State of Punjab

Vs

Modern Cultivators, Ladwa

Civil Appeals Nos. 416 and 417 of 1947

(A. K. Sarkar, M. Hidayatullah, J. R. Mudhalkar JJ)

08.05.1964

JUDGMENT

SARKAR J. –

I agree with the orders proposed by my brother Hidayatullah.

These appeals arise out of a suit brought by a firm called the Modern Cultivators against the State of Punjab to recover damages for loss suffered by flooding of its lands as a result of a breach in a canal belonging to the State of Punjab. Both the Courts below have held in favour of the plaintiff but the High Court reduced the amount of the damages awarded by the trial Court. Both parties have appealed to this Court. The Modern Cultivators contend that the High Court is in error in reducing the amount of the damages. The State of Punjab contends that it had no liability for the loss caused by the flooding. The breach and the flooding of the plaintiff's lands are not now denied.

In regard to the appeal by the Modern Cultivators I have nothing to add to what has been said by Hidayatullah J. For the reasons mentioned by him I agree that the damages had been correctly assessed by the trial Court.

In its appeal the State of Punjab first contended that the plaintiff could not succeed as it had failed to prove that the breach had been caused by the defendant's negligence. I am unable to accept this contention. The trial Court inferred negligence against the defendant as it had failed to produce the relevant documents and with this view I agree. The defendant had produced no documents to show how the breach was caused. It had been asked by the trial Court to do so by an order made on May 12, 1949 but failed to produce them. The defendant had a large number of canal officers and according to Mr. Malhotra, the Executive Engineer in charge of the canal at the relevant time, there was a regular office and various reports concerning the breach had been made. None of these was produced at the hearing. It is obvious that in an organisation like the canal office, reports and other documents must have been kept to show how the breach occurred and what was done to stop it. If such documents are not produced, an inference can be legitimately made that if produced, they would have gone against the case of the defendant, that is, they would have proved that the defendant had been negligent : Murugesan Pillai v. Manickavasaka Pandara [L.R. 44 I.A. 98]. It was suggested in this Court that the documents had been destroyed. It may be that they are now destroyed. One of the defendant's officers called by the High Court in view of the unsatisfactory nature of the documentary evidence said that documents were destroyed after three to seven years. The breach occurred in August 1947, the suit was filed in October 1948 and the trial was held about August 1949. So it would appear that at the time of the trial the relevant documents had not been destroyed. Nor was it said that they had then been destroyed. Furthermore, in view of the pendency

of the suit the documents must have been preserved. It is, clear that they had not been produced deliberately. An inference that the defendant was negligent in the management of the canal arises from the non-production of the documents. There is, therefore, evidence that the defendant was negligent.

Furthermore it seems to me that the rule of res ipsa loquitur applies to this case. The canal was admittedly in the management of the defendant and canal banks are not breached if those in management take proper care. In such cases the rule would apply and the breach itself would be prima facie proof of negligence : see Scott v. London Dock Co. [3 H. & C. 601]. No doubt the defendant can show that the breach was due to act of God or to act of a third party or any other things which would show that it had not been negligent, but it did not do so. It may be that the rule of res ipsa loquitur may not apply where it is known how the thing which caused the damage happened as was held in Barkway v. South Wales Transport Co., Ltd. [[1950] 1 All E.R. 392]. But that is not the case here. No reason has been advanced why the rule should not apply. Therefore I think that the first contention of the defendant that there is no evidence of negligence must be rejected.

I do not think it necessary in the present case to consider whether the rule in Rylands v. Fletcher [[1868] L.R. 3 H.L. 330] applies to make the defendant liable for I have already held that it is liable as negligence has been proved.

