Case Note: Case concerning the right of a riparian landowner to construct dam structures on the river. The court ruled in favor of the existence of such a right, though not as an unlimited right. It held that this right is conditioned by the similar right of other riparian owners who have co-extensive rights to the water of the stream.

(1960)62BOMLR106

IN THE HIGH COURT OF BOMBAY

Decided On: 28.08.1959

The State of Bombay
v.
Laxman Sakharam Pimparkar and Ors.

Hon'ble Judges:
S.T. Desai and Datar, JJ.

JUDGMENT

S.T. Desai, J.

(1) This second appeal by the State of Bombay raises some interesting questions of considerable importance affecting the right of riparian owners, under the general law, to the extra-ordinary use of water of a natural stream flowing past their lands by putting up Bandharas for the purpose of irrigating their lands. The suit out of which this appeal arises was brought by seven agriculturists of the village Jopul in Chandwad Taluka in the District of Nasik in a representative capacity on behalf of themselves and others claiming as riparian owners the right to put up thre kachha dams (bandharas) at specified points in the river Shelu and receive water there from for the purpose of irrigating their lands abutting on the river. It appears that n 1947 some villagers of Devargaon, who were lower riparian owners complained to the Government about the diminution of flow of water to them in consequence of the Bandharas constructed up-stream by the villagers of Jopul and orders were issued by the Mamlatdar, Chandwad, calling upon the inhabitants of Jopul to demolish the Kachha Bandharas put up by them. It was also directed in those orders that the villagers of Jopul should not take any water from the river and if they did so, action would be taken against them. The villagers, however, erected Kachha Bandharas and water charges at penal rates were recovered from them by the Government. Apprehending that the same situation would arise the next years, the plaintiffs brought the suit claiming a declaration that they had a right to erect the three Kachha Bandharas in the river Shelu and for consequential relief by way of injunction restraining the defendant, the State of Bombay from obstructing them in the exercise of their rights. The defendants denied the rights claimed by the plaintiffs. They also relied on the paramount right of the State to control and regulate the water of the river and

further alleged that the rights of the villagers, if any, had been extinguished by virtue of a Notification issued on the 17th February 1913 under Section 5 of the Bombay Irrigation Act.

(2) The erucial questions are (1) whether the plaintiffs, the villagers of Jopul, the foundation of whose rights is that they have lands on the margin of a flowing stream are entitled in exercise of and for the proper enjoyment of that right to put up the three temporary dams (Bandharas) and lead the water collected at the dams to their lands by means of channels or what are called "Pats" and (2) if they have that right, whether the state of Bombay has the paramount right to control and regulate the water of the river Shelu so as to refuse it altogether to the plaintiffs for the purpose of irrigation.

(3) It may be observed that there are a number of such Bandharas both up and down stream and on the pleadings of the parties, the dispute in suit was not as to the manner of enjoyment of this right, i.e. about the volume of water the plaintiffs could impound for their agricultural purposes but turned solely on the factum of their right to put up those Bandharas, which, according to the State, the plaintiffs had no right whatever to construct. We make this observation here because an argument on that line was sought to be advanced by the learned Assistant Government Pleader, although there was no pleading not any issue relating to the quantity of water diverted by the plaintiffs and its effect on the equal right to the flow of the water of lower riparian owners. Of course, on the basis of the natural right of riparian oners, the plaintiffs could not possibly set-up a claim to divert waters of the Shelu ad libitum. We shall advert to this aspect of the matter when we examine that argument.

(4) The facts which are not disputable in this second appeal and the findings of the lower appellate Court require to be set out in some detail in order to appreciate the contentions pressed before us. It is also necessary for that purpose to have a clear idea of the nature of th temporary dams (Kachha Bandharas), the plaintiffs' right to put up which has been strongly questioned by the learned Assistant Government Pleader.

