

In Re: Dijahur Dutt and ors.

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Court : Kolkata

Decided On : Jan-21-1879

Reported in : (1879)ILR4Cal648

Judge : Ainslie and ;Broughton, JJ.

Appellant : In Re: Dijahur Dutt and ors.

Judgement :

1. The order of the 8th November is illegal, because the Magistrate had no power to order the case to be retried; he ought to have referred the case to the High Court, under Section 296 of Act X of 1872, for final orders. The case, being one under Sections 143 and 352 of the Penal Code, was triable by a Magistrate only; and the District Magistrate had not the power to direct the order of discharge to be re-opened-Kistoram connected system of irrigation for what are now the plaintiff's and defendant's mouzahs, beneficial to both states, was by these means provided. The fact that this lower reservoir, which seems to have acquired the name of the Chahul Tal, was built mainly on the defendant's mouzah, leads irresistibly to the conclusion that it was constructed by, or with the consent of, the then owner of that mouzah; and it is evident from its situation, that its main, if not only, use was to store water for the convenient irrigation of the plaintiff's mouzahs. Then it is proved that the water has been used and enjoyed for irrigating these mouzahs from a time beyond living memory. It appears to their Lordships that, from all these facts, a presumption fairly arises that this enjoyment had an origin which conferred a right.

2. It may be that at the time when this system of irrigation was adopted the mouzahs now belonging to the plaintiff and the defendant formed one estate; and, if so, on severance, the right to the continued flow of the water in the accustomed channels would arise and subsist [see on this point *Watts v. Kelson* (L.R., 6 Ch. A., 166)]; or, if the mouzahs were always separate, it may be that, by the construction of the Mahooet Tal, water was intercepted which would naturally have flowed to Chahul, and that this or some other consideration existed which led to an agreement between the proprietors respecting the use of the water.

3. Other circumstances were proved which support the presumption of a legal right to the enjoyment of the water.

4. In 1831 proceedings were taken in the Criminal Court of Zilla Berar by the owners of Chahul against some ryots of Mahooet in consequence of their having closed the khonwa from Mahooet Tal to Chahul Tal, which led to a razinamah being come to, dated 6th April 1831, between the Elakadars of the two mouzahs. In that agreement the khonwa is described as being then an ancient one. It recites that disputes arose respecting 'the closing of a longstanding khonua of water of the tal of Mouzah Mahooet.' The arrangement come to is thus expressed:

Now between our client aforesaid, and the said Rajah Saheb, a compromise has been made in this manner: that when the water of the tal' of Mouzah Mahooet aforesaid is about to overflow, and there happens to be any necessity for discharging the same, at that time our client aforesaid shall discharge the water of the said negar towards the 'tal' of Mouzah Chahul, &c.;, through the course of the long-standing 'negar' which the Elakadar of Chahul, &c.;, declares to be 'khonwa'; that they shall not open it towards the River Ponwar, or in any other direction; and that the power of closing and opening the 'negar' of the 'tal of Mouzah Mahooet aforesaid, rests with the Elakadar of the said Mahooet.

As Moulvi Kasim Ali, 'Elakadar' of Mouzah Mahooet, has acknowledged the 'khonwa' of 'tal' Mahooet towards the Mouzah Chahul, &c.; therefore a mutual adjustment has been effected, and the contents of the razinamah are true.

5. The effect of this arrangement seems to be that the overflow of the tal shall be always discharged through the khonwa, and in no other direction. This agreement appears to refer only to the overflow water discharged from the tal through the khonwa (which was then apparently the only matter in dispute); but it is a clear acknowledgment of right to this overflow. This is made plain by the statement that 'the Elakadar of Mouzah Mohooet has acknowledged the khonwa of Tal Mahooet towards the Mouzah Chahul.' and only course for him was to. report it for orders to the High Court, which, if of opinion that the accused were improperly discharged, might, under Section 297, have directed a retrial.'

6. We, therefore, quash the order of the Magistrate, dated the 8th November 1878, and direct that no proceedings be taken in it, and if any proceedings have been taken that they be forthwith stayed.

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