi. The appellants, who were plaintiffs in the action, are the lower riparian owners on that stream, and the respondents are the upper riparian owners.

The claim in the action was that the respondents had erected a dam on their part of the stream, which had the effect of interfering with the flow of the stream down to and through the portion belonging to the appellants and in that way have interfered with their rights as riparian owners and caused them loss or damage. The claim in the action, which is contained in the plaint, raises the issue of fact and claims a declaration that the plaintiffs were entitled to the free and uninterrupted supply of water, and an injunction to restrain the defendants from putting up a dam across the river Belasi, or obstructing the free flow of water in any other manner, and, furthermore, to pass a decree for rs. 10,350 as damages for the injury suffered by the plaintiffs, and also to pass a decree "for further damage till the removal of the dam and that the amount of actual damage may be ascertained in a subsequent stage of the suit and a decree may be passed for the same on taking requisite Court fee." That was the prayer in the action, and issues were framed by the Subordinate Judge, of which issues Nos. 13 and 14 are material. Issue No. 13 is : "Did the crops of the plaintiffs suffer on account of the construction of the disputed dam." Issue No. 14 is : "Are the plaintiffs entitled to get any damage from the defendants? If so, how much?"

The case obviously involved a very long and intricate examination of the facts and involved a very prolonged calling of witnesses. It appears that at the trial twenty-one witnesses were called for the plaintiffs, the appellants, and twenty-six witnesses for the defendants, the respondents. At the end of the evidence of the first witness called by the plaintiffs they filed a petition, which is set out in the record, in these terms ; "Petition filed by plaintiffs praying that the evidence regarding loss and damages be allowed to be reserved for the present and till after the decree is passed in this suit." On that an order was made on the same date as the petition. The petition shows "that, during the course of the cross-examination of witness No. 1 of the plaintiffs on the matter of the extent of loss and damages sustained by the plaintiffs in consequence of want of water for irrigation and the failure of the crops, it has been suggested that it would be convenient to reserve the determination of the said matter at this stage to save loss of time if the plaintiffs be not successful in their suit. That the plaintiffs accordingly humbly pray that the evidence regarding the above be allowed to be reserved for the present and till after the decree is passed in the suit." On that an order was made accordingly, as appears from the record, which, after referring to the petition, adds : "Prayer allowed." That is the only reference to the order, and