(5) The river Shelu so called in the reverent sense in which every fairly copious flow of water is exalted in our country, is one of three streams which lose their identity in the Vainath Nullah but it will be convenient to describe it as a river (nadi). It raises in the Chandwad hills, some ten miles away to the north of the village Jopul. It takes its name from a village a fe miles away from the hills where some four or five streamlets join and flow as one column of water by the side of the village Jopul. Flowing further south that column of water or Nullah crosses the Bombay-Agra Road and is joined by another rivulet known as Narayan Nadi which arises from the same hills but at some distance in the west. This combined flow reaches Sogarsane and goes further South to Vanasgaon where it is joined by another rivulet knon as Vadai Nai. From Vanasgaon, the Shelu loses its identity and is called the Vainatha Nullah. It will be seen that the three rivers called "the Shelu Nadi", "the Narayan Nadi" and Vadali Nadi, which are really Nullahas, lose their identity in the Vainath Nullah. This Vainath Nullah after flowing some distance meets the river Kadwa near Niphad. This Kadwa is a tributary of the Godavari and meets the latter at Nandur-Madhmeshwar. For the present, this description is sufficient to give

an idea of the Shelu. It will be necessary for us to refer to the Godavari and its tributaries when we examine later on the contention of the defendant that the rights f the plaintiffs, if any, to put up any Kachha Badharas were extinguished by a Notification issued by the State of Bombay in 1913 under Sec 5 of the Bombay Irrigation Act.

(6) There are a number of temporary and permanents dams (Kachha and Pucca Bandharas) in the river Shelu. From the foot of the hills right up to Vanasgaon, the terrain is rocky and only the lands near the banks of the three Nullahs are rendered cultivable by irrigating them with the help of Bandharas which dot the whole banks of these nullahs known as Shelu Nadi, Vadali Nadi and Narayan Nadi. It is the case of the plaintiffs that their agricultural lands were of poor fertility and that only the lands abutting the river can give the villagers some appreciable produce. One of the villagers, as the learned Judge below has quoted in his judgment, sated in his evidence "If we are not allowed to take water from the Bandharas, we shall starve." Of course, we are not concerned in this appeazl with the consequences of the three Kachha Bandharas of the plaintiffs being removed, since if the State of Bombay is entitled as a matter of law to have them removed, then effect must be given to that right of the State. We may observe, however, that it seems rather incongruous that only these three Bandharas out of the numerous Bandharas which dot the lands of the three nullahs from the foot of the hill to the village of Vanasgaon should have been chosen for the purpose of their removal. But, as we have already said, we are concerned with the legal rights of the parties. Some of the Bandharas on these nullahs are kachha and some are pucca. Kachha Bandharas are required to be erected every year after monsoon because they are destroyed by the rush of water in the rainy season.

(7) The three Kachha Bandharas, the subject-matter of the controversy are mentioned in the Patasthal Books of 1881 in the revenue records as bearing numbers I, II and III and the villagers can them the Sal Bandhara, Dol Bandhara and Gavathan Bandhara. These three Bandharas irrigate the lands in respect of which the plaintiffs claim their riparian rights. Formerly, all these lands constituted three units lying along the river-bank on either side. These lands are described as Thalas and also as Patasthals because they are served by the Pat water from the river. Patasthal lands have significant and special meaning in the revenue records of the State. In Gordon's Bombay, Survey and Settlement Manual, Volume I, it is stated at page 91:

"By Patashthal Bagayat is meant land irrigated by damming streams with dams called 'Bandharas' and leading the water collected above the dam to the area to be irrigated by maans of channels or Pats. These Bandhars may be either permanent (pacca) or temporary (kachha), but are usually of the latter description, being constructed annually of earth and stones at small cost. Frequently a stream is dammed at many spots the overflow from the principal dam being impounded by the next lower dam, the supply of which is often supplemented by springs in the bed of the stream between the two dams. Patasthal irrigations is essentially by flow, but water-lifts called 'sups' or 'supdas' were used to lift the water to the Pat from the reservoir when the impounded water above the dam falls below the level of the channel or Pat."

