

ANDRES EUSEBIO ET AL., PLAINTIFFS AND APPELLEES, VS. PROCESO AGUAS, DEFENDANT AND APPELLANT. AND*G.R. Nos. 23189-23191. March 09, 1925*

Ponente: OSTRAND, J.

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The above entitled cases relate to the same subject-matter, have been argued together, and may be conveniently disposed of in one decision.

It appears from the evidence that the appellant Proceso Aguas is the owner of twenty-one hectares of irrigated land, adjoining the western bank of the stream Malpitic and designated in the cadaster as lot No. 3836. Over thirty years ago the appellant's predecessors in interest constructed a dam across the stream at a point about 500 meters above the land and from there the water for the irrigation of the land was conducted through a canal situated on the east side of the stream and carried across the stream to the land by means of a banca or flume. The engineer Justo Arrastia of the Bureau of Public Works estimated that the quantity of water so utilized by the appellant and his predecessors amounted to 42 second liters.

In September, 1919, the appellant removed the banca and constructed a dam across the stream at a point opposite his land with the result of diverting all of the water in the Malpitic stream as well as that of one of its affluents, Sindalan Creek, to the land adjoining both sides of the Malpitic at that point.

The appellees are the owners of 270 hectares of land also adjoining the stream but situated some 500 meters below the appellant's land, and have since time immemorial utilized the greater part of the water of the stream of Malpitic below its confluence with Sindalan Creek for the purpose of irrigating their land. The amount so used by them is estimated at 180 second liters. The construction of the appellant's dam in 1919 had the effect of depriving the appellees of the water of both streams and they therefore on September 30th of that year brought action R. G. No. 23189 asking, among other things, for a mandatory preliminary injunction ordering the appellant to remove said dam. The preliminary injunction was issued ex parte as prayed for, but was not immediately complied with by the appellant. Contempt proceedings were thereupon instituted but before any definite action therein was taken by the court, the appellant removed the dam. On the following day, October 3d, he constructed another dam across the stream on almost the same site as that of the dam removed. The appellees thereupon on October 4, 1919, instituted a second action, R. G. No. 23190. In this case the court issued another preliminary injunction ordering the appellant to remove the new dam within twelve hours and prohibiting him from constructing or erecting any kind of obstacle to the natural flow of the water in Malpitic Creek until further order of the court. Notwithstanding this injunction the appellant continued to obstruct the flow of the stream, as a consequence of which the appellees filed several motions to have the appellant punished for contempt, which motions seem to have resulted in his abandoning or destroying the second dam.

In the meantime, on October 6, 1919, the appellant brought an action, R. G. No. 23191, against the appellees, alleging that they interfered with the flow of the waters of Malpitic Creek and asking for an injunction and

damages. The court below does not appear to have taken this action seriously.

In the month of July, 1921, the appellant constructed a third dam a short distance above the site of the second dam and on the 21st of the same month the appellees filed another motion asking that the appellant be punished for contempt. The trial court after hearing found the defendant guilty and on November 8, 1921, sentenced him to suffer one month of imprisonment and to pay a fine of P50.

On September 3, 1923, the appellant again built a dam across the creek at practically the same point and still another motion for contempt was filed by the appellees on September 10, 1923. Upon the filing of this motion, the court set all three of the actions above-mentioned down for hearing and they were jointly tried. Upon the evidence presented at said trial the court declared the preliminary injunctions issued in cases R. G. Nos. 23189 and 23190 permanent, ordering the appellant to remove the dam constructed by him and prohibiting him from constructing dams across the streams in the future in such a manner as to interfere with the flow of the water, except that he may divert and appropriate a quantity of water not to exceed 42 liters per second for use on his land and may construct the necessary works for that purpose, provided that such works do not interfere with the rights of the appellees. The court further found the appellant guilty of contempt of court and sentenced him to pay a fine of P100, with subsidiary imprisonment in case of insolvency. The appellant was also ordered to pay the costs in all of the three cases.

Upon appeal to this court, the appellant makes the following assignments of error:

"1. The lower court erred in requiring the appellant, by mandatory injunction, to demolish the dam in question.

