for the transfer of cases from a Panchayat to a Court subordinate to the District Judge. Sections 54, 74 and 75 confer these powers. It is, therefore, open to the defendant—if so advised—to apply for transfer of the case, and I have no doubt that if such an application is filed, the authority concerned would give due consideration to the prayer and pass necessary orders thereon. The parties are, however, directed to appear before the Senior Subordinate Judge on the 25th May, 1959 when they would be directed either to appear before the Panchayat in question on a date to be fixed; or if the defendant has applied for transfer of the case; then to proceed in accordance with the order passed on the said application and in the light of the observations made above.

The costs so far incurred by the parties would be borne by them.

B. R. T.

APPELLATE CIVIL

Before K. L. Gosain and Harbans Singh, JJ.

THE EAST PUNJAB PROVINCE (STATE OF PUNJAB),—*Defendant-Appellant*

versus

M/S MODERN CULTIVATORS, LADWA,—*Plaintiffs-Respondents.*

Regular First Appeal No. 45 of 1950

May, 1st 1958

Tort—Negligence—Burden of proof—On whom lies—Principle of res ipsa loquitur*—When applicable—Limitation Act (IX of 1908)—Article 2 or 36—Which governs suit to recover damages to crops caused by breach in the canal due to negligence of canal authorities.*

Held, that the ordinary rule is that it is for the plaintiff to prove negligence and not for the defendant to disprove it. This rule may, in some cases, cause considerable

hardship to the plaintiff because it may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident, but he cannot prove how it happened so as to show its origin in the negligence of the defendant. This hardship is avoided to a considerable extent by the rule of *res ipsa loquitur*. There are many cases in which the accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more. He is then entitled to have the case submitted to the jury, and it is for the defendant, if he can, to persuade the jury that the accident arose through no negligence of his. The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused. Of late, however, there has been a tendency not to rely upon this principle as a special part of law of evidence and, in fact, all that this rule means is that on the proof of certain set of facts, the Court may be justified in drawing an inference, unless the contrary is proved, that the accident was not likely to occur except through the negligence of the defendant.

Held, that a suit for the recovery of damages to crops caused by a breach in the canal due to the negligence of the canal authorities is govrned by Article 35 of the Limitation Act and not Article 2. The failure of the canal authorities to notice the weakness in the canal bank and to keep it in proper condition can, under no circumstances, be treated to be an omission in pursuance of a statutory duty so as to attract Article 2 of the Limitation Act. Since the canals are maintained under a statute, the mere flooding of the adjoining land by the canal water breaking through the banks would not render the canal authorities liable *per se* without proof of negligence.

Regular First Appeal from the decree of the Court of Shri Sheopershad, Senior Sub-Judge, Karnal, dated the 28th day of December, 1949, granting the plaintiff a decree for Rs. 20,000 with costs.

S. M. SIKRI and K. S. THAPAR, for Appellant.

F. C. MITAL and H. L. SARIN, for Respondent.

JUDGMENT

HARBANS SINGH, J.—On 15th of August, 1947, there was a breach in the western bank of the Western Jamuna Canal at R.D. No. 138000 near Sangipur and Jandhera villages due to which the canal water flowed over an area of land on which sugar cane, maize and other crops had been sown by the plaintiff-firm, Messrs Modern Cultivators, Ladwa. It was alleged by the plaintiff-firm that this breach was due to negligence on the part of the canal authorities and that they further defaulted in repairing this breach with all possible speed notwithstanding the repeated complaints made by the firm and other villagers to the authorities and that the water from this breach continued flowing for a considerable time and the breach was ultimately closed as late as October, 1947. The plaintiff-firm claimed to have suffered loss to the extent of Rs. 60,000 by their standing crops having been damaged and another Rs. 10,000 due to their inability to sow the next harvest on account of the continued flow of the water over the land in dispute and the water-logging due to the same. A suit for the recovery of Rs. 20,000 by way of damages was instituted on 15th of October, 1948, by the plaintiff-firm through its partners (hereinafter referred to as the plaintiffs) against the East Punjab Province (as it was then called). The plaintiffs had originally given notice under section 80, Civil Procedure Code, claiming Rs. 70,000, but in the plaint they gave up the balance of the claim and confined their claim to a sum of Rs. 20,000 only. Harbans Singh, J.