The learned Judge in the lower appellate Court has recorded the finding that these particular Thalas which are now sub-divded into many survey numbers have been irrigated with the water of the river dammed at three specified points. It is true that all the villagers of Jopul did not at the time of the suit have their lands abutting the river Shelu. But there is evidence that the survey numbers which constitute those lands originally formed part of three holdings and they were irrigated with the water of the river dammed by the three Bandharas. An argument was urged before us by the learned Assistant Government Pleader that all the villagers of Jopul were not entitled to assert their right in the suit as riparian owners because they (all of them) did not hold lands touching the river Shelu. The learned Judge below has taken the view that since the lands of the villagers of Jopul seems to have originally formed part of three units or holdings which were irrigated with the water of the river Shelu dammed by the three Bandharas, the plaintiffs can be regarded as riparian owners. We are inclined to take the view that it is competent to the plaintiffs in their representative capacity to maintain the suit in the present form. But, even if the right to the flow of this natural water vested in some of those persons, it would not really affect the points in dispute. We shall be reverting to this aspect of the case when we deal with the argument of the plaintiffs-respondents founded on lost grant. The learned Judge in the lower appellate Court has also found that the three Bandharas appear to have been put up at specified points in the river Shelu since prior to the year 1850. He has observed:

"It is not as if these Bandharas came into existence only in about 1873 or the like. They must have been very much older.

Note books issued to the agriculturists of Jopul showing receipts of assessment have been produced in this case and they show that water rate for Bagayat crop had been levied at least since 1850."

The learned Judge has also observed in his judgment:

"In view of the indisputable evidence supplied by the Government records themselves, it must be held as established that the water of the river is used by the villagers of Jopul, whenever it is there in the river, by putting three Bandharas at three specified places for nearly a hundred years before suit so far as we can get proof of it from the records. It may well be that the Bandharas might have been erected for many previous generations but we have no records."

In establishment of their right, the plaintifs broadly asserted that they had proprietary rights to the water of the river. Then they rather vaguely contended that there was "dediation" of the right in their favour. They also claimed a customary right to put up the Bandharas and further a right by prescription. All these contentions were negatived by the lower appellate Court. The plaintiffs also contended that ancient and uninterrupted user having been proved, there arose in their favour the presumption of a lost grant. This contention has been upheld by the learned Judge in the Court below. The learned Judge took the view that "the right claimed by the plaintiffs is capable of being originated in a grant and since that grant is made for the particular lands, it is a grant attached and

capable of descending with the estate. Therefore, in a sense, it is possible to hold that the doctrine of lost grant in this case is capable of giving a basis to the plaintiffs' suit." The learned Judge also reached the conclusion that the plaintiffs were justified in claiming the right to take water from the river as a natural right available to them as riparian owners to make ordinary and extraordinary use of the water flowing in a stream by the side of their lands. He held that the plaintiffs had established that natural right and were entitled to put up Kachha Bandharas for the purpose of irrigating their lands. The contention of the State that in any event the right was extinguished in consequence of the Notification, date 17th February 1913 under Section 5 of the Bombay Irrigation Act was repelled by the learned Judge. The State of Bombay has now come to this court in this second appeal.

(8) The first contention on behalf of the appellants pressed before us is that the natural right of the plaintiffs as riparian owners could not include the right to construct any Kachha Bandharas. Relying on Section 37 of the Land Revenue Code, 1879, the learned Assistant government Pleader has argued that the plaintiffs had no interest in the bed of the river and even if they had the right to use water of the river for extraordinary purpose of irrigating their lands abutting on it, they had no right whatever to construct any dams kachha or pucca in the bed of the river. The argument was stressed in the form of an interrogation : "How could they put up a structure on our property?" It was said that at the highest they could divert a reasonable quantity of water by improvising channels on their own land or by some contrivance like a pump fixed on their hand. In support of this contention, it was urged that there was high authority of the Privy Council to support the proposition that a riparian owner whose land abuts on a flowing stream is not entitled to put up any Bandharas across the path of the stream and collect water by that artificial means. Reliance was placed in support of this proposition on a decision of Mr. Justice Vyas sitting alone on the appellate side of this Court in Abbasali v. Sheikh Munir. The argument proceeded that the learned Judge has laid down this proposition on a reading of the following observations of Lord Dunedin in Secretary of State v. Sannidhiraju Subbarayudu:

"A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. In ordinary cases the fact that his land abuts on the stream makes him the proprietor of the bed of the stream usque ad merium filum. But he may not be. He may be ousted by an actual grant to the person on the other side, or he may be and often is ousted by the Crown when the stream is tidal and navigable, because where the stream is tidal and navigable the solum of the bed belongs to the Crown. Yet in neither of these cases are his rights as a riparian owner to take water affected. He would have no right in the two cases put to erect an opus manuactum in the bed of the stream even if from the point of view of navigation or diversion of the direction of the flow it was unobjectionable, for the land is not his, but his right to take water remains."

