PRINCE VYAS LAKSHMAN & VEENA DEVI LAKSHMAN

v.

THE TRUSTEES OF SANATAN DHARAM STRI SABHA
PITAMBAR MADHAVJI RANIGA
KADAVU DEVELOPMENT COMPANY LIMITED
SUVA CITY COUNCIL

[HIGH COURT, 1989 (Byrne J) 14 August]

Civil Jurisdiction

Land- indefeasability of title- easements- artificial drainage- whether unencumbered owner of the land entitled to obstruct- Land Transfer Act (Cap 131) Section 39.

The Plaintiffs who were the registered owners of unencumbered land sought a declaration that they were entitled to seal off and close artificial drains which ran across their property. The High Court HELD: that in the absence of a registered easement acquired by grant or prescription the Plaintiffs were entitled to the declaration sought subject however to those likely to be affected by the closing off of the drains being indemnified.

Cases cited:

Bailey v. Vile [1930] N.Z.L.R. 829
Broder v. Saillard (1876) 2 Ch.D. 692
City of Oakleigh v. Brown (1956) V.L.R. 503
Coulter v. T.M. Burke Pty Ltd (1960) V.R. 16
Gartner v. Kidman (1961-1962) 108 C.L.R.
Gibbons v. Lenfestey (1915) 84 L.J. (P.C.) 158
Hurdman v. North Eastern Railway Company (1878) 3 C.P.D. 168
Nelson v. Walker (1910) 10 C.L.R. 560
Righetti v. Wynn (1950) St. R. Qd. 231
Strange v. Andrews [1956] N.Z.L.R. 948
Vinnicombe v. MacGregor (1902) 29 V.L.R. 32
Vinod Patel Holdings Ltd v. Suva City Council (Civ. Action No. 330/ 1985)
Whalley v. Lancashire and Yorkshire Railway Co. (1884) 13 Q.B.D. 131
Wilsher v. Corban [1955] N.Z.L.R. 478

H.K. Nagin for the Plaintiffs.
H.M. Patel for the Fourth-named Defendant.
No appearance by the First, Second and Third-named Defendants.

Action for declaratory Judgment in the High Court.

Byrne J: .

This case concerns the right of the owners of land within the city limits of the City of Suva to seal off water flowing by artificial drains from upper land through their property. The following are the facts which are not in dispute:

The first named Plaintiff is the registered proprietor of Lot No. 8 on Deposited Plan No. 2923 (Certificate of Title No. 11771) and he became so registered on 30th September 1983.

The Plaintiffs jointly are the registered proprietors of Lot No. 5 on Deposited Plan No. 2805 being the land described in Certificate of Title No. 11778 and they became so registered on 20th September 1985.

At present water in an underground drain flows from the Second Defendant's property (Certificate of Title No. 11643) and enters the western boundary of the First-named Plaintiff's property (Certificate of Title No. 11771). There is no drainage easement registered on Certificate of Title No. 11771.

Also at present water flows in an open concrete drain from the First Defendant's property (Certificate of Title No. 11778) at the northern boundary. There is no drainage easement registered on the plaintiff's property in Certificate of Title No. 11778.

Also water flows in an open concrete drain from the Third Defendant's property (Certificate of Title No. 11767) into the plaintiff's property (Certificate of Title No. 11778) and enters that property at the eastern boundary.

Since approximately 1986 the plaintiffs have been wanting to seal off these drains for the development of their properties and for this purpose, by letters dated 14th May 1986 from their present Solicitors, issued notices to the First, Second and Third-named Defendants requiring them to divert the drains, but received no response from the Defendants. This has led to the present legal proceedings. By Originating Summons dated 19th June 1986 the plaintiffs seek a declaration against all four defendants that the plaintiffs are entitled to seal off these drains. It appears that the Fourth-named Defendant is sued as being the Drainage Authority for the City of Suva.

Unfortunately only the Fourth-Defendant has been represented throughout these proceedings. There have been no appearances on behalf of the other three defendants who are most likely to be affected by any order which this Court may make. The Court is thus placed in the somewhat invidious position of having to decide the rights of these first three defendants without the benefit of hearing any legal argument from them. This is to be regretted.

