Privy Council Appeal No. 71 of 1936.

Bengal Appeal No. 70 of 1934.

The Commissioners for the Port of Calcutta - - *Appellants*

v.

The Corporation of Calcutta - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1937.

Present at the Hearing:

LORD ALNESS.
SIR GEORGE LOWNDES.
SIR SHADI LAL.

[*Delivered by* LORD ALNESS.]

This is an appeal from a judgment and decree of the High Court of Judicature in Calcutta, dated 22nd August, 1935, which reversed the judgment and decree of the same Court in its original civil jurisdiction, dated 8th June, 1934, and which decreed the respondents' suit to recover from the appellants the sum of Rs.44,612.9.4. as damages for negligence.

The questions at issue are whether the appellants are liable for the damage caused by the flooding of the respondents' pumping station, and whether their claim was barred by time in virtue of a provision in the Calcutta Port Act, 1890.

The principal facts in the case are not in dispute, nor is the amount of damages due by the appellants, if liability is established.

As their Lordships have formed a clear opinion that the respondents' claim is statute barred, and, as their Lordships, in that view, deem it unnecessary to form or express an opinion on the question of negligence, it is possible to abridge the examination of the facts which would otherwise have been appropriate and necessary.

The appellants are a statutory body, constituted under the Calcutta Port Act (Bengal Act III of 1890). The respondents are a statutory body, constituted under the Calcutta Muncipal Act (Bengal Act III of 1923).

The appellants own and operate a double track railway which runs north and south, on the east side of the river Hugli, and which is parallel and adjacent to the river. The railway crosses at right angles the approach road to the Howrah Bridge, which links up the towns of Howrah

and Calcutta, lying respectively on the west and east side of the river. The respondents have a pump house in the angle formed by the interception of the railway with the approach road. Unfiltered water for the use of the inhabitants of Calcutta is drawn from the river through four suction pipes, which run from the river under the appellants' railway to the pump house.

In or about the year 1914, in order to avoid the inconvenience of the then existing arrangement, whereby the railway traversed the approach road by a level crossing, the appellants executed a scheme, in virtue of which the railway was carried under the approach road. This scheme involved the lowering of the respondents' suction pipes, so as to keep them under the level of the railway. The appellants carried the respondents' pipes from the river side to the pump house in three brick-lined tunnels, which were sealed up on the river side. The middle tunnel carried two pipes, and the tunnels on the north and south of it carried one pipe each. The appellants then laid the railway over the top of the roof of the tunnels. In order to afford protection to the tunnels, they overlaid the roof with steel plates.

To protect the railway against flooding the appellants constructed a drain in the middle of the railway track. The drain ran into a sump, which was emptied by two pumps set up in a pump house belonging to the appellants, and situated on the other side of the railway line from and just opposite to the respondents' pump house. The respondents also had a sump in their pump house, with a small pump attached to it.

In the beginning of the year 1926, the respondents, being desirous of increasing their supply of unfiltered water from the river, discussed with the appellants a project for laying down a fifth pipe through which to draw water from the Hugli to the respondents' pump house along a line south of the southermost of the existing pipelines. As this pipe, like the others, had to be carried across the appellants' railway, it was agreed, by letters passing between the parties, and hereinafter referred to, in order to ensure as little interference with the railway as possible, that the work should be done by the appellants' staff at the respondents' expense.

On 21st and 22nd July, 1926, while the laying of the fifth pipe line was under discussion, an abnormal fall of rain occurred in Calcutta, and flooding ensued. In particular, the appellants' subway was flooded. The water flowed into their pump house, and overwhelmed the pumps. It poured through the tunnels, and over certain screen walls into the respondents' pump house. The whole pumping plant was thereby put out of action.

The respondents, in their plaint, alleged that their pump house was flooded in consequence of the appellants' negligence. They stated that the rush of water into the pump house was due to the existence of two holes under the steel plates, which were made by the appellants, or which they suffered to remain open. In both respects the appellants were alleged to have been guilty of negligence.

