Privy Council Appeal No. 4 of 1928.

Dawood Hashim Esoof and another (substituted for the Official Liquidator) - - - - - - - - - *Appellants*

v.

C. Tuck Shein (substituted for Leon Shain Sway) - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY, 1931.

Present at the Hearing:

LORD TOMLIN.
LORD MACMILLAN.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The parties to this appeal are the owners of rival saw-mills on or adjacent to the northern end of a tidal creek communicating to the south with the Rangoon River, through which the tide flows into the creek. The value of the creek is as a means of floating logs up from the river to the mills.

The appellants are admittedly the owners under grant from the Government of the soil of this part of the creek, which extends for about 200 feet to the north of the Strand Road. They are also the owners of land on the north and east sides of it. Their predecessors in title had reclaimed a considerable portion on the east, and at the time when the suit out of which this appeal arises was instituted, only a narrow strip from 40 to 50 feet wide was left to which the tide had access.

It will be convenient to refer to the part of the creek to the north of the Strand Road, with which alone the dispute is concerned, as the upper creek.

The Strand Road crosses the creek by a bridge, and immediately below it is a second bridge carrying the railway. The head-way under both these bridges is limited, being only 2·88 feet above ordinary spring tides under the Strand Road bridge, and a little more in the case of the railway bridge, but this is admittedly sufficient for the passage of logs and small boats.

The respondent's saw-mill was erected in 1922 on the west side of the upper creek by his predecessor in title, who constructed in connection with it on his own land a timber pond, into which he proposed to float his logs by an entrance cut into the upper creek. To this the predecessors of the appellants objected, and they planted a row of piles opposite this entrance, which effectually blocked the passage of the respondent's logs. The predecessor of the respondent then instituted his suit on the original side of the Rangoon High Court, praying for an injunction and damages.

The parties to the present appeal are transferees from the original plaintiff and defendant, but nothing turns on the devolution of their rights, and for the purposes of this judgment the respondent will be regarded as the plaintiff and the appellants as the defendant.

The case made in the plaint was that the upper creek was a public waterway through which the respondent, as a member of the public, had the right to float logs to his pond. By paras. 6 and 7 of the plaint it was also alleged that since 1905 he had been floating logs and bringing them to his mill on the western bank. If this was intended to be a claim to a separate right by way of easement, it is clear that it must fail, inasmuch as the suit having been instituted in 1923, the right was not alleged to have been exercised for 20 years before suit (see Section 26 of the Limitation Act, 1908), and no claim as an easement has been maintained before their Lordships.

The appellants denied the claim and asserted that the upper creek was their private canal over which the respondent had no rights, but before the Board it was admitted that the so-called " canal " was all that then remained of what had been the top of the creek prior to the reclamation on the east.

It is not disputed that the upper creek is tidal " in the sense that at certain periods of the month the tide reaches its most remote point ; but for most of the time it is dry, at any rate above the Strand Bridge, except for a trickle of water making its way back to the river. For a few hours at high tide on five to ten days in each month there is enough water in the creek to float ordinary teak logs, 3 feet in diameter, the whole length of the creek ; in the middle of the creek the water is then well over a man's height."

This quotation is from para. 5 of the printed case of the respondent, and may be taken to reproduce the result of the evidence which was given at the hearing.

The Trial Judge held that though the upper creek was tidal to the extent stated above, it had not been established that it was a public waterway, and he dismissed the suit. In the Court of Appeal this decision was reversed, and a decree was passed in the respondent's favour ordering the removal of the piles and restraining the appellants from continuing or repeating the obstruction. It is not, their Lordships think, very clear upon what ground the judgment of the Appeal Court was rested. They do not in terms, at all events, find that the upper creek was a public waterway, and in certain review proceedings taken by the appellants the learned Judges expressly disclaimed any intention so to hold. Their conclusion is as follows :—

> " At high tide water continues to flow right up to respondent's slip-way, and in sufficient quantity to enable logs to be floated up, and the right of floating up logs has been exercised for a great many years by all those who had occasion to use it for this purpose. That right had never ceased to exist ; the water had never ceased to exist, and plaintiff (the present respondent) is as much entitled to float his logs up to-day as he was when he had a mill on the eastern bank."