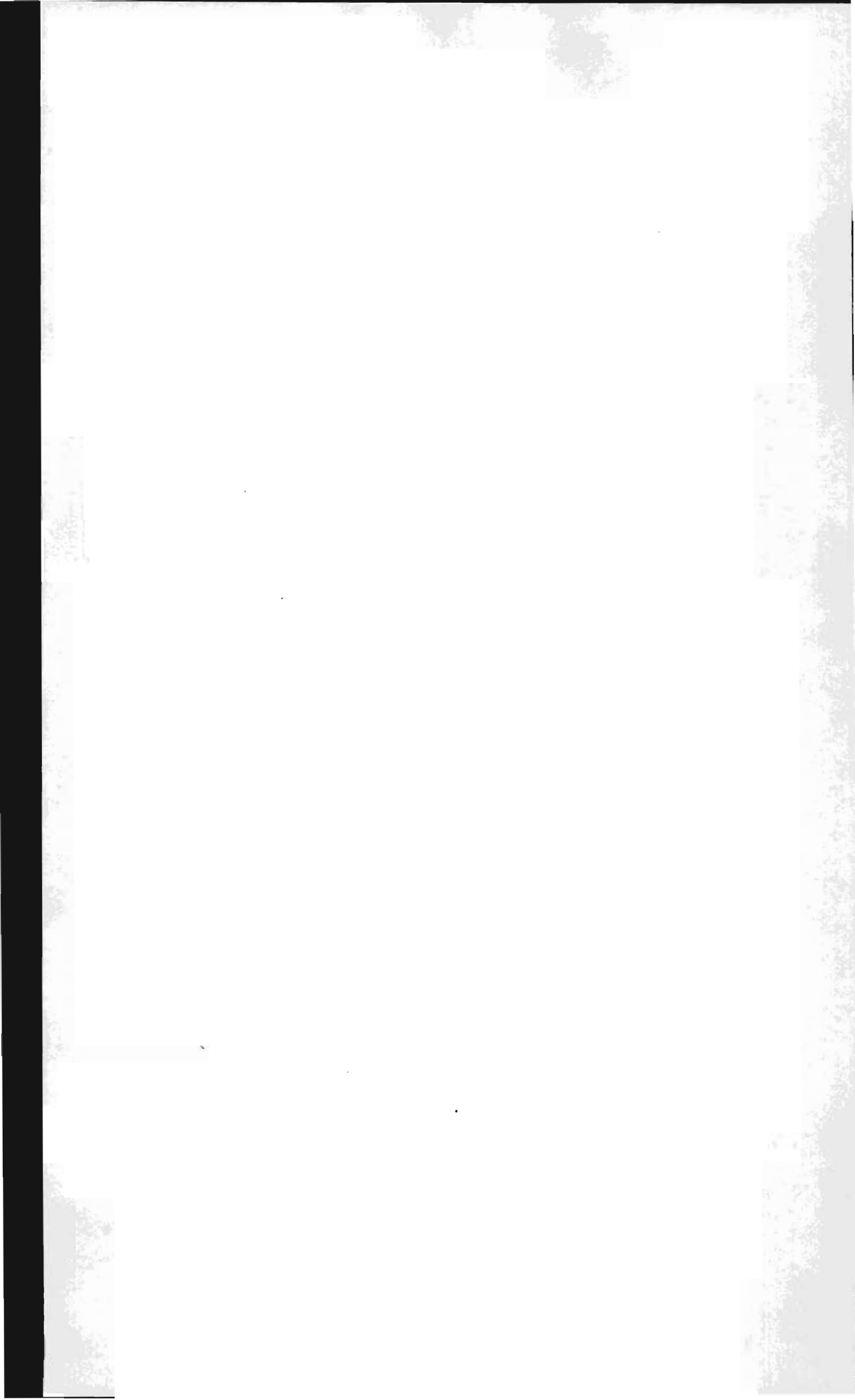
there is nothing in the record to show that that order was made after it had been objected to on the part of the defendants. It was certainly a most reasonable and proper order to make. It was well within the inherent jurisdiction of the Court in determining how the suit should be conducted, and their Lordships cannot find any trace anywhere that the defendants, the respondents, at the time objected to that order being made. The trial proceeded on the basis of that order. No further evidence as to damage was called; at least, their Lordships have not discovered, and their attention has not been called to any further evidence as to damages. At the close of the prolonged and very complicated trial the Subordinate Judge of Bhagalpur gave judgment. The judgment is very interesting, very long and very complete. He finds that the plaintiffs' claim succeeded. Their Lordships need only refer to the very end of his judgment as being a matter material on this appeal. In paragraph 11 the judgment proceeds thus: "The 13th issue relates to the crops of the plaintiffs having suffered on account of the construction of the Bandh. It has been established by evidence that the villages named in the plaint produce paddy. Paddy must suffer if there is not sufficient water. The crops will therefore suffer if the means of irrigation is stopped." Then paragraph 12 says: "The 14th issue related to damages suffered by plaintiffs. On the side of plaintiffs a large number of sale certificates have been filed to show that the tenants could not pay rent and their holdings were sold for arrears of rent. The Kamat lands will also suffer by want of irrigation, and the Zamindar will also suffer damage in respect of Bhaoli lands. I find, therefore, the plaintiffs have suffered damage and they are entitled to recover the same from the defendants. They cannot, however, get damage as claimed in the plaint without the same being determined. They may get the amount determined by filing the petition, and the amount so determined shall be recoverable by them. They are also not allowed costs in this suit on the amount claimed in the plaint, but they will get costs in proportion to the amount determined." The order proceeds to declare: "The right of the plaintiffs to uninterrupted flow of water from the Belasi is declared, and it is further ordered that defendants have no right to put up a dam across the said river so as to stop or diminish the flow of water to the villages lower down." It orders the defendants to remove the dam within a month, and it grants a permanent injunction in the terms prayed for by the plaintiffs. Then it proceeds, and this is the part which is material for the purposes of this appeal: "Plaintiffs are held entitled to recover damages, the amount whereof to be hereafter determined. For the purposes of costs to be assessed at this stage the value of the land is held to be Rs. 9,000, and the costs and damage will be awarded on the same being determined." That is the judgment of the Subordinate Judge. The respondents