On 21st June I attended a view in the presence of counsel for the Plaintiffs and the Fourth Defendant and two civil engineers from the Suva City Council hereinafter called "The Council". The view took place in moderate rain and I was thus able to observe the flow of water from the first three defendants' properties which are higher than those of the plaintiffs'. I was informed by the

Council engineers that in their opinion, if the Court grants the declaration sought by the plaintiffs, this would cause a build-up of water on all the land on the Fletcher Road and Luke Street sides of the area which is situated at Samabula 3 Miles.

The Plaintiffs base their claim first on indefeasibility of title. They say that they are the registered proprietors for value and without fraud of the properties described in Certificates of Title Nos. 11771 and 11778; that when they bought the properties they had no notice of any adverse interest, actual or constructive of anyone else and they thus took their titles free of any such interest even if it can be said that one exists. They rely on Section 39 of the Land Transfer Act (Cap. 131) the short effect of which is to guarantee immunity from attack by adverse claim to the title of any person becoming the registered proprietor of any land in accordance with the provisions of the Act, subject to the three exceptions mentioned therein. This concept is central in the system of registration under the Act, and because the Fourth Defendant does not deny the Plaintiffs' claim to hold indefeasible rights in their land, I shall not refer to this question again in this judgment. On the above facts, and with this concession of the Plaintiffs' indefeasibility of title, the question now is "are the Plaintiffs entitled to the relief which they seek?"

The answer to this question depends on a consideration of certain case law. By the common law the proprietor of land upon the banks of a natural stream of running water is entitled to have, and is obliged to accept, the flow of water past his land. He cannot either deprive those lower down the stream of its flow nor pen it back upon the lands of his neighbour higher up. These rights and obligations do not depend on prescription or grant. They are proprietary in character, natural incidents of the ownership or lawful possession of the land abutting on the stream.

The position of an artificial water-course, that is a water channel constructed by man as distinct from a natural stream, is entirely different. Generally speaking the owner of land through which an artificial water-course runs may block or divert it at his will, unless some easement over it has been acquired by grant or prescription.

Thus in Hurdman v. North Eastern Railway Company, (1878) 3 C.P.D. 168, 173 Cotton L.J. delivering the Judgment of the Court of Appeal said (subject to a qualification not here relevant):

> "...If anyone by on artificial erection on his own land causes water, even though rising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment he will be liable to an action at the suit of him who is injured, and this view agrees with the opinion expressed by the Master of the Rolls in the case Broder v. Saillard (1876) 2 Ch.D. 692, 700)."

As has been pointed out in an helpful article by Professor F.M. Brookfield in 1 New Zealand Universities'. Law Review p.440 at 447 it would be pedantic to
A interpret too literally the word "erection", and the more general word "structure" or "work" may be regarded as its synonym in the context, although for a contrary view see Righetti v. Wynn (1950) St.R. Qd.231, 234.

Similarly, a higher owner cannot, without becoming liable in damages, by artificial drainage release a sudden natural accumulation of water on his land to lower
B land, even though it would naturally have percolated there Whalley v. Lancashire and Yorkshire Railway Company (1884) 13 Q.B.D. 131.

In 1915 came what has come to be regarded as a landmark decision of the Privy Council in Gibbons v. Lenfestey (1915) 84 L.J. (P.C.)158. One passage of the speech of Lord Dunedin has been quoted frequently in cases dealing with the right of natural drainage of surface water but I do not propose to quote this
C passage here except to say that in it the Privy Council, though dealing with the law of Guernsey, which is based on Roman sources and the Grand Coutumier of Normandy and not on the common law, suggested that the common law itself had adopted the Roman law rule that (apart altogether from the case of a defined stream) an upper proprietor may as of right send on to the contiguous land of a lower proprietor natural water flowing on the former's land, even if, in the course
D of draining or otherwise improving his land, such upper proprietor has collected such water in a more concentrated volume than nature has done.