The plaintiff's " mill on the eastern bank " to which reference is here made was on the land immediately to the east of the upper creek, which the original plaintiff rented from one Sheobax, the then owner, for five years between 1895 and 1901. He then became insolvent and the mill was sold by the official assignee. It and the land upon which it stood, including the bed of the creek, are now admittedly the property of the appellants, and their Lordships fail to understand how the plaintiff's temporary occupation between 1895 and 1901 could give him any right of user in the absence of proof that the waterway was public.

Their Lordships, therefore, think that the case must be decided solely upon the question of a public waterway. The line of piles forming the alleged obstruction is admittedly upon the appellants' property, and unless they interfere with a public waterway the respondent can have no cause of action for their removal, and he must in effect show that the water right up to the bank of his land, the access to which is blocked by the appellants' piles, is part of the public waterway. Their Lordships doubt if this aspect of the case was presented to the Courts in India.

Under the English law there can be no doubt that the bed of a tidal creek, which is vested in the Crown, and over which all subjects of the Crown have a right of navigation, is confined to the space covered by " ordinary " high tides, that is the mean between spring and neap tides—or in other words, to that part of the shore which for four days in every week, or for the most part of the year, is reached and covered by the tides : *Attorney-General* v. *Chambers* (4 De Gex, M. & G. 206).

In India it has long been recognised that the beds or channels of tidal navigable waters are the property of the Government in right of the Crown : *Doe d. Seebkristo* v. *East India Co.* (1856), 6 Moo. I.A. 267 ; *Gureeb Hossein* v. *Lamb*, Calc. S.D.R. (1859),

p. 1357 ; *Lopez* v. *Muddun Mohun Thakoor* (1870), 13 Moo. I.A. 467 ; *Nogender Chunder Ghose* v. *Mahomed Esof* (1872), 10 Beng. L.R. 406 ; *Baban Mayacha* v. *Nagu Shravucha* (1876), I.L.R. 2 Bomb. 19 ; *Srinath Roy* v. *Dinabandhu Sen* (1914), 41 I.A. 221. The only reported case in India (so far as their Lordships have been able to discover) in which reference is made to the *extent* of the channel or bed so vested in the Government is *The Secretary of State* v. *Kadirikutti* (I.L.R. 13 Madr. 369), in which the doctrine of *Attorney-General* v. *Chambers* was held applicable. The principle of the English rule is stated by Lord Cranworth to be that it is only within these limits that the bed can be regarded as in the nature of unappropriated soil, not capable of ordinary cultivation and occupation. Their Lordships think that this principle is equally applicable to Indian waters, and that the same rule should be applied. The public right of navigation or waterway can only be co-extensive with the right of the Crown or the Government in the bed, and their Lordships are therefore of opinion that the right claimed by the respondent in the present case over the creek cannot extend beyond the limits of " ordinary " high tides in the sense defined above. It is clear, however, that as the upper creek is only navigable for a few hours at most on from five to ten days in the month, the whole of it cannot possibly be a public waterway. Indeed, their Lordships doubt whether " ordinary " high tides rise beyond the Strand Bridge at all. A table showing the maximum depth of water under the bridge during portions of the months of January, May and September, 1924, has been proved in the case, and it appears from this that the upper creek must have been wholly dry during a considerable portion of each month—" for most of the time " according to the paragraph quoted in an earlier part of this judgment from the respondent's case.

The respondent's real complaint is not of an obstruction to the channel generally, but of something which obstructs free access from the channel to his land on the west. In order to make good this complaint he must prove not merely that there is a public waterway over some part of the upper creek, but that the waterway comes right up to his land. The public right to use the waterway would not imply the right to land upon, or to take merchandise on, to or over immediately adjacent land in private ownership. Such a right may no doubt be established by custom or prescription, as for instance in the case of a right of towage, (*Ball* v. *Herbert*, 3 T.R. 262), but the banks above the " ordinary " high-water mark remain private property unaffected by the waterway. The rights of riparian owners on the banks of tidal navigable waters exist *jure naturae*, because the land has by nature the advantage of being washed by the stream, but it is essential to the existence of this right that the land should be in contact with the flow of the stream at least at the times of " ordinary " high tides : see *Lyon* v. *Fishmongers' Co.* (1 App. Cas. 662).