The position taken on behalf of the defendant was that the breach which had occurred on 15th of August, 1947, was in the old inlet of Chhalaundi Silting Tank, that the canal water which escaped

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through the aforesaid breach flowed back into the canal through the outlet of the Chhalaundi Silting Tank and that the Executive Engineer went to the spot and found that no damage had been caused and that the breach was duly closed and strengthened. It was further stated that damage to the crops was due to the overflowing of various rain-water *nullahs* which had overrun the land in question due to the heavy rains during the month of September because the flood water brought by these *nullahs* could not be fully discharged into the canal as was usually the case because the canal was running in full supply. Pleas of limitation and lack of a proper notice under section 80 and non-maintainability of the suit due to the plaintiff-firm being unregistered, were also taken. As a result of these pleadings the following issues were settled:—

(1) Is the plaintiffs' firm a registered firm and if not then is not the registration necessary?

(2) Whether the suit is barred by time?

(3) Whether notice under section 80, Civil Procedure Code, is not according to law?

(4) Are the plaintiffs entitled to any compensation by way of damages; and if so, then how much?

(5) Relief.

The trial Court held, that the suit was maintainable because the firm had been registered during the pendency of the suit, that the suit was governed by Article 36 of the Indian Limitation Act and was, therefore, within time, that notice

under section 80, Civil Procedure Code, was in accordance with law and that the plaintiffs had suffered damage due to the breach in the canal and the amount of Rs. 20,000 claimed by them was not excessive. As a result of these findings the suit of the plaintiffs was decreed in full, with costs, and the defendant (now State of Punjab) has filed the present regular first appeal against the aforesaid judgment and decree.

It is clear from the record that the land over which the plaintiffs had sowed sugar-cane and other crops had been taken on lease by them from various proprietors and had been handed over to these proprietors only about a year before the breach. This land formed part of a large low-lying area and had been transferred to the canal department several years ago for raising its level by desilting of the canal water. This was done by dividing the area into a number of compartments known as 'tanks' and by making the canal water run into them through gaps made in the canal bank known as 'inlets' and allowing the water to stand or move slowly over this area resulting in the deposit of silt thereon and the desilted water flowing back through another gap in the canal bank low down the canal known as 'outlet'. In this manner the canal department gained by the canal water getting rid of the harmful silt and the proprietors of the land gained by the level of the land being raised. After this process had been continued over a number of years and finding the level of the land sufficiently raised, the land was returned to the proprietors in the year 1946, and the gaps made in the canal bank for allowing the water to run into the tanks were duly closed by the canal department. Though in the pleadings of the parties and their evidence, there was some controversy as to whether there

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was a breach in the canal bank or only a breach in the old inlet in the bank, the statement of the present Executive Engineer, Mr. Budhwar, which was recorded by us on 18th of December, 1958, makes it clear that there is no essential difference between the two. An inlet is a gap made in the canal bank and consequently a breach in the inlet would be a breach in the bank if such a breach occurs after the inlet had been closed by the authorities.

The main points urged on behalf of the State before us were:—

(1) that there was no evidence that the breach that occurred on 15th of August, 1947, in the canal bank or in the old inlet was due to any neglect or default of the canal anthorities;

(2) that immediate steps were taken to close this breach, that the Executive Engineer himself went to the spot on receiving the intimation on 16th of August, 1947, that the same was closed on 18th of August, 1947, and finally on 21st of August, 1947; and that consequently there was no neglect or default on behalf of the authorities to close the breach; and

(3) that, in any case, the loss to the crops occurred due to the extraordinary heavy rains during the month of September, 1947, that no damage was caused due to the breach in the canal bank, and that the plaintiffs taking advantage of this breach which had been promptly repaired had put up a false claim by attributing the loss to the overflow of the canal water.

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In the course of the evidence led on behalf of the plaintiffs, which was recorded on various dates between 12th of May and 8th of July, 1949, it was pointedly stated on behalf of the plaintiffs that the breach was not repaired at all till the month of October, 1947. Though the defendant's evidence was recorded nearly a month thereafter on 28th of July, 1949, and Mr. Malhotra, the Executive Engineer, who was the main witness in the case, was examined on 23rd of August, 1949, yet no documentary evidence was produced in the form of reports of the Overseer or other office records showing the date or dates on which the breach was actually closed. Mr. Malhotra contended himself by bringing with him copies of the bills for the travelling allowance drawn by him during the month of August, 1947, which apparently showed that he had gone to the spot on 16th of August, and again on 21st of August. The material evidence on this point was exclusively with the defendant and the breach having admittedly taken place it was normally the duty of the defendant to explain, not only the cause which led to the aforesaid breach but also to show that the auhorities concerned were vigilant thereafter and acted with all possible speed in minimising the damage by closing the breach as early as practicable. Apart from the bare statement of the Executive Engineer, Mr. Malhotra, as D.W. 3 that the breach had been closed on the 21st of August, 1947, morning before he reached the spot, no other evidence was produced to indicate that the breach had been closed on the above-mentioned date. Reliance was placed on the statement of D. W. 1 Mr. Bhandari, the Sub-Divisional Officer, who took over charge of the Silting Tank Sub-Division on 28th of August, 1947, and who stated that there was no breach in the tank on the date he took over charge or any other date thereafter. On behalf of the plaintiffs, Niranjan