(9) The greatest stress was laid by the learned Assistant Government Pleader on these observations of their Lordships of the Privy Council and its has been urged that the law has already been decided against the contention of the plaintiff and they were, therefore, not entitled to erect any Kachha Bandharas on the river Shelu and that Mr. Justice Vyas

has correctly laid down the law as stated above. We are unable to adopt that view. With great respect to the learned Judge it seems to us that the observations of Lord Dunedin do not permit of being read in the manner suggested. They are made in quite a different context, as e shall immediately point out. It was while considering the position of a riparian owner with lands adjacent to a river which was "both tidal and navigable" that those observations fell from their Lordships. All that has been said in the passage quoted above as referred to by Mr. Justice Vyas is that in two cases a riparian owner would have no right to erect an opus manufactum and in terms express and explicit their Lordships have defined those two cases none of which can possibly be said to apply to the case before us in which there has been a grant of that nature and there is a water course which is not a tidal and navigable river. Moreover, it appears that the attention of the learned Judge does not appear to have been drawn to the following observations of the Privy Council in a case from Canada, Miner v. Gilmour (1858) 12 Moo. P.C. 131 at p. 156:

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it or any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

It was, however, urged that the basis of the right or riparian owners to dam up the stream recognised under English law is that there is a presumption under that law with regard to the ownership of the bed of non-tidal rivers, viz. that the riparian owners own half the bed on their side of the stream. An examination of the cases on the subject makes it abundantly clear that the right of a riparian owner to obstruct water of a running stream adjacent to his lands for ordinary and extraordinary purposes does not depend on the ownership of the soil of the stream. "With respect to the ownership of the bed of the river", said Lord Selborn in Lyon v. Fishmongers' Co. (1876) 1 AC 662: 'this cannot be the foundation of riparian rights properly so called, because the word 'riparian' is relative to the banks and not to the bed of the stream; and the connection, it exists, of property on the banks with property in the bed of the stream depends not upon nature, but on grant or presumption of law. The title to the soil constitution the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriate by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good jure naturae as vertical". We do not think it is possible to make any fine-drawn distinction such as we are asked to do by Mr. Gumaste. It will suffice to note that one of the two conditions deduced by Lord Dunedin in the case reported in AIR 1932 PC 46, clearly relates to the case of a riparian owner on a non-tidal stream who is proprietor of

the bed of the Stream usque ad medium filum ad has made a grant of it to the person on the other side of the stream. Of course a riparian owner, whether proprietor of the half of the soil of the stream on his side of it or not, cannot claim any right in derogation of his grant. The passage from the Privy Council decision in (1858) 12 Moo PC 131 already quoted by as has been accepted as an accurate statement of the law in decisions of Courts both in England and in India. Our attention has also been drawn by learned counsel to some other decisions of courts in India. Before we turn to those cases, we may permit ourselves to make some brief observations on the subject and on some o the incidents of the use of water for purposes which are described as extraordinary but permissible. The limit of this right probably is incapable of any accurate definition.

(10) Every owner of land adjacent to water running in a defined natural courses - whether higher riparian owner or lower riparian owner - has a right arising jure naturae to the accustomed flow of water both as to quantity and quality. His right to the ordinary or primary use of water flowing past his land extends to domestic purposes including purposes of his cattle. This he can exercise without regard to diminution of supply to lower owners. His right to extraordinary or secondary user can, however, be exercised only within limits. We may incidentally mention that this natural right of a riparian owner is recognized in Illustration "J" to Section 7 of our Easements Act. This right may be exercised by diverting the water for other purposes such as agriculture but subject to the crucial condition that his user is reasonable. Reasonable use must always be a matter of degree and the true rule of the matter would seem to be that his user must not deprive lower owners of their accustomed flow of water by interrupting the natural course and regular flow of the stream.