It had previously been held in the United States, Canada, New Zealand and New South Wales that the Roman law rule did not form part of the common law. In Vinnicombe v. MacGregor (1902) 29 V.L.R. 32, three Victorian Judges held the
E rule applicable but A'Beckett J. powerfully dissented. In Nelson v. Walker (1910), 10 C.L.R. 560 O'Connor J. held the doctrine altogether inapplicable. Griffth C.J. and it seems, Higgins J. doubted its application while Isaacs J. expressed no opinion but both Griffith C.J. at p.568 of the report, and O'Connor J. at p.576 held the rule inapplicable to town land in any case. In their view, it never applied even in Roman law, to anything but country land. Over the years however it
F seems that the rule as laid down in Gibbons v. Lenfestey came to be accepted as part of the common -law: see *Coulson and Forbes on Waters and Land Drainage*, 5th Ed., 1933 p.142. This was despite the fact that Lord Dunedin's remarks in Gibbons v. Lenfestey were purely obiter dicta although in New Zealand the Court of Appeal in Bailey v. Vile [1930] N.Z.L.R. 829 declared that the law "had been definitely settled by the Privy Council in Gibbons v. Lenfestey." There the Court
F of Appeal felt bound to over-rule its earlier decisions and adopt the civil law doctrine as the fundamental rule. However Bailey v. Vile was a case dealing with drainage of natural waters, as distinguished from the case here of artificial drainage. Furthermore it seems very doubtful in view of the authority cited by the High Court of Australia in Nelson v. Walker (1910) 10 C.L.R. 560, whether the rule has ever applied to town lands such as those with which I am concerned here. I am not satisfied that it does and I decline to so hold. I prefer to follow the

Victorian decisions of City of Oakleigh v. Brown (1956) V.L.R. 503 and Coulter v. T.M. Burke Pty Ltd (1960) V.R. 16 where two distinguished Judges of the Victorian Supreme Court , Sholl J. and Smith J. also declined to do so. In the first of these cases Sholl J considered many of the authorities and said that the Privy Council itself laid it down that the right which it described would not extend to "foreign" water, introduced e.g. by a pipe supply – see per Lord Dunedin, 84 L.J.P.C. at p. 160.

In Wilsher v. Corban [1955] N.Z.L.R. 478, North J. held that an artificial drain leading from higher to lower land may become the place where the surface water of the particular watershed is deemed naturally to go, i.e. may become a natural drain to which the servitude attached. It was said that the matters which the Court could consider in determining whether an artificial drain came within the proposition include the following:

> The antiquity of the drain, circumstances of its creation, e.g. whether or not by express agreement, and whether successive lower owners have known or ought to have known of its existence or have agreed to or acquiesced therein:

However Windeyer J., with whom Dixon C.J., concurred in the leading High Court of Australia case of Gartner v. Kidman (1961-1962) 108 C.L.R.12,described this case and that of Strange v. Andrews [1956] N.Z.L.R. 948 as "confusing" - see his judgment at p.43. In the present case the facts are different in that here the Court is not dealing with the natural flow of water from higher land to lower but with man-made drains which form part of the Suva City Council drainage system. The Plaintiffs took their titles only subject to what was registered thereon. As the drainage easements were not registered on the titles they cannot be said to bind the Plaintiffs and compel them to accept the water flow from the higher blocks.

The only local authority to which I was referred was Vinod Patel Holdings Limited v. Suva City Council Supreme Court - Civil Action No. 330 of 1985 which is authority for the proposition that the cost of relocation of a drain, which is not the subject of a drainage easement is the responsibility of the Suva City Council. But that case is clearly distinguishable from the present. In this case the plaintiffs are not asking the Council to bear the cost of relocation of the drain but are merely seeking a declaration that they are entitled to seal off the drains which are in their properties. It seems to me in all the circumstances, particularly from their undoubted rights under Section 39 of the Land Transfer Act and on the principles of the cases I have mentioned, that the Plaintiffs are entitled to the declaration. However I consider that this right which I find they have must be conditional on them undertaking to indemnify and keep indemnified all other land owners in the vicinity of the Plaintiffs' properties who are likely to be affected by my decision, I also direct that the works which they propose to undertake on the land in question must have the approval of the Suva City Council at the Plaintiffs' cost. I foresee that the Council through its civil engineers

will wish to keep under surveillance the work being carried out by the Plaintiffs, in its capacity as the drainage authority for the City of Suva. Although my decision in fact rejects the submission made by the Council I do not consider it would be appropriate in the circumstances of this case that the Council should pay the Plaintiffs' costs of these proceedings. It seems to me the fairer course is to direct that the parties pay their own legal costs and I so order.

(Judgment for the Plaintiffs.)