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Parkash, one of the proprietors, who appeared as P. W. 7, stated that after the breach he and other villagers met the Deputy Commissioner and also Executive Engineer, but nothing was done though promises had been made. He further stated that they had been making petitions off and on to the Deputy Commissioner and the Executive Engineer and had even sent reply-paid telegrams to the Executive Engineer and offered to supply the labour. Unfortunately, however, no copies of these representations or telegrams, prior to a letter sent on 1st of October, Exhibit P. 18, have been brought on the record and it was stated that no such copies were retained, and no such representations said to have been sent prior to 1st of October, have been found on the record produced by the canal authorities at the instance of the plaintiffs.

In view of this unsatisfactory state of evidence, we considered it proper to send for all the documentary evidence that may be available in the official records and we consequently summoned the present Executive Engineer to bring all the records, that may be found by him still available, bearing on the question of this breach and its closure. As was to be expected, Mr. Budhwar, the present Executive Engineer, had no personal knowledge and unfortunately most of the reports or other documents that could have thrown any light on the circumstances in which the breach occurred and was repaired had been destroyed and the only thing that he could lay his hands on was the old telegram receipt register for the period 9th of August, 1947, to 15th of September, 1947, which he had actually salvaged out of the records meant to be destroyed. There are copies of some seventeen telegrams, in this register, relating to the present breach, dating from 16th of August, 1947, to 27th of August, 1947. The last telegram having

any direct bearing on the question as to when the breach was closed is C. W. 1/15, dated the 22nd of August, 1947, which was sent by the Sub-Divisional Officer apparently from the spot to the Executive Engineer, Karnal. This runs as follows:—

> "L. C. efforts for closing breach were made last night. The canal supply did not fall below 5,000 cusecs. When bags were put in, the water headed up and the bags washed away. Closing was tried three times but it could not be closed. Wire further instructions."

The Executive Engineer frankly stated that he has not been able to lay his hands on any telegram or other communication after 22nd of August, 1947, indicating the date on which breach was actually closed. He, however, stated that if the breach had not been closed, he could not expect the Sub-Divisional Officer to have left the spot. He also brought the register containing extracts of travelling allowance bills of Raj Singh, the then Overseer of Chhalaundi, for the month of August. A copy of this, Exhibit C. W. 1/18, indicated that he was paid travelling allowance up to 26th of August, 1947, and from this Executive Engineer tried to infer and it was urged on behalf of the State also that the breach must have been closed on or before the 26th of August, 1947, otherwise the Overseer could not have left the spot. However, the evidence already on the record together with that brought by this Executive Engineer does not conclusively prove as to when the breach was finally closed. One thing is, however, clear from the telegram, Exhibit C.W. 1/15, that all efforts to close the breach prior to the 22nd of August, 1947, had met with complete failure and that the statement of the Executive

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Engineer, Mr. Malhotra, that the breach was finally closed on 21st of August, 1947, before he reached the spot in the morning is obviously false. According to this telegram of the Sub-Divisional Officer, three successive efforts were made on the night between 21st and 22nd August, to close the breach by putting in the bags filled with earth but due to the canal supply not falling below 5,000 cusecs the water headed up and the bags were washed away. He asked for further instructions and we do not know whether these instructions were actually given or not, and if so, what these instructions were and what was the effect thereof. The copies of the telegrams now produced by the present Executive Engineer, Mr. Budhwar, give a direct lie to the statement of Mr. Malhotra, the then Executive Engineer, that this breach was earlier closed on 18th of August and that the inlet that had been so closed opened up again on the 20th of August, 1947. The telegrams copies Exhibits C. W. 1/1 to C.W. 1/14, give a picture of what happened from 16th of August, 1947, to the 21st of August, 1947. On 16th of August, 1947, the breach was reported to be more than thirty feet in width (*vide* C. W. 1/1) and the Sub-Divisional Officer asked for closing of the canal from the head. Exhibit C.W. 1/3, also dated 16th of August, 1947, shows that at the time the Sub-Divisional Officer reached the spot the water was partly standing and partly running to the depth of one and a half feet and a cultivated area of about 300 acres was thus under water out of which 70 per cent was under sugar-cane and rice and the remaining under maize and *urd* etc. By 17th of August water further spread and almost all the fields of villages Jhandhera and Chhalaundi were under water within Chhalaundi Tank (see Exhibit C. W. 1/4). The area which was so under water was estimated to be about 350 acres

