

**Case Note:** Case concerning right of a riparian landowner construct dam on the stream in exercise of his natural right. The Court ruled against such a right existing as it would be amounting to more than reasonable use. The fact that the riparian landowner was allowing non-riparian landowners to a share of the water was one of the factors that led to the court ruling against him.

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AIR1953Bom305, (1953)55BOMLR344

## **IN THE HIGH COURT OF BOMBAY**

Decided On: 10.10.1952

**Abbasali Hasanali Peerjade and Anr.**

**v.**

**Shaikh Munir Shaikh Dagui and Ors.**

**Hon'ble Judges:**

Vyas, J.

## **JUDGMENT**

### **FACTS**

A certain stream which has its source in the village of Kharale passed northward through the village of Dhekwad Digar and then through the village of Narayanpur Digar on the side of the village Girasgaon and the villages Fulsar, Nimboni and other villages, ultimately meeting the river Tapi. The plaintiffs filed the present suit against the defendants on 13-10-1944, for a declaration that they had got a right, many years old, of taking water of the suit stream which passed by their village of Girasgaon by constructing a dam within the limits of the village of Girasgaon with a view to store the water in order to raise garden crops and also for an injunction to restrain the defendants from doing any act, such as the construction of a dam within the limits of Dhekwad village or digging of water channels for irrigating lands in Narayanpur Digar, to obstruct the suit stream and thereby disturb the right of the plaintiffs to take water from that stream for growing garden crops. Defendants 2 and 3 contended (1) that they were the owners of that much portion of the stream which passed by or through their village on the ground that they were the inamdars of the soil which included the portion of the bed of the stream situated within their villages; (2) that they had been using the water of this stream by constructing dams themselves since many years and those were the dams at Dhekwad Digar and Narayanpur Digar; (3) that they denied the right claimed by the plaintiffs, namely the right to use the water of this stream after first storing it by building a dam or bandhara across the stream in the village of Girasgaon, and (4) that the plaintiffs as the

lower riparian owners had a natural right to the use of the water of this stream which remained in the stream after flowing through the villages of Dhekwad Digar and Narayanpur Digar. The trial Judge accordingly decreed the plaintiff's suit. On appeal the lower appellate Judge substantially confirmed the decree of the trial Court. (Defendants 2 and 3 appealed to the High Court.)

**Vyas, J.**

(1) (His Lordship after narrating facts & dealing with a point not material to the report continued) : The next point which is pressed by Mr. Gokhale for the appellants is an important point which goes to the root of the case and that point is: Even assuming that the plaintiffs as lower riparian owners have got a natural right to the use of the water of this stream, are they entitled to construct a 'bandhara' across the stream in their own village of Girasgaon? What the plaintiffs are obviously wanting to do in this case is to build a 'bandhara' across the stream in Girasgaon, store the water by that contrivance and use that water for their own domestic requirements and agricultural purposes and also permit that water to be used by several of them who are not riparian owners in so far as their own lands are not abutting on the stream itself. I have already pointed out above that plaintiffs 1, 2, 3, 4, 6, 7, 3, 11, 12, 14, 15 and 16 are not riparian owners at all; and yet the plaintiffs are seeking to build a 'bandhara' and store water of this stream so that the water may be made available even to such of them who are not riparian owners for their agricultural operations. The question before us thus is: Whether the plaintiffs are entitled to store or collect the water for the abovementioned purposes by the construction of a dam?

(2) Now, a riparian owner is a person whose land actually abuts on a stream and there is no doubt that he has got a natural right to use the water of that stream primarily for domestic purposes and also for carrying out agricultural operations upon the lands abutting on the stream. Now, the contention of Mr. Gokhale, which, in my opinion, is a perfectly correct contention) is that it is not a natural right of a riparian owner to put an obstruction across the path of a flowing stream and collect water by that artificial means. The point which is sought to be made by Mr. Gokhale is that a riparian owner is entitled to the use of the water in its natural flowing state, that is to say, as it flows along in a natural way in a stream. It is submitted by him that even the quantity of water which is reasonably required by a riparian owner cannot be stored by him by the erection of a dam because storage in that manner is an artificial contrivance. There is a great deal of difference, says Mr. Gokhale, between constructing water channels or employing oil engines or 'mots' to carry the water from a running stream to agricultural holdings abutting on the stream and construction of 'bandharas'. Mr. Gokhale is right. The former, i.e., water channels, oil engines or 'mots', are no doubt artificial contrivances in a way, but those are contrivances without which it would be impossible to make the water available even to the lands which are actually situated on the bank of the stream, in other words impossible to exercise even the natural right of a riparian owner. On the other hand, the storage of water by erecting a 'bandhara' is a mechanical or artificial contrivance of a different category altogether. Clearly it could not be said that non-resort to an artificial method of storage of water by the construction of a 'bandhara' would make