The second point raised by the defendant was one of limitation. It was contended on behalf of the defendant that the case was governed by art. 2 of the first schedule of the Limitation Act. It is not in dispute that if that article applies, the suit would be out of time. That article relates to a suit "for compensation for doing or omitting to do an act alleged to be in pursuance of any enactment". It was said that the Northern India Canal and Drainage Act, 1873 imposed a duty on the defendant to take care of the canal banks and its failure to do so was the omission to do an act in pursuance of an enactment within the article. I have very grave doubt if this interpretation of art. 2 is correct. There is authority against it : see Mohammad Saadat Ali Khan v. The Administrator, Corporation of City of Lahore [[1945] ILR 26 Lah. 523]. But apart from that I find nothing in the Canal Act imposing any duty on the defendant to take care of the banks. We were referred to ss. 6 and 51 of that Act. Both are enabling sections giving power to the State Government to do certain acts. Under s. 6 it has power to enter on any land and remove any obstruction and close any channels or do any other thing necessary for the application or use of the water to be taken into the canal. This obviously does not impose any duty in connection with the canal bank. Section 15 gives the power to the canal authorities in case of accident happening or being apprehended to a canal to enter upon lands of others and to do all things necessary to repair the accident or prevent it. This section again has nothing to do with taking care of the canal banks. Therefore, even assuming that the defendant's interpretation of art. 2 is correct, this is not a case to which it may apply. I wish however to make it clear that nothing that I have said here is to be read as in any way approving the defendant's interpretation of art. 2. Therefore the defendant's contention that the suit was barred by limitation also fails.

The defendant's appeal must, therefore, be dismissed and the plaintiff's appeal allowed. Costs will naturally follow the result.

HIDAYATULLAH, J. –

On August 15, 1947 the Western Jamna Canal at R.D. No. 138000 near Sangipur and Jandhrea

villages burst its western bank. The canal water inundated the neighbouring fields where crops of sugar cane, maize, urud etc. grown by the plaintiff firm were damaged. The plaintiff brought this action alleging that the breach in the bank was caused by negligence on the part of the canal authorities who were guilty of further negligence in not closing the breach without delay. The plaintiff estimated its loss at Rs. 60,000 in respect of the standing crop and a further loss of Rs. 10,000 in respect of the deterioration of the land for further cultivation. It however, limited its claim to Rs. 20,000.

The State Government denied negligence on the part of the canal authorities. Government admitted that a breach did occur in an old inlet channel of Chhalaundi Silting Tank on August 15, 1947 and some canal water escaped through the breach which, it was said, flowed back to the canal through the outlet of the silting tank lower down the canal. Government claimed that the site was immediately inspected by the Executive Engineer and no damage to the crops was discovered and that the breach was promptly closed and the bank was strengthened. Government stated that there were heavy rains on the 8th September and again from 23rd to 28th September, 1947 causing floods in the nullahas but as the canal was running full supply, water brought by the nullahas to the silting tank could not get to the canal and over-flowed to the adjoining areas.

Shortly stated, plaintiff's case was that there was a breach in the western bank of the canal owing to the negligence of the defendants and canal water escaped to the fields causing them to be flooded; while the case of the Government was that a breach did take place but it was promptly repaired and the fields were flooded not by the canal water but by heavy rains in the month of September. The trial judge passed a decree for Rs. 20,000 against Government, but it was reduced by the High Court to Rs. 14,130. These two cross-appeals have thus been filed by the rival parties by special leave of this Court.

The High Court and the court below have agreed in holding that there was a break in the canal. The size of the breach has been variously described, but it was certainly not less than 30 feet wide and the depth of the water at the breach was about 15 feet. It is admitted that the canal was then running full supply @ 5,000 Cusecs. As the width of the canal was 400 feet, the out-flow would be at the rate of 5,000 x 30/400 Cusecs if the breach was 30 feet wide. This would mean extensive flooding of the low lying areas unless the breach was immediately closed. Some of the witnesses say that it was as much as 70 to 80 feet wide and that would make the out-flow even greater. The High Court held that the floods were not caused by the rains. Prior to the break in the canal there was only 1 inch of rainfall. The heavy rains took place much later. The inundation of the fields was thus by water from the canal and not from the nullahas. This much has already been held. It is admitted that the breach occurred at a place where there was an old nullah through which silting operations were carried out in the past and this exit was closed in the previous years and the breach was at that very site. The breach was noticed on the morning of the 16th. No attempt was made by either side to establish the exact duration of time before the breach was repaired. Mr. Malhotra (Executive Engineer) stated that it was repaired by the 18th but was re-opened (one does not know why) on the 20th and again closed on the 21st. Evidence on behalf of the plaintiff established that water continued pouring out as late as the month of October. This was apparently an exaggeration. There is no evidence to show that the flow of water in the canal was reduced from the headworks when the breach occurred. It apparently continued on full supply. The High Court attempted to secure the documents from the Canal Office which had not been produced earlier. The Executive Engineer, then in charge was summoned to bring all the papers in his office and he produced the telegrams received by and copies of telegrams issued from the head office between August 16, 1947 and September 5, 1947. From these documents it is now established that the breach was not repaired at