(11) It is not our purpose to define what is reasonable user or what may or may not amount to owners. That would primarily be a question of fact. Inflicting of "a sensible injury" to the other riparian owners. That would primarily be a question of fact. Nor do we think that it would be of service to examine and analyse the leading cases on the subject. Various principles could be collected from them, but we do not think that a general formula applicable to all circumstances could be evolved on this question of putting up Bandharas. The following propositions seems to us to accord with those principles:

(1) A riparian owner, in the exercise of his right to use the water of the stream for extraordinary purposes such as agriculture, can impound and divert water to irrigate his land adjacent to the stream.

(2) The right is not an absolute or exclusive right. He cannot abstract water ad libitum for his right is conditioned by the similar right of other riparian owners who have co-extensive rights to the water of the stream. It is limited but only by rights of persons in similar position having lands abutting both sides of the stream. The crucial condition is that the user of the stream by him must be a reasonable use and not capricious or such as would inflict sensible injury on others similarly situated.

(3) This standard or reasonableness applies to the volume of water that he can divert, to the purpose for which he can utilise it as also to the mode or method that he may adopt for impounding and channeling such water.

(4) There is no rule exclusive or inclusive which defines the mode or specific methods or manner of diverting that water for that must depend on a variety of factors including for instance geographical and natural features of the lands of the riparian owners upstream and downstream, the terrain and the magnitude of the stream.

(5) A normal and usual mode or method of diverting water adopted in many parts of the country and more so in rocky or hilly terrains is that of putting up in the stream Kachha or Pakka Bandharas (dams). In case of such terrains and principally in higher reaches of a small river or rivulet this is the most practicable and economical method and it is too late in the day now to throw doubt on the reasonableness of this ancient system. It is incidental to the right itself. But the Bandharas must be such that they permit the flow of the water down stream and without diverting the natural course of the stream.

(6) The riparian rights of lower owners is to have the water of the stream transmitted to them continuously and in a manner which does not materially affect their enjoyment on the right. An upper riparian owner who puts up a Bandhara must, therefore, take care to see that the stream continues to flow without interruption and without any substantial diminution in volume.

(12) Applying these propositions to the facts of the case before us, the conclusion seems inescapable to us that the State cannot challenge the right of the plaintiffs as riparian owners to put up the three Kachna Bandharas,the subject-matter of the suit. We are unable to agree with the view taken by Mr. Justice Vyas in MANU/MH/0140/1953. An attempt was made on behalf of the appellants to show that water was extracted by the plaintiffs in such a manner that it violated the similar right of the lower riparian owners. That, however, is not a question that can arise on the pleadings of this suit and there is no issue on this aspect of the matter. Our attention has been drawn to some cases where this right to put-up Bandharas was accepted by the parties and the Court, but it is true that in none of those cases the government as owners of the soil of the stream had questioned the very factum and existence of the right. Such was the position in three decisions of this Court, Mahadu v. Narayan 6 Bom. LR 291, Waman v. Changu, 8 Bom. LR 87 and Mahadu v. Jijai 30 Bom. LR 443. In all these cases, the disputes were between upper and lower riparian owners and the State not being a party, there was no challenge to the very existence of the right to put up such Bandharas. The position in two other decisions Sheikh Monoour Hussein v. Kanahya Lal, 3 Suth WR 218 and Murli v. Hanuman Prasad, to which our attention was drawn was also similar. These decisions, however, do show that putting up Bandharas is an ancient method adopted by agriculturists for extracting water for irrigating their lands adjacent to a natural stream. For reasons already discussed, we are of the view that the learned Judge below was right in the conclusion reached by him that the plaintiffs had established their right to take water by erecting kachha dams in the river Shelu.

(13) Then, there is another aspect of the whole matter and another ground, viz., doctrine of lost grant on which the conclusion we have reached may well rest. The learned Judge in the lower appellate court, as we have already mentioned, has found that thee Bandharas were being put up at specified points in the river Shelu at least since prior to the year 1850. He has also pointed out there is evidence of villagers who have deposed to the fact that the Bandharas are ancient and beyond living memory. It is established, therefore, in this case that so far as the antiquity of the exercise of this right is concerned, the plaintiffs have successfully established the same. Taking into consideration these facts and other evidence on the record the learned Judge below reached the conclusion that the plaintiffs could base the right claimed by them n the doctrine of lost grant. It has been argued before us by the learned Assistant Government Pleader that plaintiffs in the suit have claimed the right to put up the Bandharas as villagers of Jopul and there cannot be any such legal right in favour of a fluctuating body like inhabitants of a village.