it impossible for a riparian owner to exercise his natural right to the use of the water. It is next contended by Mr. Gokhale that in no case can a riparian owner store water more than what is reasonably required for his ordinary purposes, namely, domestic and agricultural purposes. In this case, there is every likelihood that the quantity of water sought to be stored by the plaintiffs by constructing a dam across the stream would be a quantity far in excess of the reasonable requirements of the plaintiffs for their domestic purposes and agricultural operations and that, says Mr. Gokhale, the plaintiffs are not entitled to do under the guise of a natural right to use the water. Finally, Mr. Gokhale's contention is that in this particular case, by the construction, of a 'bandhara' across the stream, the plaintiffs are not merely seeking to exercise the natural right of riparian owners, but are wanting to make water available to those persons who not being riparian owners have not got a natural right to the use of the water, and this they are not entitled to do in any event. As I have stated above, I see considerable force in all these contentions of Mr. Gokhale.

(3) In the case of --'Secretary of State v. Sannidhiraju Subbarayudu', AIR 1932 P.C. 45 (A), it was held by the Privy Council that

"the right of a riparian owner to take water from the stream for all ordinary purposes (namely, for domestic use and for irrigation of his own property alone) is a natural right, analogous to an easement but not in the strict sense of the word an easement."

In the body of the judgment of their Lordships which was delivered by Viscount Dunedin it was observed (p. 48)

"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 medium 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 manufactum*' 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."

Mr. Gokhale for the appellants relies upon these observations of their Lordships and contends that as the land of the bed of the stream passing by the village of Girasgaon did not belong to the plaintiffs, they were not entitled to erect an '*opus manufactum*' in the shape of a 'bandhara' across the stream and that the only right which they were entitled to was the right to take water.

(4) In the case of --'Lyon v. Fishmonger's Company', (1876) 1 A. C. 662 (B), certain important propositions were laid down in the judgments of Lord Chancellor Cairns, Lord Chelmsford and Lord Selborne, and those propositions were : (1) The right of a riparian

owner to the use of the stream does not depend upon the ownership of the soil of the stream; and (2) The right of a riparian owner to take water is, first of all, for domestic use, and then for other uses connected with the land of which irrigation of the lands which form the property is one. It is clear, therefore, that such of the plaintiffs as are lower riparian owners are entitled to take water of the stream first of all for their domestic use and thereafter for other uses connected with the land, for instance the irrigation of the lands which actually abut on the stream. They would not be entitled to store the water by the construction of a dam across the flowing water, for that is not the right which they have got as riparian owners.

(5) In --'Swindon Waterworks Co. v Wilts and Berks Canal Navigation Co.', (1875) 7 H L 697 (C), it was observed by Lord Cairns (p. 704) :

"Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said 'ad lavandum et ad potandum', whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use."

Mr. Gokhale is right in contending that the storage of water by an artificial contrivance of the construction of a dam cannot be said to be an ordinary purpose for which a riparian owner is entitled to use the water of a stream on which his lands abut. In --Mc-Cartney v. Londonderry and Lough Swilly Railway', (1904) A.C. 301 (D), also, it was observed (p. 307) :

"...In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction... The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

Clearly thus the plaintiffs, as lower riparian owners, are under no restriction in the ordinary or primary use of flowing water of this stream. As I have pointed out above, the storage of water by an artificial contrivance of a dam can be said to be neither an ordinary use nor a primary use of the flowing water. Besides, as was observed in the above-mentioned case, the use of water must be reasonable, and I cannot agree with Mr. Patwardhan in this case that the plaintiffs are seeking to make a reasonable use of water when they want to make the water available to as many as 12 of the plaintiffs who are not even riparian owners. Only 4 out of the 16 plaintiffs, namely, plaintiffs 5, 9, 10 and 13 whose lands abut on the stream are entitled to the use of this water for their tenements and irrigation of their lands.