least upto August 27, 1947 and the evidence that it was repaired on the 18th was therefore not accurate. It has also been established that the case of the plaintiff that water continued to flow right upto October was also false. It may thus be assumed that repairs were completed by the 27th August but not earlier.

It is admitted that the area into which water flowed was used as a silting tank. The silting operations comprise the opening of the bank of the canal at a selected place to let out turbid water which passing through the silting tank drops the sediment and flows back to the canal at a lower reach free of the silt, and closing of the bank. It is now admitted that at the exact spot where the breach took place there was previously an opening for silting purposes which was recently closed. There is no evidence to show negligence on the part of Government. Curiously enough Government said that it had not preserved the papers connected with this mishap. We can hardly believe this. Government led evidence to establish that the banks of the canal were periodically inspected and claimed that the breach was an act of God without any negligence on the part of the canal authorities. It is an admitted fact that crops of the plaintiff were destroyed if not wholly at least substantially. The only question, therefore, is whether Government can be held responsible for the damage caused to the plaintiff and, if so, what should be the compensation.

Two points were urged on behalf of Government : the first was that the suit filed by the plaintiff was out of time inasmuch as Art. 2 of the Indian Limitation Act which prescribes a period of three months was applicable and not Art. 36 which prescribes a period of two years. This was held against Government by the High Court and the court below. The second point urged on behalf of Government was that there was no proof of negligence whatever by the plaintiff and the plaintiff must therefore fail. The High Court in dealing with this point held that, in the circumstances res ipsa loquitur and that it was not necessary for the plaintiff to prove negligence and it must be so presumed. The High Court differed from the court below in assessing damages.

In the appeal of the Government both these points are urged. On behalf of the plaintiff, in the companion appeal, it is contended that the High Court omitted to give proper compensation for the loss of maize and urud crop. It is submitted that the High Court adopted the formula that in respect of sugar crop which needs plenty of water the damages should be assessed at 1/3 of the value of the crop and in respect of maize and urud crops at 1/2 the value. The plaintiff contends in its appeal that the whole of the maize and urud crop was completely destroyed and the decree of the court of first instance allowing 3/4 of the value of the crop as compensation was unassailable. It is pointed out that evidence disclosed that water in the fields was 4 to 5 feet deep and the maize and urud plants were less than 2 feet high. In other words, the plants remained submerged during all the time the fields were inundated. It is obvious that the crop must have been entirely destroyed and the allowance of 1/4 was because the destroyed crop had some value as chari. On the facts, as found, there was hardly any justification for reducing the amount of the decree for damages passed by the court of first instance. The High Court itself, in more than one place, stated in its judgment that the maize and urud crops were completely destroyed. It is, therefore, clear that unless Government succeeds in its appeal the decree of the court of first instance must be restored in this case. Mr. Vishwanatha Sastri on behalf of Government asked for a remit, but in view of the slight difference and the fact that the High Court itself remarked that the maize and urud crops were completely destroyed there would not be any necessity to order a remit in case the appeal of the Government fails. I shall now turn to that appeal.

The facts as found in this case are that in 1946, the land which got flooded, was used for silting operations. An opening in the western bank was made in that year and the bank was restored in June

1946. Till the month of August in the following year there was no complaint. Evidence discloses that the banks were regularly inspected. A special Engineer and a Special Sub-Divisional Officer were in charge and there were watchmen also. There is no evidence of wilful conduct. The plaintiff has not led evidence to establish any particular act of negligence. There is no evidence that the breach was caused by the act of a third party or even of God. Mr. Sastri, therefore, contends that as there was no foreseable danger against which precautions could be taken beyond making periodical inspections, and this was done, there can be no liability. He submits that in this view of the matter the plaintiff must fail in the absence of proof of negligence.