(Exhibit C. W. 1/5). An effort was made on 17th of August to collect *ballies* and empty cement bags. The *ballies* were received on the 18th and so were the empty bags (Exhibit C. W. 1/8). The bags were filled in with earth on 19th of August and the boat was being awaited for making an effort to close the breach. The boat seems to have reached Abdullapur by 18th evening but due to the disturbances the boatman left and the boat ultimately reached the site on 21st of August, 1947, (Exhibits C. W. 1/13 and C. W. 1/14). Then we have the wire Exhibit C. W. 1/15 dated the 22nd of August, 1947, referred to above relating to the unsuccessful three efforts made during the night of 21st of August to close the breach. This wire further shows that for some reasons, the head was not closed even up to that date although a request for the same had been made on 16th of August, 1947. Thus, it is clear that the breach, which had occurred at 4 a. m. on 15th of August, 1947, Exhibit C. W. 1/2), had not been closed either temporarily or otherwise till the 22nd of August, 1947, and the statement of the Executive Engineer, Mr. Malhotra, that this was closed on 18th of August, 1947, and was again finally closed on 21st of August, is altogether incorrect. The learned Advocate-General drew our attention to copies of two other telegrams, one being Exhibit C. W. 1/16, dated 24th of August, 1947, in which the Sub-Divisional Officer, Dadupur, enquired from the Sub-Divisional Officer, Silting Tank, as to whether the boat with the pile driver was free after use at the breach site, and the other being Exhibit C. W. 1/17, dated the 27th of August, 1947, from the Sub-Divisional Officer, Dadupur, saying that he had been a day earlier the boat and pile driver lying unused at RD 139 and requesting permission to allow the boat to be taken to RD 110 for reinforcing the site and the bank at that place adding that the

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boat would be returned after use there. It was argued that this showed that at least by 26th of August, 1947, the breach had been closed because the boat could not have been seen lying idle if this had not been done. No doubt, this telegram read together with the copy of the travelling allowance bill of the Overseer, Exhibit C. W. 1/18, which showed that Overseer went from Radaur to Karnal on 26th of August, does suggest that probably the breach had been closed by the 26th of August. The learned counsel for the respondents, however, urged that there may have been an effort at closing and the breach may have been temporarily closed, but the closure was neither permanent nor complete and that water continued flowing even thereafter, and in support of this he placed reliance on Exhibit C. W. 1/20, which is a note addressed by the Executive Engineer, Mr. Malhotra, to the Senior Zilladar, Karnal, dated the 5th of September, 1947, and which had been produced by the present Executive Engineer from the official record. This note runs as follows:—

> "An old inlet of Chhalaundi Silting Tank at R. D. 139 R. M. L, L, breached on 16th of August, 1947, and is still flowing.
>
> Some crops have been grown in the Chhalaundi Silting Tank. There are complaints of flooding of these crops and some damage. Please proceed to site and examine the crops and submit your recommendations."

It is not denied that probably in pursuance of these instructions, the Zilladar and the Patwari did go to the spot, inspected the crops and later made a report to which reference will be made in due course. The argument on behalf of the respondents was that when the Executive Engineer

in this chit, mentioned the fact that the old inlet which had breached on 16th of August was still flowing, this should be taken to mean what it actually states and it clearly indicates that the breach had not been completely closed by that date, i.e., the 5th of September, 1947. The only explanation that could be suggested by the other side was that probably this indicated only the allegations made by the complainants and not the actual state of affairs as they existed at the spot. We cannot, however, understand why even if these were the allegations made by the complainants, the Executive Engineer did not immediately proceed to the spot himself and verify whether the water was still flowing from the breach as alleged.

As already stated, the whole difficulty in the case has arisen because of the failure of the canal authorities to bring on the record all the facts which were within their own knowledge and to give an explanation how, according to their investigation, the breach occurred and when it was finally closed and why it could not be closed earlier. Even if it be taken that the breach was finally closed on 26th of August for which, as already discussed, there is no definite proof and the letter Exhibit C. W. 1/20 points to the contrary, there is no explanation why it should have taken more than ten days for the breach to be finally closed. If the canal had been closed from the headworks, the efforts made on 21st of August to close the breach might have been more successful because there would not have been so much of water flowing in the canal. We are also not clear whether the boat could not have reached the spot more quickly. The two telegrams, Exhibits C.W. 1/1 and C. W. 1/2, further indicate that although the breach had occurred at 4 a. m. on 15th of August, no intimation was given by the Overseer

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to the Sub-Divisional Officer concerned till the 16th of August, 1947, who, on receipt of the information, started from Karnal at 7-30 a. m. on that day. Thus, it was argued that there was apparently good deal of negligence on the part of the authorities in closing the breach.