(14) The doctrine of lost grant, as has so often been pointed out originated as a technical device to enable title to be made by prescription despite the impossibility of proving immemorial user. One indispensable condition that must be satisfied before invoking this doctrine and asserting any right under it is that those claiming the right must show that it attached to any estate in lands of which they claim to be owners by devolution. The inhabitants of a village cannot eo nomine prefer any such right. As it is sometimes said there must be "admissible grantees". Two other conditions equally important which must be satisfied in order to sustain a right of the nature before us on the doctrine of lost grant are that the right must be capable of being made the subject of a grant and there must be a person capable of making such a grant. The doctrine itself and the firmly settled principles underlying it were reaffirmed by the Spreme Court in Manohar Das Mohanta v. Charu Chandra, and Braja Sundara Deb v. Moni Behara. Now we have in the case before us the established fact that even prior to 1850, the three Bandhara, Sal Bandhara, Dol Bandhara and Govathan Bandhara served the three units or Thals and now serve the lands owned by the villagers of Jopul, not as any indefinite body of persons but as owners of specified parcels of land which were formerly part of those three units owned by their remoter predecessors in title. It is indisputable and it has not been disputed before us that there can in law be a grant of a right in favour of the riparian owner of any lands to enjoy for the extraordinary purpose of irrigating his lands the waters of a natural stream by erecting Bandharas. The grant may not only be of the right to divert the waster for that purpose but also of the bed of the stream. Therefore, we have here a right claimed which is capable of being the subject of a grant and there are ascertainable grantees. It is easy to see that the grantor could be the Government or Sovereign. It has, however, been argued by the learned Assistant Government Pleader that that there could not have been any grant in the present case by the Government and reliance has been placed in support of that contention on the following passage in Coulson on Waters, 5th Edn., p. 115:

"From these authorities, it seems, that the Roman Law considered running water, not as a bonum vacans, in which any one might acquire a property but as public or common, in this sense only, that all might drink of it, or apply it to the necessary purpose of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he has

the possession; and during the time of such possession only". Then it is said that prior to 1879 when the Bombay Land Revenue Code was enacted, the beds of rivers or streams or nullahs did not vest in the government. Founded on this premises the argument is that Government could not have been a grantor of any grant in favour of the owners of the three unit in respect of a right to divert the waters of the Shelu by putting up any Bandharas on the same. We are unable to accede to this argument. We do not see how it follows from any of the provisions of the Land Revenue Code that prior to 1879, Government or the Sovereign could not have made any grant relating to the right claimed by the plaintiff. What we have to see here is whether the subject -matter is capable of a grant and whether there could be a grantor and there are ascertainable grantees. In our judgment all the conditions requisite for invoking the doctrine of lost grant are satisfied.

(15) These considerations are sufficient to lead us to the conclusion that the plaintiffs have established their right to put up Kachha Bandharas by reason of immemorial user under a grant which s lost.

(16) It was next urged on behalf of the appellants that even if the plaintiffs had in the past this right to put up Kachha Bandharas on the river Shelu, that right was extinguished by the Government Notification, dated 17th February 1913, made under Section 5 of the Bombay Irrigation Act. The notification described as a proclamation was as follows:

"Whereas it appears expedient to the governor in Council that the water of the Godavari river and its tributaries so far as they lie within the boundaries of British territory, above the weir of Nandur Madhameshwar should be applied and used by Government for the purpose of the Right and Left Bank Godawari canals, the Governor in Council is pleased in exercise of the powers conferred by Section 5 of the Bombay Irrigation Act, 1879, to declare that the said water ill, after the first day of June 193, be applied and used."