The High Court applied to the case the rule in Donoghue v. Stavenson [[1932] A.C. 562] reinforcing it with what is often described as the doctrine of res ipsa loquitur. This case is first of its kind in India and needs to be carefully considered. Before us reliance was placed upon the rule in Rylands v. Fletcher [L.R. 3 H.L. 300]. That rule, shortly stated, is : that any occupier of land who brings or keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence : Per Salmond, Law of Torts 13th Edu. p. 574. The rule in Rylands v. Fletcher was derivatively created from the rule of strict liability applicable to the acts of animals but, in my opinion, it is hardly applicable here. Canal systems are essential to the life of the nation and land that is used as canals, is subjected to an ordinary use and not to an unnatural use on which the rule in Rylands v. Fletcher rests. The words of Lord Cairns "non-natural use" of land and of Blackburn, J. "special use bringing with it increased danger to others" are sometimes missed. There is difficulty in distinguishing non-natural and natural user but perhaps the best test to apply is stated by Lord Moulton in Richards v. Lothian [[1913] A.C. 263, 280] :

> "Some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."

They formed the basis of observation of Viscount Maugham in Sedleigh-Denfield v. V. O'Callaghan and Ors. [[1940] A.C. 880 at 888 As was pointed out by Holmes in his Common Law (1963) at p. 93 :

> "It may even be very much for the public good that dangerous accumulations should be made...."

Cases of breaks in canals resulting in danger to neighbouring lands are rare but some are to be found in law reports from the United States of America. I need not refer to them because the following passage from American Jurisprudence Vol. 9 page 340 para 38 gives an adequate summary of the principles on which they had been dealt with :

> "A canal company is also liable for flooding private property where it has not acquired the legal right to do so; it is answerable in damages for all loss occasioned by a neglect on its part to use reasonable care and precaution to prevent the waters of its canal from escaping therefrom to the injury and detriment of others. A canal proprietor is not, however, liable for damages to adjoining lands resulting from a mere accidental break in his canal which human foresight and vigilance could not have anticipated, and against which proper prudence and judgment could not be expected to provide. Although it has been held that a canal company is not liable for damages occasioned by the percolation of waters through the banks of its canal, in

> the absence of proof of negligence on its part in want of skill or care in the construction and maintenance of its canal, such holdings are maintenance of its canal, such holdings are opposed to the weight of reason and authority."

Perhaps the liability is viewed strictly as an inducement to care. Safety is best secured when it is made the responsibility of the person who must not only take precautions to avoid accident but who alone decides what those precautions should be. In this connection the rule that is most often quoted was stated by Erle C.J. in Scott v. London and St. Katherine Docks Co. [3 H. & C. 596 : 159 E.R. 665] thus :

"There must be reasonable evidence of negligence.

> But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In subsequent cases it has been customary to regard this as a statement of the principle of res ipsa loquitur. But the principle, if it be one, cannot always be safely applied where the facts before the court are not the whole facts. In a vast canal system constructed with great care and attention to detail it may be difficult to prove negligence but it may sometimes be equally difficult to explain how the defect arose. The principle of res ipsa loquitur had its origin in the falling of a barrel of flour from a first floor window on a passerby but it has been extended to situations quite different. It is not very much in favour and if applied it must be correctly understood. It is not a principle which dispenses with proof of negligence. Rather it shifts onus from one party to another. It is rule of evidence and not of liability. A too ready reliance on the maxim reinforces a fault liability and makes it into an absolute liability. If absolute liability is to give way to fault liability, some fault must be established by evidence or must be capable of being reasonably inferred from the circumstances. It is not sufficient to say res ipsa loquitur because the danger is that facts may not always tell the whole story and if there is something withheld how can the thing be said to speak for itself ? The principle which I consider reasonable to apply where fault has to be inferred from circumstances was best stated by Lord Porter and I respectfully adopt it. Speaking of res ipsa loquitur it was observed by Lord Porter in Barkway v. South Wales Transport Co. Ltd. [[1950] 1 All E.R. 392 at 394, 395] :

> "The doctrine is independent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."