So far as the breach is concerned, it was urged that in the absence of any explanation coming from the canal authorities, the learned trial Court was entitled to draw an inference adversely against the defendant that the breach was the result of negligence on the part of the authorities. It was argued that the Western Jamuna Canal is one of the major canals and, as stated by C. W. 1 examined by us, its banks are inspected by the Overseer almost daily, by the Sub-Divisional Officer five or six times a month, by the Executive Engineer three or four times a month and by the Superintending Engineer, once a month, and that during the rainy season and during high supplies two persons for each mile of the canal bank are specially engaged to inspect the area within their beat day and night. The breach had occurred at 4 a. m. on 15th of August and there is no evidence that the communal riots had broken out prior to that. In fact, the telegram, Exhibit C. W. 1/13, dated the 20th of August, 1947, goes to indicate that at Abdullapur the riots had occurred round about the 20th of August, 1947, when the boatman had left the boat in the canal. The breach, therefore, had occurred during the times which were more or less normal and if normal precautions, as detailed by C. W. 1, Mr. Budhwar, had been observed no breach would have normally occurred or would have gone undetected for 24 hours. Furthermore, it is in evidence that the inlet had been closed only a year before and having been closed recently the danger of the same

giving way should have reasonably been present to the mind of the authorities and the circumstance of the breach having occurred at the site of the old inlet would be an indication that the normal routine was not being followed and in particular, the precautions required to ensure safety of this particularly weak point of the bank were not observed. The learned counsel relied on what is known as the principle of *res ipsa loquitur*. Salmond on Torts (Twelfth Edition) at page 430. While dealing with this rule, observes as follows:—

> "The rule that it is for the plaintiff to prove negligence, and not for the defendant to disprove it, is in some cases one of considerable hardship to the plaintiff; because it may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident but he cannot prove how it happened so as to show its origin in the negligence of the defendant. This hardship is avoided to a considerable extent by the rule of *res ipsa loquitur*. There are many cases in which the accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more. He is then entitled to have the case submitted to the jury, and it is for the defendant, if he can, to persuade the jury that the accident arose through no negligence of his. The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused."

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It is further stated that for this rule to apply, two conditions have to be established (1) that the thing is shown, to be under the management of the defendant or his servants and (2) that the accident is such as in the ordinary course of things does not happen if those who have the management use proper care *Scott* v. *London,* (1), As regards the effect of the operation of this maxim, at page 433 it is observed that in a case where the principle can be applied, the plaintiff is entitled to have his case left to the jury and 'the mere happening of the accident affords 'reasonable evidence, in the absence of explanation by the defendant', that it was due to the defendant's negligence". However, there is no legal presumption of negligence even where *res ipsa loquitur* applies and "hence if the defendant produces a reasonable explanation, equally consistent with the negligence and no negligence, the burden of proving the affirmative that the defendant was negligent and that his negligence caused the accident, still remains with the plaintiff. On the other hand, it has recently been held by the Court of Appeal (*Moore* v. *Fox etc.,* (2), that the onus of disproving negligence lies on the defendant, at least in the sense that he must show either that the accident was due to a specific cause which does not cannote his negligence, or that he had used all reasonable care in the matter". Of late there has been a tendency, not to rely upon this principle as a special part of law of evidence and, in fact, all that this rule means is that on the proof of certain set of facts, the Court may be justified in drawing an inference, unless the contrary is proved, that the accident was not likely to occur except through the negligence of the defendant.

(1) (1865) 3 H. & C. 596
(2) (1956) 1 Q.B. 596

In the present case, as already stated, the facts proved are that:—

(i) a breach took place on the right bank of this canal, being one of the major canals, at a place which had been closed only a year before

(ii) there is no explanation forthcoming as to why this happened;

(iii) information of this breach reached the Sub-Divisional Officer more than 24 hours after its actual occurrence;

(iv) no effort could be made to close the breach till the night between 21st and 22nd of August and the efforts so made were unsuccessful because the canal was not closed from the head although a request for the same had been made on 16th of August;

(v) the breach, according to the defendant, was closed sometime before the 26th of August, though according to a document produced by the defendant, the Executive Engineer had stated on 5th of September, 1947, that water was still flowing.

Even though the statements of the plaintiffs to the effect that the breach was not closed till October be treated as exaggeration yet from the facts detailed above, in the absence of any explanation as to how the breach occurred, when it was actually closed and why it could not be done earlier, we cannot but infer that the breach took place and its closure was delayed due to the negligence on the part of the canal authorities.