It has been strenuously urged that the effects of this notification which was made in accordance with the provisions of Section 5 of the Bombay Irrigation Act was that the waters of the river Shelu could be applied and use only for the purpose of canals. We agree that it is competent to the State Government under Section 5 of that Act to notify that specified waters shall be applied for the purpose of canals. At the same time, it seems equally clear that this must be done in language of sufficient clarity and not in a manner which would leave ample scope for doubt as to the identity of the running waters to which the provisions are being made applicable. The learned Assistant Government Pleader has taken s through a number of sections of the Irrigation Act, but it is not necessary to examine the scheme of the entire enactment. It ill suffice to refer to some only of the provisions of that Act which have bearing on the question before us. The preamble to the Act suggests that the enactment was for the purpose of construction, maintenance and regulation of canals and for the supply of water from such canal and for levy of water so supplied. The definition of "canal" s very wide, but we are really not concerned with the application of that definition to any provision of the Act. Section 5 which is the section with which we are primarily concerned, is as under:

"wherever it appears expedient to the State Government that the water of any river or stream flowing in a natural channel, or of any lake or any other natural collection of still water, should be applied or used by the State Government for the purpose of any existing or projected canal the State Government may, by notification in the official gazette declare that the said water will be so applied or used after a day to be named in the said notification, not being earlier than three months from the date thereof".

The notification which was in pursuance of the powers conferred on the State Government under that section and is in the form of a proclamation has already been set out by us. The section, it is clear, empowers the State Government to declare that the water of any river or any stream flowing in a natural channel is to be applied or used for the purpose of any existing or projected canal. Any natural flow of water running in a channel may be declared as required for the purpose of a canal. Whether a particular river is a tributary of another river or whether a particular nullah which ends in another nullah or a river or a tributary has been declared for the purpose of the Act under Section 5 must necessarily be a question of construction of the notification relating to the same. Section 6 empowers any Canal Officer to close any channel which may have been made the subject-matter of a declaration under Section 5 and for that purpose to enter on any land and remove any obstruction. Then, there are sections which relate to inspection and regulation of water supply and canal crossings and removal of obstructions. Then there are provisions relating to construction of new water courses with which we are not concerned, nor are we concerned with the rights and obligations of owners of water-courses. Supply of water from a canal is to be regulated in accordance with the provisions of the Act and any person desiring to have supply from a canal has to submit an application in writing and water may be supplied to him. There are provisions for compensation which also have little bearing on the present question. Section 61 deals with penalties and lays down inter alia that whoever voluntarily and without proper authority damages, alters, enlarges or obstructs any canal or interferes with or increases or diminishes the supply of water from any canal or by any means raise or lowers the level of the water in any canal may be punished in the manner there stated. It may be observed that the notification so strongly relied on by the appellants confines the declaration to "Godavari river and its tributaries". The expression "tributary" is one of rather indefinite import and its meaning in any particular notification must necessarily depend on the context in which it appears and in ascertaining its meaning, the Courts can have regard to the object of the Act, because the declaration is to be for the purposes specified in the Act. In the widest sense even an unnamed stream or what is called the mouth of the river may be said to be a tributary because it gives water to the river. The argument of the learned Assistant Government Pleader had to go to the length of saying that the expression "tributaries" in this notification is not to be understood in the ordinary sense of the known and recognized tributaries of the river Godavari but must include every flow of water, every natural channel, every small stream, every brook, every rivulet, every mullah and every river which gives water to the river Godaari within the boundaries of the territories of the State. We are unable to give any such unbridled and expansive meaning to the expression "tributary" in that notification. It is not necessary for us in this case to lay down what precisely is the meaning of the expression "tributaries". But, we have little doubt that even if the expression "tributaries" is to be read in a sense