I have made these observations so that the principle may not be applied too liberally. It must also be remembered that what is said in relation to it in one case cannot indiscriminately be applied to another case. It should not be applied as legal rule but only as an aid to an inference when it is reasonable to think that there are no further facts to consider.

I shall now consider the facts as they stand in this case to discover if the canal authorities can be

said to be at fault. The facts show that the water escaped into the Chillaundi Silting Tank through the nallah which had previously been used for silting operations and had been sealed in the previous year. If the plug were sound it would have withstood the pressure of water as it did after it was repaired on the 27th August even though 28" of rainfall fell within 20 days. There is nothing to show that the outflow was due to rainfall or a storm so exceptional that it could be regarded as an act of God. Nor was it due to any disturbance of the earth's crust or interference by a stranger. There is thus sufficient evidence, in the absence of reasonable explanation (which there is not), to establish negligence. Further, there was inordinate delay and negligence in sealing the breach. Even the flow in the canal was not reduced for repairs to be carried out quickly. In such circumstances, the facts prove negligence and government was rightly held responsible. Whether the defect was patent or latent is not much to the purpose. It was not an inevitable accident, and the Government must be held liable.

It remains to consider the question of limitation. The High Court and the court below have applied Art. 36 of the Indian Limitation Act. Government claims that the proper Article to apply was Art. 2. These Articles may be set down here :

#Description of Period of limitation Time from whichsuit. period begins to run.2. For compensation Ninety days When the act orfor doing or for omission takesomitting to do an place.act alleged to bein pursuance ofany enactment inforce for the timein India36. For compensation Two years (now When the mal-feasancefor any mal-feasance, one year) mis-feasance ormis-feasance non-feasance takes place.or non-feasanceindependent ofcontract and notherein speciallyprovided for.##

It is not denied that if Art. 2 was not applicable, the proper Article would be Art. 36 and the suit would also be within time. In contending that the second article applies reliance is placed on a decision of the Privy Council in Punjab Cotton Press Co. Ltd. v. Secretary of State [I.L.R. 10 Lah. 171 P.C.]. But that case is clearly inapplicable. There the canal authorities cut the bank of a canal at a selected point to let the water away with a view to protecting a railway track passing close by on a high embankment and in this way flooded and injured the plaintiff's mills. The Judicial Committee held that if the act was done, as was said, under s. 15 of the Northern India Canal and Drainage Act 1873 (8 of 1873), Art. 2 was applicable and not Art. 36. The case was thus remanded to find the fact necessary for the application of the right article. In relying upon this case, Mr. Viswanatha Sastri claims that s. 15 of the Canal Act covers the present facts. Mr. Gopal Singh, who followed, also refers to s. 6. These sections read :

"6. Powers of Canal Officer.

> At any time after the day so named, any Canal Officer, acting under the orders of the State Government in this behalf, may enter on any land and remove any obstructions, and may close any channels, and do any other thing necessary for such application or use of the said water."

"15. Power to enter for repairs and to prevent accidents.

> In case of any accident happening or being apprehended to a canal, any Divisional Canal Officer or any person acting under his general or special orders in this behalf may enter upon any lands adjacent to such canal, and may execute all works which may be necessary for the purpose of repairing or preventing such accidents. Compensation for damage to land.

Compensation for damage to land :

> In every such case, such Canal Officer or person shall tender compensation to the proprietors or occupiers of the said lands for all damage done to the same. If such tender is not accepted, the Canal Officer shall refer the matter to the Collector, who shall proceed to award compensation for the damage as though the State Government had directed the occupation of the lands under section 43 of the Land Acquisition Act, 1870."

In regard to section 6 it is sufficient to say that it has no application here. It refers to the day named in s. 5 and that section provides for a notification to be issued declaring that water would be applied after a particular date for purpose of any existing or projected canal or drainage work or for purposes of Government. On such notification issuing any Canal Officer, acting under the orders of the State Government, may enter on any land and remove obstructions or close any channels so that water may be applied to those purposes. This is an entirely different matter and it is no wonder that Mr. Viswanatha Sastri did not rely upon s. 6.