then appealed to the High Court at Patna, and they lodged a very long memorandum of appeal dealing very minutely with the various facts of the case relating to the course of the river and the obstruction to the river and the flow of water. Of all the heads, amounting to forty-seven, in this lengthy memorandum, their Lordships have only been referred as relevant to the appeal, to head 13, which complains "that the finding of the court below that plaintiffs' crops suffered by reason of obstruction complained of and they are entitled to damages is not correct." That being the memorandum of appeal lodged by the respondents in the High Court, the matter was heard at some considerable length in the High Court, and the judges of the High Court delivered a judgment, which was again very complete, dealing with all the disputed facts relating to the actual obstruction complained of and confirmed the findings of the Subordinate Judge, and their Lordships' attention has not been drawn to any respect in which they departed from the findings of the Subordinate Judge; but at the end of their judgment the High Court proceeded to deal with the question of damages in a passage which commences: "There remains the question of damages." The judgment of the High Court sets out certain paragraphs of the plaint, and then it proceeds, "Prayer (d) is as follows." Then it sets out the terms of the prayer, which has already been set out in this judgment. The judgment proceeds to quote the terms of the Subordinate Judge's ruling on the 14th issue, a passage which has been already referred to, and then it proceeds as follows: "It is difficult to understand why the question of the amount of damages already suffered should not have been decided. The evidence in proof of damages is inadequate." Then it sets out various statements from the evidence, and it proceeds to criticise the evidence as it appeared in fact in the record. Then it proceeds: "Admittedly no papers have been filed to show the usual income from the Kamat lands. This should have been filed before the hearing of the suit. In the plaint there is a prayer to decree the damages already suffered. It is only in regard to future damages (until the removal of the dam) that there is a prayer for subsequent assessment. In my opinion the plaintiffs should have proved by proper evidence at the trial the amount of damages actually suffered up to the date of the filing of the suit. This they have failed to do, and their prayer for damages must be dismissed." Their Lordships disregard the two remands for further investigation which were made before the final decree was drawn up, and which are not material in this appeal. The final decree was in this form: "It is ordered and decreed that this appeal be dismissed"—that is to say, the appeal of the respondents from the judgment of the Subordinate Judge—"and the decree of the Court below be, and the same is hereby confirmed." Then come these words, which are crucial for this appeal to their Lordships Board: "with this variation only, that the plaintiffs' claim for

damages be dismissed. It is further ordered and decreed that the plaintiffs shall get one-half the costs of the proceedings at the trial in the Court of First Instance and in the first hearing of this appeal in this Court, but they shall get their whole costs of the proceedings subsequent to the first order of remand in this Court. It is further ordered and decreed that the defendants shall bear their own costs." As has been already said, it is from those words varying the decree of the Subordinate Judge that this appeal is brought, and that is the only issue. Their Lordships have carefully examined the record and they have found nothing in the record which throws any light upon the matters which are the subject of this appeal beyond what has been set out in their judgment. Their Lordships are unable to find that there was any justification for the course taken by the Court in allowing the appeal from the Subordinate Judge to the extent of that variation. An explanation, if it is necessary to seek for explanation, of the course taken by the High Court may be that they had not their attention drawn to the petition and order made on the 12th May, 1924, to which their Lordships have already referred. Even so, it might appear that a less drastic course might have been taken than to exclude the appellants from any right to recover damages at all for the wrong committed to their rights as riparian owners. It has been found by the Subordinate Judge, and affirmed by the High Court, that such a wrong was committed and that some damage, whatever the damage may be, has flowed from it, and, that being so, their Lordships see no reason at all to criticise or attack the order which was made postponing the determination of the issue of the amount of damages until after the issue of liability had been determined by the Trial Judge and by the High Court. The course adopted by the Subordinate Judge in so postponing this issue appears to their Lordships to have been a very usual, a very proper and very convenient course, and, in all the circumstances of this case their Lordships can come to no other conclusion than that this part of the judgment of the High Court was made in some way under inadvertence and that their error must be corrected.

In their Lordships' opinion this appeal must be allowed and the order of remand dated the 5th June, 1928, and the decree dated 24th June, 1930, of the High Court set aside in so far as they vary the decree of the Subordinate Judge by decreeing that the plaintiffs' claim for damages be dismissed, and also in so far as they deal with the appellants' costs in the proceedings at the trial in the court of first instance and in the first hearing of the appeal in the High Court by awarding to the appellants only half of their costs. In their Lordships' opinion that part of the order and decree of the High Court should be set aside and the order of the Subordinate Judge be restored in so far as it has been varied, that is to say that part of the order which is to this effect: "The plaintiffs are declared entitled to damages, the amount whereof

will hereafter be determined." The matter will accordingly be remitted to the court below to give effect to this judgment of their Lordships and the appellants will have not only one half of their costs of the proceedings in the trial court and of the first hearing of the appeal, but the whole of such costs, and the appellants will have the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

NARESH MOHAN THAKUR AND OTHERS

v.

BRJMOHAN MISRA, since deceased, AND
OTHERS

SAME

v.

SAME.

(Consolidated Appeals.)

DELIVERED BY LORD WRIGHT.