of amplitude, it cannot embrace any small nullah or stream in the very high reaches of what may be called the river Godavari. We have already pointed out as to what the river Shelu is and stated that it is one of three nullahs which constitute the Vainath Nullah. Godavari is one of the holy rivers of India. Ganga, as it is locally called, it is one of the most celebrated rivers of India. It has many sources and one of its sources which attrcts lakhs of people every twelve years is situated at Trimbak or Trimbakeshwar, a place which is at a distance of some miles from the city of Nasik. There is, however, no imposing natural formation at that place and the place has its importance in its holiness. But, there is a slight flow of water from Trimbak. After about seven miles it receives the waters of a tributary called "Kikvi". Three miles further to the east it is met by the Alandi. Seven miles east of Gangapur, it passes the town of Nasik. A mile or two below Nasik, it receives the Nasardi and about 15 miles below Nasik isthe junction of the Godavari with the Darna which is one of its chief tributaries, and it meets the Banganga. At Nandur Madmeshwar, it meets the Kadwa which is a large affluent and brings a considerable increase in the wasters f Godavari. Lower down, a few miles away, it meets Dev stream. After a course of about 60 miles from Trimbak it leaves Nasik district and enters the Ahmednagar district. After a course of about sixty miles it flows south-east through a rich alluvian plain past Kopargaon to the town of Puntamba situated in the frontiers of the former territories of Nizam. Thereafter, it also receives a number of tributaries. In thus describing the course of Godavari,we have referred to the Kadva as one of its tributaries. That Kadv is not the same Kadva river to which we have referred in the earlier part of our judgment. In the Bombay gazxetyteer, Volume 16, page 9 it is stated that the chief streams that join the Godavari in its course through the district of Nasik are the Darna and the Kadva. The Darna receives the other kadva at Belhu and it is pointed out that, that Kadva is not the large river of that name but a small deep stream that drains the south and south-east of Igatpuri. The larger Kadva which is a tributary is a different river altogether from this Kadva which is served by the Vainath Nullah. The Vainath Nullah, as we have already mentioned in constituted by the combined flow of the three Nullahs, Seluh river, the Narayan river and the Vadali river. Having regard to the facts relating to the nullah known as the river Shelu and the known and recognized tributaries of the Godavari as also the context in which the expression "tributaries" appears in the notification and the scheme and object of the Act, it is extremely difficult for us to accede to the contention that this river Shelu which is a sheer Nullah and which loses its identity in the Vainath Nullah can be regarded as a tributary of the Godavari. We have to understand this expression "tributaries" in the context of the Act and bearing in mind the purposes of the Act.

(17) In support of his argument, the learned Assistant Government Pleader has drawn our attention to two decisions of Courts in England, Harbottle v. Terry (1882) 10 ABD 131, and Evans v. Owens, (1895) 1 QB 237. In the latter decision it was held that a brook running into a river which ran directly into the Severn was "tributary" of the Severn within the meaning of a certificate made under the Salmon Fishery Act. In those two cases the Court had to interpret the word "tributes" which found place in the Salmon Fisheries Acts and the object of the Legislature and the consequences which would follow the application in particular instances of the powers given by the statute, difference meanings were given tot he expression "tributes" in the two cases. In the case

of (1882) 10 QBD 131, Field J. pointed out the object of the Act and observed that the question as to what meaning should be given to the word "tributes" in the Certificate of the Secretary of State in the case depended upon the facts relating to the water ay Stephen J. also observed that the question what is or is not a tributary must depend upon the particular distinguishing circumstances of each case. It is true that in the latter of the two cases a wide meaning was given to the expression "tributaries" but the actual decision inthose cases cannot help us in interpreting the word "tributes" in the Notification before us. The meaning to be attributed to the expression "tributaries" must necessarily have a reasonable relation to the facts relating to the water of the river Shelu and the object of the Irrigation Act Indubitably the intention would not possibly be to declare that the waters of the Shelu, a sheer stream, itself in the high reaches of the Vainath Nallah were to be applied or used for any purpose of the act. For all these reasons, we are satisfied that the learned Judge below was right in the conclusion reached by him on this aspect of the matter.

(18) There remains for consideration a contention that the plaintiffs in their suit have claimed the right to put up bandharas and irrigate their lands on behalf of all the villagers of Jopul on whose behalf of all the villagers of Jopul on whose behalf the suit was brought formed part of three Thals or Units. In our opinion, the learned Judge was right in the conclusion reached by him. It is possible, if the contention in the present form had been raised, that the plaintiffs would have led evidence for the purpose of showing that by agreement or grant from former owners they had become entitled to irrigate their lands from the waters of the Shelu. We do not see any difficulty in the way of the plaintiff to get the declaration which has been granted to them. Moreover, we have also taken the view that the plaintiffs are entitled to rest their claim on a lost grant. In that view of the matter, there can be no doubt whatever that the plaintiffs can sue representing themselves and other villagers of Jopul who claim the right not as any fluctuating body of villages but as owners of lands and ascertainable grantees and are, therefore, entitled to the reliefs grants to them.

(19) In the result, the appeal fails and will be dismissed with costs throughout.

(20) Appeal dismissed.