Section 15 no doubt confers a power to enter lands and property of others to affect repairs or to prevent accidents. One can hardly dispute that it is the normal duty of canal authorities to make repairs and execute works to prevent accidents. But Art. 2 cannot apply to omissions in following the statutory duties because it cannot be suggested that they are 'in pursuance of any enactment'. Cases of malfeasance, misfeasance or non-feasance may or may not have statutory protection. Act or omission which can claim statutory protection or is alleged to be in pursuance of a statutory command may attract Art. 2 but the act or omission must be one which can be said to be in pursuance of an enactment. Here the suit was for compensation for damage consequent on a break in the canal of August 15, 1947. The only act or omission could be the opening and closing of the channel for silting operations. That was before June 1946. The third column of Art. 2 provides the start of the limitation of 90 days - "when the act or omission takes place." The period of limitation in this case would be over even before the injury if that were the starting point.

This subject was elaborately discussed in Mohamad Sadaat Ali Khan v. Administrator Corporation of City of Lahore [I.L.R. [1945] Lah. 523 F.B.] where all rulings on the subject were noticed, Mahajan J. (as he then was) pointed out that "the act or omission must be those which are honestly believed to be justified by a statute." The same opinion was expressed by Courtney Terrell C.J., in Secretary of State v. Lodna Colliery Co. Ltd. [I.L.R. 15 Pat. 510] in these words :-

> "The object of the article is the protection of public officials, who, while bona fide purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong. The protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a bona fide belief by the official that the act complained of was justified by the statute; secondly, the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection."

These cases have rightly decided that Art. 2 cannot apply to cases where the act or omission

complained of is not alleged to be in pursuance of statutory authority. It is true that in Commissioners for the Port of Calcutta v. Corporation of Calcutta [64 I.A. 36] the Judicial Committee, while dealing with s. 142 of the Calcutta Port Act (3 of 1890) which reads :

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

pointed to the presence of the words "purporting or professing to be done in pursuance of this Act" and observed that they regarded the words as of 'pivotal importance' and that their presence postulated "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". But they were giving protection to an act which could ligitimately claim to be in pursuance of the Port Amt. Here the break in the bank was not that kind of act or omission. It could not claim to be in pursuance of the Canal Act. Nor could the opening or closing of the channel for silting operations, though in pursuance of the Canal Act, be the relevant act or omission because they were more than a year before the cause of action and to apply a limitation of 90 days to that cause of action is not only impossible but also absurd. Art. 2, therefore, does not apply here. It was not contended before us that the suit was otherwise time-barred and we accordingly confirm the finding that the suit was within time.

The result thus is that the appeal filed by the State Government fails and I would dismiss it with cots and allow the appeal filed by the plaintiff with costs. I would modify the judgment and decree of the High Court by altering the amount of Rs. 14,130 to Rs. 20,000 as ordered by the trial judge.

MUDHOLKAR, J. –

I agree with my brethren Sarkar and Hidayatullah that the appeal preferred by the defendant, the State of Punjab, be dismissed and the appeal preferred by the plaintiff, the Modern Cultivators, be allowed and the decree for damages be restored to the sum awarded by the trial court. I also agree with the order for costs as proposed.

I wish to add nothing with regard to the plaintiff's appeal to what has been said by my brother Hidayatullah nor to what he or my brother Sarkar has said regarding the question of limitation raised on behalf of the defendant. They have both held that art. 2 of the Limitation Act is not attracted to a case like the present where the damages sustained by the plaintiff are not the result of anything done by the State in pursuance of a statutory power exercised by it or by reason of an act which could properly be said to have been performed in the purported exercise of a statutory power. If art. 2 is out of the way, it is not disputed on behalf of the State that the suit will be within time.

My learned brother Hidayatullah has referred to the rule of common law as to strict liability with respect to damages resulting from the escape of deleterious substances or cattle from the land which have been accumulated or brought on the land by its owner for his use and which were not natural there. The rule was stated thus in Rylands v. Fletcher [[1868] L.R. 3 H.L. 330] by Blackburn, J. :

> "We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape."