Unless, therefore, the respondent establishes that a public waterway abuts on his land, his suit must fail.

A plan prepared in 1896–7 shows that at that time a considerable strip of dry land, forming part of what is now the appellants' property, intervened between the upper creek and the site of the alleged obstruction. Since that time erosion of the western shore, possibly due to the reclamation on the east, has brought the highest water limit to the respondent's land, but there has been no attempt to show that it is washed by " ordinary " high tides so as to be in contact with a public waterway, and their Lordships for the reasons already given think that this is most improbable.

Certain other contentions advanced on behalf of the respondent remain to be considered.

It was suggested in the first place that though at the time of suit the upper creek may have been dry for a considerable portion of every month, this was due to silting up, or perhaps to the reclamation on the east side, and that if it was at one time, as the respondent contended it was, a public waterway, no lapse of time would deprive it of that character. Their Lordships think it sufficient to say that in their opinion it is not established that the upper creek was at any time a public waterway, and this was the finding of the Trial Judge.

Reliance was placed upon the former user by boats, and the alleged user by the predecessor of the respondent for floating logs to his old mill on the west bank between 1905 and 1914. It appears that prior to 1906 there were a number of huts, said to have been inhabited by beggars, on the land to the north of the upper creek, and that the inhabitants used it for the passage of boats to the Rangoon River whenever the water was of sufficient depth. In 1906 the land on which the huts stood was acquired by the Tramway Company: the huts were removed and from that time onward the boat traffic ceased. The Trial Judge was satisfied that the evidence as to these boats was true, but he held, following the authority of *R.* v. *Montague* (4 B. & C. 589), that this was not sufficient to establish the claim to a public waterway.

Their Lordships think that the learned Judge was right. *R.* v. *Montague* was approved by this Board in a case from the Straits Settlements (*Sim Bak* v. *Ang Yong* [1923], A.C. 429), and there seems to be no reason why the doctrine laid down by Bayley, J. should not be applicable to India, for if, as was held in that case, a tidal water is " a petty stream, navigable only at certain periods of the tide, and then only for a very short time and by very small boats, it is difficult to suppose that it ever has been a public navigable channel." Their Lordships think that this description applies closely to the upper creek and to the class of navigation proved in the present case.

With reference to the alleged floating of logs to a former mill of the respondent's predecessor between 1905 and 1914, it is only

necessary to say that the Trial Judge held it not proved, and their Lordships see no reason to disagree with him.

The last matter that calls for consideration is a decree of the Recorder's Court in Rangoon dated the 18th May, 1897. A suit had been instituted by the predecessor in title of the respondent against one MacGregor, who had a mill at the mouth of the creek where it leaves the Rangoon River. The complaint was that MacGregor had obstructed the floating of a mill-boiler from the river into the creek, and the decree declared that the creek was a public waterway. It is clear, their Lordships think, that this dispute concerned only the creek below the bridges, and had nothing to do with the upper creek. In their Lordships' view this decree, if relevant at all to the matter of this appeal, can afford no help to its decision.

Their Lordships would also observe that none of the contentions dealt with in the latter part of this judgment can avail the respondent to establish that he has by reason of his riparian ownership a right of access, which the appellant has obstructed, to any public waterway existing in the upper creek.

For the reasons given their Lordships think that the decree of the Appeal Court in Rangoon, dated the 24th March, 1925, should be set aside, and that of the Trial Judge, dated the 8th July, 1924, should be restored, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of the appellant in the Appeal Court in Rangoon and before this Board.

In the Privy Council.

DAWOOD HASHIM ESOOF AND ANOTHER (SUBSTITUTED FOR THE OFFICIAL LIQUIDATOR)

v.

C. TUCK SHEIN (SUBSTITUTED FOR LEON SHAIN SWAY).

DELIVERED BY SIR GEORGE LOWNDES.

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