The appellants, in their written statement, denied the charge of negligence, and they also denied responsibility for making the holes or leaving them open. They also charged the respondents with negligence. They further pleaded section 142 of the Calcutta Port Act as barring the respondents' claim.

Several issues were framed for the trial of the suit. The eleventh issue was in these terms—"Is the suit time barred by reason of section 142 of the Port Act?" The section is in these terms:—

> "No suit shall be brought against any person for anything done "or purporting or professing to be done in pursuance of this Act, "after the expiration of 3 months from the day on which the cause "of action in such suit shall have arisen."

This issue was determined by Mr. Justice Buckland on the pleadings in the appellants' favour. This judgment was recalled on appeal, the Court of Appeal holding that the issue could not properly be determined until the facts had been investigated. The suit was accordingly remitted for trial.

In the course of the trial, it emerged in examination of the appellants' witnesses, that the holes referred to had been made in June 1926, by or under the supervision of one Manotosh Chatterjee, a superintendent of works in the appellants' service, in connection with the project of laying the fifth pipe line already referred to, and in order to locate in the ground, as he alleged, the exact centre of the southern pipe in connection with the project of laying the fifth pipe line.

Mr. Justice Buckland, after evidence and argument, delivered judgment on 8th June, 1934, dismissing the respondents' suit. He held (1) that no negligence on the appellants' part had been found, and (2) that, in any event, Chatterjee, in making the holes, was acting on behalf of the appellants in pursuance of the Calcutta Port Act, and (3) that the respondents' claim was accordingly barred by section 142 of that Act. The learned judge accordingly dismissed the suit.

From this judgment the respondents appealed. The Appeal Court, on 22nd August, 1935, allowed the appeal, and passed a decree for the amount claimed. The learned judges of the Appeal Court held (1) that the cause of the damage to the respondents' pumping station was the appellants' negligence in leaving the holes open, and (2) that the appellants were not protected by section 142 of the Port Act, as the acts of Chatterjee in making and leaving the holes open were not done by the appellants in pursuance of the Port Act.

From that judgment the present appeal has been taken. As already indicated, their Lordships regard themselves as absolved from considering and determining the issue of negligence, inasmuch as they are satisfied that the appellants can successfully invoke the protection of section 142 of the Port of Calcutta Act.

In order to appreciate precisely the work which was being effected when the cause of action arose, it will be convenient *in limine* to bear in mind the terms of two letters

which passed between the appellants and respondents. On 2nd February, 1926, the respondents' contructional engineer wrote to the secretary of the appellants in these terms:—

> " I have the honour to inform you that this Corporation proposes to erect an additional 42" diar. suction pipe and to extend the existing jetty by about twelve feet in which to carry this pipe at the above Pumping Station.
>
> " I herewith enclose the plans relative to this proposal for your Commissioners' information and beg to point out that this scheme will affect the river front of the heavy lift yard by shortening same at the North end by twelve feet.
>
> " As regards the crossing of your Commissioners' subway and railway lines it is suggested that this work be executed by your Commissioners so that as little interference as possible will occur in the working of your railway and this matter has been discussed with your Commissioners' Engineers who are preparing an estimate which will be laid before my Committee for their approval with regard to this portion of the work.
>
> " I shall be glad if you will look into this matter and let me have the approval of your Commissioners at an early date to the execution of this work."

The reply to that letter was in these terms:—

> " I beg to refer to your letter W.W. 6616 dated 2nd February, 1926, regarding a proposal to install an additional suction pipe at Mullick Ghat Pumping Station, which has since been discussed by you with the Commissioners' Engineering Department.
>
> " It is agreed that the construction of the culvert from and including the river side retaining wall to the back of the retaining wall at the Pump House should be carried out by the Commissioners' Staff, and I enclose an estimate of Rs.44,620 for this work. This estimate cannot, however, be regarded as an accurate one, as it is difficult to estimate correctly the cost of some portions of the work, and it is quite possible that it may be considerably exceeded. The Corporation would of course be liable for any expenditure incurred over and above the estimated amount which would be refunded. A nominal way-leave rental of Re.1 per annum would be charged for the pipes crossing the Commissioners' land.
>
> " As regards the extension of the Mullick Ghat Jetty, the sanction of the Local Government will be necessary under Section 83 of the Calcutta Port Act, and Government insist, in all such cases, on an undertaking being given that any work below the high water mark at the time of construction will be removed without any claim to compensation if such removal be considered necessary by the Port Commissioners at any time in the interests of the Port. " The Chairman on receipt of a letter from the Chief Executive Officer, giving this undertaking, will propose to the Commissioners that they should recommend Government to accord sanction to the extension. Three copies of the plan should be attached to the letter."