It was approved by the House of Lords, but Lord Cairns laid down a new principle distinguishing the natural from the non-natural user of land and holding that in the latter case only was the liability absolute. (see Salmond on Torts, 13th ed. p. 579). This rule has been adopted in this country in several cases (see Gooroo Churn v. Ram Dutt [[1865] 2 W.R. 43]; Dhanusao v. Sitabai [I.L.R. [1948] Nag. 698] and several other cases) and can, therefore, be regarded as a part of the common law of the land. In the country of its origin, this rule has been subjected to certain exceptions. The present case falls in one of the exceptions recognised in some, though not, all cases. It has been held in some cases that where the owner or occupier of land accumulates a deleterious substance thereon by virtue of an obligation imposed upon him by a statute or in exercise of statutory authority he will not be rendered liable for damages resulting therefrom to other persons unless it is established that he was guilty of negligence in allowing the deleterious substance to escape. In a recent decision Dunne v. Horth Western Gas Board [[1964] 2 W.L.R. 164] the Court of Appeal has recognised this exception and the controversy may be said to have been set at rest, subject, of course, to what the House of Lords may have to say hereafter. Indeed, the liability to pay damages to another resulting from an act of a person is laid upon him by the law of torts upon the basis that his act was wrongful and that he was a wrong-doer. Where, therefore, the act consists of something which the law enjoins upon that person to do or which the law permits him to do, it cannot possibly be said that his mere act in doing that something was in itself wrongful and that he was a wrong-doer. He will, however, be liable if he performed the act in a negligent manner or if the escape of the deleterious substance subsequent to accumulation of that substance in exercise of a statutory authority was the result of his negligence. There is nothing here to show that in constructing the canal under the powers conferred by Northern India Canal and Drainage Act, 1873 the State did anything other than what the law permitted. Therefore, by constructing the canals and allowing water to flow along it the State merely exercised its statutory authority. Further, there is nothing to show that there was any want of care in constructing the canal and so no question of negligence will arise in constructing the canal and allowing water to flow along the canal in question. Here, what has happened is that at the point where prior to 1946 the water from the canal was allowed to flow into the silting tank through a nallah, there was an opening which was plugged in that year. Here, it is established that over a year after that opening was plugged by the State a breach of about 30 or 40 feet was caused. This occurred on August 15, 1947. It has not been shown that the breach could have been caused by an act of God or an act of third party. The contention of the State that it was caused by heavy rains in the catchment area has not been found to be true. If, therefore, there is material from which it could be inferred that the breach was caused by reason of negligence on the part of the State in inspecting the banks of the canal and in particular that portion of it where the breach had been caused the State would be liable in damages. This would be so not by the operation of the rule in Rylands v. Fletcher [[1868] L.R. 3 H.L. 330] but by reason of negligence.

The sole ground upon which the liability of the State could be established in this case would be negligence of the State in properly maintaining the banks of the canal. For this purpose it would be relevant to consider whether there were periodical inspections, whether any breaches or the development of cracks were noticed along the banks of the canal and in particular at the place where the breach ultimately occurred or whether any erosion of the banks particularly at the place where one of the banks had been plugged had been noticed and no action or timely action had been taken thereon. There is evidence to show that the canals were being regularly inspected. That, however, is not the end of the matter. Immediately after the breach occurred some reports were made and as pointed out by my brethren in their judgments they were not placed before the court despite its order requiring their production. When the matter went up before the High Court it was said that the records had been destroyed in the year 1958 or so and therefore they could not be furnished. This

action on the part of the State is manifestly unreasonable and the legitimate inference that could be drawn from it is that if the documents had been produced they would have gone against the State and would establish its negligence. In these circumstances I would hold that though the plaintiffs have been unable to adduce positive evidence of negligence it could legitimately be presumed that the State was negligent inasmuch as it had deliberately suppressed evidence in its possession which could have established negligence. In the circumstances of this case I do not think it appropriate to refer to the rule of evidence res ipsa loquitur.

Appeal No. 416 dismissed and Appeal No. 417 allowed

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