(6) Gale, in his treatise on the Law of Easements, 12th edn. (1950), has observed at p. 231 that :

"...The natural rights of a riparian owner may be shortly defined as three-fold : First he has a right of user. He can use the water for certain purposes. Secondly, he has a right of flow. He is entitled to have the water come to him and go from him without obstruction..."

We are not concerned in this case with the third right. It is clear, therefore, that the lower riparian owners still further down, namely, the residents of the villages of Fulsar, Nimboni and other villages whose lands abut on this stream which also passes through those villages are entitled to expect that the riparian owners above them, namely the plaintiffs, would let the water of this stream go to them without obstruction. It is true that no resident of any of the villages of Fulsar, Nimboni and other villages is before us as a party to this litigation. But that would not, in my opinion, alter the merits of the position when we are considering the question whether the plaintiffs are entitled to obstruct the flow of the water at Girasgaon by constructing a 'bandhara' across the stream: there. The point is that they have not got a natural right to do so, because the lower riparian owners further down are entitled, to the water of the stream going to them without any obstruction,

(7) In -- '(1875) 7 HL 697 (C)', where the appellants, being riparian owners on the bank of a stream, claimed the right to collect the water of the stream into a permanent reservoir for the supply of an adjacent town, it was held that this was not a reasonable use of the water within the meaning of the rules. Now, the use of the water which the plaintiffs are wanting to make in this case is analogous to what the appellants wanted to do in that case. There the appellants wanted to collect water into a reservoir so that the water may be supplied to the adjacent town. Here the plaintiffs are seeking to collect the water by constructing a dam across the stream at Girasgaon, so that the water may be made available to as many as 12 of the plaintiffs whose lands do not abut on the stream but may be said to be adjacent lands. **On the authority of the decision in the English case cited above, I hold that the use which the plaintiffs are, seeking to make of the water of this stream is not a reasonable use and they have not got a natural right to make such a use.** Then, again, in --'McCartney v. Londonderry Co., (D)', Lord Macnaghten said (P. 306) :

"There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes --sometimes called extraordinary or secondary purposes--provided those purposes are connected with or incident to his land and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all."

Now, what the plaintiffs here are wanting to do would fall within the category of the third case, because the use which they are seeking to make of the water of this stream is foreign to or unconnected with the riparian tenements, in so far as plaintiffs 1, 2, 3, 4, 6, 7, 8, 11, 12, 14, 15, and 16 are concerned. Plaintiffs 5, 9, 10 and 13 have no right to build

a dam or 'bandhara' across the stream at Girasgaon and to store the water in order to make the water available to those tenements which are not riparian tenements. In 'Gaved v Martyn', (1865) 19 CB (NS) 732 (E), Erle C. J. observed (p. 759) :

"The flow of a natural stream creates natural rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality."

It is thus clear that each one of the riparian owners whose lands are situated on this stream has got mutual rights and liabilities and each one is bound to see, while making a reasonable use of the water by himself, that every other riparian owner gets the use of the water without the flow or the quantity or quality of it being altered. Gale in his book on Easements, which I have referred to already above,' says at p. 236 :

"...To this may be added that as between himself and lower riparian owners the upper owner is not only bound to allow the water to flow on, but is entitled to insist that it shall flow on. 'He has the right to have the natural stream come to him in its natural state, in flow, quantity, and quality, and to go, from him without obstruction.' Any obstruction by a lower riparian owner of such a character that it might reasonably be expected that injury would be caused to an upper riparian owner is actionable at the suit of the latter."