Following on these letters, certain exploratory work proceeded, in which Chatterjee was employed. Both Courts accepted as accurate and reliable Chatterjee's statement of what he did in making the holes, and why he made them. Both Courts also accepted the view that Chatterjee was instructed to get measurements, and that he adopted his own method of procuring these. Was Chatterjee purporting or professing in what he did to act in pursuance of the Calcutta Port Act? That is the question. The trial judge answered that question in the affirmative, and their Lordships think that he was right in so doing.

The letters quoted disclose that an appeal had been made to the appellants as a statutory body to do certain work. To that appeal they assented. The work related to the appellants' railway track. It was being done on their property, and in their interest. The workmen, including Chatterjee, were paid by the appellants, presumably from statutory funds, and the work was superintended by them. In what Chatterjee did or omitted to do, he was solely concerned with his employers' business. The respondents' argument was that the appellants failed to repair a part of their railway line, which was situated on their own land. In these circumstances, it is vain, in their Lordships' opinion, to suggest, as the respondents did, that the appellants were acting in a private capacity, or indeed, in any other than their statutory capacity.

The suggestion made on behalf of the respondents in argument was that the appellants were acting in the capacity of private contractors. Their Lordships are unable to accept this view. In point of fact, there was then no contract between the parties: the work being done was, as already stated, of an exploratory character. A contract may have been in contemplation of the parties: but it was not in being. Their Lordships are clearly of opinion that the appellants did not divest themselves of their capacity as a Port authority, and did not assume some other capacity, in having the work done.

Reliance was placed by the respondents on the case of the *Bradford Corporation* v. *Myers* ([1916] 1 A.C. p. 242). Now, inasmuch as that case related to the construction of the Public Authorities Protection Act (1893), which contains language not to be found in the Indian statute, and which omits language to be found in the latter, manifestly the decision falls to be handled with care. In particular, the English Act does not contain the words "purporting or "professing to act in pursuance of the statute". Their Lordships regard these words as of pivotal importance. Their presence in the statute appears to postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection, if the work professes or purports to be done in pursuance of the statute. The English Act was properly treated by the House in the *Bradford* case as one from which the words "professing or purporting" were omitted, and the observations of the House must, of course, be construed "*secundum subjectam materiem*". They have, in their Lordships' judgment, no application to this case. Their Lordships can find nothing in the *Bradford* case which forbids the interpretation which they propose to attach to the Indian Act. Their Lordships were not referred to any decision on that Act, either by this Board or by any Court in India. It apparently therefore falls to be construed judicially for the first time.

The respondents argued that the Indian statute fell to be strictly construed, and that, while it protects against a claim based on breach of statutory duty, it does not protect against an omission to perform a statutory duty. Their Lordships are unable to accept either argument. The

argument is unsupported by authority, or from any other source.

The Court of Appeal in their judgment would appear, their Lordships think, to have forgotten (1) that the appellants were engaged in work designed for the protection of their railway, and (2) that the neglect complained of was leaving unrepaired a portion of that railway. These circumstances, in their Lordships' view, render it impossible to divorce the work which was being done from the statutory capacity in which the appellants were doing it.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, the decree of the appellate side of the High Court set aside with costs, and the decree of Buckland J. dismissing the suit restored. The respondents must pay the costs of the appeal.

(43697—3A) Wt. 8151—17 190 8/37 P. St. G. 338.

In the Privy Council.

THE COMMISSIONERS FOR THE PORT OF CALCUTTA

v.

THE CORPORATION OF CALCUTTA

DELIVERED BY LORD ALNESS

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