This brings us to the next point as to whether any damage was suffered by the plaintiffs due to this breach or whether the damage was only due

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to the heavy rains which occurred during the month of September. According to the evidence, the only heavy rain of any importance during the month of August in Radaur area was 1.77 inches on 10th of August. The heavy rains actually occurred during the month of September. On 8th of September, there was the first heavy rain which was recorded as 6.30 inches in Radaur and 4.50 inches in Dhanaura, and then heavy rains started in both places from 24th of September onwards, the heaviest being seven inches in Radaur and eight inches in Dhanaura on 25th of September. On the record, however, there is clear evidence that considerable damage had taken place long before the 5th of September and this is clear from Exhibit C. W. 1/20. The plaintiffs had made complaints about the flooding of their crops due to the breach long before that and the Executive Engineer had asked the Zilladar to proceed to the spot and inspect the damage. At that time the plaintiffs or the other residents of the affected area could not have foreseen that there would be heavy rains later in September and that they should make complaints before hand. We have also referred, in the earlier part of the judgment, to the telegrams of the Sub-Divisional Officer which gave the area affected by the breach as 300 acres on 16th of August, which extended to 350 acres on 17th of August and as admittedly the breach was not closed for several days thereafter, this area may have been further extended and, in any case, as given in Exhibit C. W. 1/4, the fields of Chhalaundi within the Chhalaundi Silting Tank, in which the area taken on lease by the plaintiffs was admittedly situated, was practically under water. So far as maize and *urd* are concerned, the same must have been destroyed completely, for one and half feet water stood in the fields for a period of exceeding ten days, though

damage to sugar-cane crop would not be so much. This was also indicated by the Sub-Divisional Officer in his telegram, Exhibit C. W. 1/3.

With regard to the actual quantum of damage, it was rightly urged by the learned Advocate-General that the mere statements of the plaintiffs cannot be relied upon for this purpose because they have admittedly made great exaggeration with regard to the actual closure of the breach. According to the witnesses of the plaintiffs and the plaintiffs themselves, the canal authorities made absolutely no attempt at closing the breach and this statement is obviously incorrect as has been established from the various telegrams, copies of which have been proved on the record. Ranbir Singh, Zilladar, went to the area in dispute under the orders of the Executive Engineer (apparently in view of the letter; Exhibit C. W. 1/20, dated the 5th of September or some similar letter) on 26th of October, 1947, along with D.W. 1; Mr. Bhandari; who was the Sub-Divisional Officer incharge of the Silitng Tank Sub-Division for making a survey of the damage done-to the crops. Har Parshad Patwari, under the directions of the Zilladar, prepared two statements which are Exhibits D. 1 and D. 2 giving the area and the extent of damage to the crops. Exhibit D. 1 is in respect of villages Chhalaundi and Dhanaura and the area covered under serial Nos. 1 to 7 belonged to the plaintiffs. The remaining area belonged to persons other than the plaintiffs and we are not concerned with the same. According to this, the total area under groundnuts was 16 *bighas* and four *biswas*, under sweet potatoes 13 *bighas* and 19 *biswas* and in both these cases the loss was 13/16th of the total expected produce. The maize was over 84 *bighas*, *urd* over 168 *bighas* and 2 *biswas* and *jowar* over 3 *bighas* and 18 *biswas*, and there was a total loss in this case. So far as sugarcane is concerned, over an

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area of 142 *bighas* and 8 *biswas* there was total loss and over 44 *bighas* and 16 *biswas* the loss was 11/16th of the total expected produce. Exhibit D.2 relates to village Dhanaura and the area mentioned herein belonged to the plaintiff. According to this maize crop was over 11 *bighas* and 10 *biswas*, *urd* over 23 bighas and 2 *biswas* and *jowar* over 96 *bighas* and 6 biswas and there was a total loss of the expected produce. With regard to the produce expected of the commodities and their price, we have merely the statement of P. W. 1 examined by the plaintiffs and there is no other evidence to the contrary. The estimate of the produce given by him and the price of the various commodities on the face of it do not appear to be unreasonable.

The learned counsel for the respondents calculated the produce expected and the price of the same which is marked 'X' by us and a copy of the same was given to the learned Advocate-General to check up the calculations. The only objection raised by him was that in Exhibit P. 22 and P. 29, there is no claim for chari which accounts for Rs. 385-3-0. This is the last item in Exhibit D. 2 relating to the damage in village Dhanaura. The claim is made in respect of *chari* and *jowar* over an area of 96 *bighas* and 6 *biswas* and the amount claimed is Rs. 385-3-0. Exhibit P. 22 is a letter, dated the 8th of April, 1948, addressed by the plaintiffs to the Executive Engineer, printed at pages 56-57 of the paper book, and we find that the last but one item claimed therein is as follows:—

"Jowar Dhanaura Village 96 bighas, 6 biswas."