Mr. Gokhale is relying on these observations, and I think quits rightly, in support of his submission that defendants 2 and 3 who are the upper riparian owners are entitled to insist that the plaintiffs who are the lower riparian owners, but not the lower-most, shall allow the flow of the water to continue forward and downward in its natural state, both as regards quantity and quality. As it was pointed out by Erle C.J. in --'Gaved v. Martyn, (E)', there are mutual rights and liabilities as between all the riparian owners. There is clearly an obligation on defendants 2 and 3 to let the plaintiffs who are lower riparian owners have a reasonable quantity of water for their domestic requirements and agricultural purposes. But what the plaintiffs are wanting to do here is to make that obligation more onerous. There is a mutual obligation between all the riparian owners, from uppermost to lowermost of them, to see that the water flows down without its quantity being changed or quality altered. That obligation, so far as defendants 2 and 3 are concerned, becomes clearly more onerous if they have to allow the plaintiffs to build a 'bandhara' across this stream at Girasgaon and yet to see that the stream flows down to the lowermost riparian owners in its natural state. In another manner also, the obligation upon defendants 2 and 3 to see that the plaintiffs get a reasonable quantity of water for their ordinary or primary purposes and domestic uses becomes more onerous if they are subjected to a position in which they will be compelled to let the plaintiffs have water far in excess of what is reasonably required for their domestic and agricultural purposes. There is every probability that the water which the plaintiffs want to store will be much in excess of what they, in pursuance of their natural right as riparian owners, would reasonably want for their own domestic and agricultural requirements. This is clear enough, because the stored water is sought to be made available to those who have got no lands abutting on the stream. Defendants 2 and 3 are being obliged to suffer such a position and that is a position clearly contrary to the law of rights and liabilities of

riparian owners. Mr. Gokhale is right in submitting that the plaintiffs are not entitled to impose an obligation on defendants 2 and 3 to suffer such a position.

8. The net result, therefore, is that defendants 2 and 3 are rightly contending that the plaintiffs have not got any natural right to the use of the water of this stream either for their domestic purposes or for their agricultural requirements by collecting the water first by constructing a dam across the stream and then making that water available to their lands. In any case, the plaintiffs have got no natural right to make the water available to as many as 12 of them whose lands do not abut on the stream nor are they entitled to build a dam across the stream for any such purpose.

9. Mr. Patwardhan for the respondents has sought to support the judgment of the two Courts below and his argument is that the rights of the appellants (defendants 2 and 3) as upper riparian owners will not suffer in this case if the plaintiffs were permitted to build a dam or 'bandhara' across the stream at Girasgaon. His submission is that the stream passes first through the villages of Dhekwad Digar and Narayanpur Digar and then goes down to the village of Girasgaon and that, therefore, even if the plaintiffs collected the water by obstructing the flow of the stream by putting up a dam or 'bandhara' across the stream at Girasgaon, the defendants' natural right to use the water of the stream for their ordinary or primary purposes or domestic uses would not be affected. The quantity of water available to them would always remain the same and there would be no obstruction to them in their continuing to exercise their natural right to the use of the water. In my view, this is not a correct approach to the case. The correct approach is to examine whether it is a natural right of the plaintiffs, in respect to the use of the water of this stream, to store the water first by the construction of a 'bandhara' and then to make it available to their own lands and also to the lands of several of them who are not riparian owners at all. For the reasons already pointed out 'in extenso', I answer the question against the plaintiffs. It is beside the point to consider whether the action of the plaintiffs in constructing a 'bandhara' at Girasgaon would prejudicially affect the natural right of the defendants. The point here is : Are the plaintiffs entitled to store the water by building a 'bandhara' across the stream in exercise of their natural right to use the water of the stream? That point must be found against them for the reasons already stated.

(10) The result, therefore, is that this appeal must be allowed and the decrees passed in favour of the plaintiffs by both the Courts below must be set aside. The decrees of the two Courts below are set aside without prejudice to all the riparian owners in this case whose lands are abutting on the banks of this stream coming together and adjusting their differences as to the mode of taking water for themselves for their requirements. The plaintiffs' suit shall stand dismissed with costs throughout. The plaintiffs who are the respondents will bear their, own costs of this appeal as also the costs of defendants 2 and 3 who are appellants here. Cross-objections are dismissed without any order as to costs.

(11) Appeal allowed.

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