"2. The lower court erred in holding that the appellant is only entitled to 42 liters of water per second for irrigation purposes.

"3. The lower court erred in adjudging the appellant guilty of contempt of court."

Under the first assignment of error the appellant argues (a) that the appellees have not established their right by injunction inasmuch as they have not shown substantial damage by the diversion complained of, and (b) that the order of the court below requiring the appellant to demolish his dam deprives him of the right to make reasonable use of the water of the stream for the purpose of irrigation.

With respect to this argument it is sufficient to say that it clearly appears from the evidence that both Malpitic and Sindalan Creeks are public waters (art. 407, Civil Code) and subject to the provisions of the Irrigation Act, No. 2152 as amended; that section 43 of the Act prohibits " * * * any change in the place of diversion, storage, use, or restoration, nor in the works necessary for the use of the same, except upon the approval of the Secretary of Commerce and Police * * * " and that it does not appear that the appellant ever obtained such authorization for the construction of the dam in question. His action was therefore entirely illegal and might well be enjoined upon petition by any party in interest without any showing that actual damages had already accrued. The rule is thus stated in 27 R. C. L., 1116:

"While some of the earlier cases held that an action for interference with the flow of a stream could not be maintained unless some actual injury had been inflicted, it is now the generally accepted view that it is not necessary for a riparian owner, in order to maintain an action founded on the unlawful interference by another owner with the flow of a stream, to show in his use of the land actual and present damage. It is enough if it appears that an injurious effect is produced upon his property, such as to diminish its value, if the defendant, by lapse of time, should acquire a right to maintain the obstruction. * * *" (Johnson vs. Lewis, 13 Conn., 303; Price vs. High Shoals Mfg. Co., 132 Ga., 246; 22 L. R. A. [N. S.], 684; Stimson vs. Inhabitants of Brookline, 197 Mass., 568; Morrill vs. St. Anthony Falls Water-Power Co., 26 Minn., 222; Tootle vs. Clifton, 22 Ohio St., 247; Alexander vs. Kerr, 2 Rawle's Reports [Pa.], 82; Miller vs. Miller, 9 Pa. St., 74.)

It may also be noted that in the present case the uncontradicted evidence of the appellees shows that through the erection of the dam in question, the waters of the Malpitic and Sindalan streams were diverted from 270 hectares of land belonging to the appellees, thereby preventing the proper cultivation of the land which, in the course of a year, would involve the loss of from 1,509 to 1,800 cavanos of palay and 2,668 piculs of sugar. In these circumstances, the court certainly did not err in issuing a mandatory injunction and ordering the immediate removal of a dam, the construction of which seems to have been a matter of merely a few days work. (See 27 R. C. L., 1115 and 1134.)

In his second assignment of error the appellant contends that the court below acted in an arbitrary manner in limiting the amount of water to be allowed the appellant to 42 liters per second. There is no merit in this contention. In determining the amount to be allowed, the court evidently relied on the testimony of the engineer Arrastia who estimated the amount appropriated by the appellant in the past as 42 second liters which is 9 second liters in excess of the amount ordinarily allowed by the Bureau of Public Works for the irrigation of land similar to that of the appellant and of the same area.

Inasmuch as it appears that the rest of the water in the stream has been appropriated since time immemorial by the appellees and title thereto acquired by prescription (art. 409, Civil Code), and considering that the water rights so acquired are expressly recognized and respected by sections 1 and 50 of the Irrigation Act, it is evident that the court below would not have been justified in allowing the appellant to appropriate a greater amount than that fixed in the judgment.

In his third assignment of error the appellant objects to the part of the judgment of the court below which finds him guilty of contempt and sentencing him to pay a fine of P100. In view of the repeated violations of the orders of the court committed by the appellant as hereinbefore set forth, he was, in our opinion, treated very leniently by the court below and appears to have well deserved the penalty imposed.

The judgment appealed from is therefore affirmed, with the costs against the appellant. So ordered.

Johnson, Malcolm, Villamor, Johns, and Romualdez, JJ., concur.

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