A similar entry also occurs in Exhibit P. 29, printed at page 57 of the paper book. It appears that the learned Advocate-General has apparently failed to notice that the word '*chari*' is also used

for '*jowar*' because we find that this area of 96 *bighas* and 6 *biswas*, which is mentioned in Exhibit D. 2; is also mentioned both in Exhibits P. 22 and P. 29. According to the calculations given in the statement marked 'X' the total amount of loss in respect of ground-nuts, sweet-potatoes, maize; *urd* and *jowar* at both the places comes to Rs. 19;021-10-0 and that of sugar-cane to Rs. 13,856. As already stated, ground-nuts, sweet-potatoes; maize; *urd* and *jowar* crops must have suffered considerably due to the breach, but some damage must also be attributed to the subsequent rains. There is no definite material on the record for us to arrive at any definite conclusion as to what proportion of the loss should be attributed to the breach. We, however, feel that in case of sugar-cane the loss due to the breach can be taken at least to be one-third of the total damage noticed by the Ziledar and the Patwari in October, and in the case of other commodities the loss may be taken to be at least one-half of the total damage. The loss of ground-nuts, maize etc., therefore, attributable to the breach comes to Rs. 9,510, being roughly one-half of Rs. 19,021-10-0 and in the case of sugar-cane this loss comes to Rs. 4,620, being roughly one-third of Rs. 13,856. The total loss attributable to the breach thus comes to Rs. 14,130.

On behalf of the State question of limitation was also raised. It was contended that the proper article applicable was Article 2 of the Schedule to the Limitation Act and not Article 36 as has been applied by the learned trial Court. Article 2 runs as follows:—

"2. For compensation for doing or for ommitting to do an act alleged to be in pursuance of any enactment in force for the time being in India.	Ninety days	When the act or ommission takes place."

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Article 36 is to the following effect:—

"36. For compensation for any malfeasance misfeasance or non-feasance independent of contract and not herein specially provided for.	Two years	When the malfeasance misfeasance or non feasance takes place."-

The question raised by the learned Advocate-General was considered by a Full Bench in *Mohd. Sadaat Ali* v. *Lahore Corporation,* (1). In that case Municipal Corporation of Lahore which was required, under section 132 of the Punjab Municipal Act, to maintain water pipes omitted to notice and remedy a burst pipe, resulting in damage to the property of the plaintiff. The question referred to the Full Bench was whether a suit filed by the plaintiff claiming compensation for damage said to have been caused by the failure of a local body to maintain its water system in proper order is governed by Article 2 or Article 36 of the Limitation Act. Abdur Rahman, J. and Mahajan, J. (as he then was) in two separate detailed judgments for somewhat different reasons, came to the same conclusion that Article 2 would not govern cases of failure to carry out a duty enjoined on a statutory body under the Act and that such a case would be covered by Article 36. Harries C. J. and Munir and Achhru Ram, JJ.— the other three learned Judges constituting the Bench—also came to the same conclusion, though some of them agreed with the reasons given by Abdur Rahman, J. while others agreed with the reasons given by Mahajan, J.

The learned Advocate-General, however, placed reliance on *Calcutta Port Commrs.* v. *Calcutta Corporation,* (2), which was distinguished by the Full Bench; and it was urged by him that

(1) A.I.R. 1945 Lah. 324
(2) A.I.R. 1937 P.C. 306

the view taken by the Full Bench is not a correct one. By all the learned Judges constituting the Full Bench stress was mainly laid on the fact that an omission to be governed by Article 2 must be one which is alleged to be in pursuance of an enactment and consequently an omission to do an act which is enjoined to be done by the statute could not be said to be governed by the aforesaid Article. Mahajan, J. brought out the distinction in this respect between the wordings of section 1 of the Public Authorities Protection Act, 1893, 56-57 Vict., Chapter 61 and those of Article 2 of the Limitation Act. The relevant part of section 1 is to the following effect: —

> "Where * * * any action * * is commenced in the United Kingdom against any person for any act done in pursuance, or execution * * * * of any Act of Parliament * * *, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: —"

Sub-clause (a) then provides that such a suit or action should be brought within six months next after the act or neglect etc. Mahajan, J., while dealing with this provision observed as follows: —

> "It is clear that if the language of this Act had been adopted by the framers of Article 2, Limitation Act, the case of default by a municipal corporation and the failure on its part to maintain its water system in proper order resulting in damage to the plaintiff would be governed by this article. It would clearly be a default in the execution

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of a public duty by the corporation. The question, therefore, is whether a default of a public duty by a corporation or by any person is within the scope of the Indian Statute, as it is within the clear language of the Act of Parliament. My answer is in the negative because the language of Article 2 is not as wide as is the language of the English statute."

The learned Judge then referred to the observations of Terrell C. J. in *Secretary of State* v. *Lodna Colliery Co., Ltd.,* (1) and; in applying the tests laid down by the learned Chief Justice observed as follows at page 332 of the report: –

> "The first test for the application of the article is a *bona fide* belief by an official that the act complained of was justified by the statute. Can it be seriously argued that the corporation or its officials honestly believed that section 132 did not exist in the statute, or that they had no duty to repair and to look after the municipal pipes? * * * * If an official had been charged with the duty of repairing the water pipe that had been laid in the neighbourhood of the plaintiff's house and that official was guilty of acts of omission and commission while executing his job, he could claim protection of the article by pleading that he honestly believed that the directions laid down in the statute for doing the job entrusted to him were different from the ones that he thought had been laid down in the statute. A

(1) I.L.R. 15 Pat, 510

mere default in repairing the municipal water pipes is a breach of a statutory duty, but is outside the phraseology of the article, though it is clearly within the English statute * * * * * Again, in the present case, no act was being executed under colour of a statutory duty. That duty was being simply ignored. I do not think that when a corporation is simply sitting idle and doing nothing to such an omission Article 2 has any application. It is only an omission in the execution of an act which is within the ambit of the article."

Applying these very tests to the present case, it is clear that the failure of the canal authorities to notice the weakness in the canal bank and to keep it in proper condition can, under no circumstances, be treated to be an omission in pursuance of a statutory duty. In fact, it was urged by the learned Advocate-General that there is so statutory duty cast upon the canal authorities either to maintain the canal banks in proper order or to repair the same in case there is a breach. Section 15 of the Northern India Canals and Drainage Act provides that:—

"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 * * *

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 an accident."

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It was contended that this gives only power to the canal authorities to do the repairs and for that purpose to enter upon any lands adjacent to the canal, but does not impose any statutory duty to undertake such repairs. It is not necessary for us to go into this because, in any case, failure to maintain the canal bank in proper order cannot be said to be in pursuance of any statutory duty and similarly, failure to repair the canal bank cannot be in pursuance of any statute. If at all the statute provides for avoiding such accidents and making repairs, the failure of the authorities to act in accordance with the statute cannot be an omission in pursuance of the statute. In view of the fact that the canals are maintained under a statute, the mere flooding of the adjoining land by the canal water breaking through the banks would not render the canal authorities liable *per se* without proof of negligence and the rule in *Rylands* v. *Fletcher*, (1), would not apply. That however does not mean that the canal authorities having charge of the canals would not be liable for the damage that is caused to the neighbouring lands due to their negligence in maintaining the canal banks in proper order because the general principles of *Donoghue* v. *Stevenson*, (2), of owing duty of care to your "neighbour", would certainly be applicable. In any case, such a liability having arisen not on account of any omission in pursuance of a statute, Article 2 is altogether inapplicable and the residuary Article 36 would be the only article which would be applicable to the case. The wordings of section 142 of the Calcutta Port Act, which was the subject matter of consideration by their Lordships of the Privy Council in *Calcutta Port Commrs.* v. *Calcutta Corpo-*

(1) (1866) L.R. 1 Ex. 265
(2) (1932) A.C. 562
(3) A.I.R. 1937 P.C. 306

ration, (3); are materially different from those of Article 2, as has been discussed by Mahajan, J. in his judgment in the Full Bench case, referred to above, and consequently the observations of their Lordships of the Privy Council in that case have no application to the present case. We are, therefore, of the view that the learned trial Court came to a correct conclusion in holding that Article 36 applied to the facts of the present case and that the suit was within time.

For the reasons given above, we accept this appeal only to the extent of reducing the amount decreed by the Court below to Rs. 14,130. In all other respects, this appeal is dismissed. The plaintiffs will have their proportionate costs in the Court below, but the parties will bear their own costs in this Court in view of the partial success of the appellant.

B.R.T.

LETTERS PATENT APPEAL

Before Bhandari, C.J. and Gosain, J.

M/S AERON STEEL ROLLING MILLS, JULLUNDUR CITY,—*Appellants.*

versus

THE STATE OF PUNJAB AND ANOTHER,—*Respondents.*

Letters Patent Appeal No. 130 of 1958

1958

May, 7th

Industrial Disputes Act (XIV of 1947)—Section 33-B—Provision empowering Government to transfer cases from one Tribunal to another—Whether mandatory or directory—Tests to determine whether a provision is mandatory or directory stated—Difference between the two.

Held, that a mandatory provision within a statute is one where strict compliance with the statute is essential to the preservation of rights of parties affected and the omission