Privy Council Appeal No. 155 *of* 1917.

The Secretary of State for India in Council - - - - *Appellant*

v.

Maharaja Sri Maharajah Saheb Meharban Dostan Maharajah Sri Ravu Sir Venkata Swetachalapati Ranga Row Bahadur Garu, Maharaja of Bobbili - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH JULY, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.
LORD SHAW.

[*Delivered by* LORD SHAW.]

This is an appeal against a decree of the High Court of Madras dated the 27th October, 1915, which affirmed a decree of the District Judge of Vizagapatam, dated the 9th December, 1909. The suit was brought by the Maharaja of Bobbili, viz., the present respondent, for the refund of a sum levied under the Madras Irrigation Cess Act (VII of 1865), and paid under protest, and for a declaration that he was entitled to use the water from a certain channel for irrigation of the village of Narayanapuram, free of the cess.

The respondent was the owner of a village called Narayanapuram in the district of Vizagapatam. For upwards of a century the lands of this village have been irrigated by the water of the Suvarnamukhi river flowing through an artificial channel known as the Sakarapalli channel. The river runs through the respondent's estate (amongst others), and its banks and bed in its course through that estate admittedly belong to him.

The history of the facts may be stated in one or two sentences. The Suvarnamukhi river rises in zamindari land and flows through zamindari land up to the suit village of Narayanapuram. From this river a channel was constructed by a zamindar of Palkonda, no doubt for irrigation purposes. Apparently in order to obtain a suitable flow, the river had to be tapped at a point considerably above the Palkonda lands, and the river being so tapped the channel proceeded therefrom through the lands of *inter alios* the predecessor of the present Maharaja, who is the respondent.

The Trial Judge is of opinion that the channel was probably constructed somewhere between 1690 and 1780. The evidence is not clear as to the exact date at which certain sluices, four of which still remain, were constructed from the channel for the purpose of irrigating the respondent's lands. The Courts below have come to the conclusion that the irrigation of the village is not proved to have taken place prior to the permanent settlement of the year 1801, notwithstanding the fact that, as already stated, the Trial Judge is of opinion that the channel itself was constructed many years earlier. It is unnecessary for the Board to enter upon the question whether a conclusion of this kind, which is more of the nature of a conjecture with regard to the probabilities of an obscure situation, could be classed as a concurrent finding of fact precluding a different finding here; but their Lordships must not be held as acceding to the view, founded upon the state of the permanent settlement record, that the absence of express notice of the sources of water supply, warrants the conclusion that such a supply—from the channel admittedly in existence then and for many years before—was not furnished to the respondent's lands.

As to the state of matters at the beginning of the 19th century, their Lordships agree with the view of the District Judge when he says :—

> "The plaintiff relies upon Exhibit C as showing that in 1814 the then zamindar admitted the right of plaintiff's predecessor to irrigate his lands from the channel through five *punathas* (sluices). There can be no doubt about this. This document was proved as Exhibit IV, in the connected suit O.S. No. 13 of 1906 on behalf of the defendant. Its existence was then probably not known to the plaintiff, as it was only produced for the first time at the hearing of O.S. No. 13 of 1906. It shows conclusively that while the Palkonda zamindars owned the channel, the plaintiff's right to irrigate his Narayanapuram lands through five *punathas* was admitted and recognised, and that no labour or contribution was provided by the village for repairing the channel. The oral evidence shows that the zamindar (plaintiff) is in fact only enjoying four *punathas* now."

Two outstanding facts accordingly appear with regard to the irrigation of this property, namely, that for over at least one hundred years it has been enjoyed as matter of right; secondly, that no pecuniary return was made therefor. In short, the case appears to be the simple one, viz. :—that, for land given as part of the channel artificially constructed for irrigation purposes, a right to draw off water as it passed was conferred upon the respondent's predecessors and himself, and that that right has been enjoyed by them ever since. It is in these circumstances that the question

arises whether the respondent is liable to pay an irrigation cess in virtue of the Madras Act No. 7 of 1865, as amended by Madras Act V of 1900. No claim therefor in respect of these lands was made until the year 1907. Payment was made under protest, and the present suit to determine liability was instituted.

The case depends upon the proper construction to be put upon the Act referred to. Its preamble is not without importance :—

> "Whereas, in several districts of the Madras Presidency, large expenditure out of government funds has been, and is still being, incurred in the construction and improvement of works of irrigation and drainage, to the great advantage of the country and of proprietors and tenants of land ; and whereas it is right and proper that a fit return should, in all cases alike, be made to government on account of the increased profits derivable from lands irrigated by such works ; it is enacted as follows :—"

So far as the preamble goes, the Act would not appear to be directed against lands such as those of the respondent ; for it is admitted that no works or action of the government have either created or increased the supply of water to his lands. It is nevertheless true, as was indicated by Lord Parker in his judgment in *Kandukuri Balasurya Row and another* v. *The Secretary of State for India in Council* (44 I.A. 166), that section 1 of the Amending Act makes operative provisions somewhat in excess of the apparent ambit of the preamble. If so, the section must govern.

It is in the following terms :—

Sections 1 and 4 of the Madras Act VII of 1865 . . . shall be read and construed as if at the time of the passing of the said Act there were and had been inserted in lieu of the said sections the following, viz. :—

> "(*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by government, and also,
>
> "(*b*) whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and, in the opinion of the Collector, subject to the control of the Board of Revenue and of the government, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land,
>
> "it shall be lawful for the government to levy at pleasure on the land so irrigated a separate cess for such water, and the government may prescribe the rules under which, and the rates at which, such water-cess as aforesaid shall be levied and alter or amend the same from time to time.
>
> "Provided that where a zamindar or inamdar or any other description of landholder not holding under *ryotwari* settlement is by virtue of engagements with the government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more . . . . . ."

The respondent's position is that of a zamindar not holding under "*ryotwari* settlement" ; he is, therefore, a person directly pointed to by the proviso just cited, and in view of the history of

the lands as already sketched, the question is at once raised as to whether this zamindar is "by virtue of engagements with the government" entitled to irrigation free of separate charge. If he is, then no cess is leviable in respect thereof; nor would any cess have been leviable under the Act of 1865 as unamended: for by section 4 of the Act of 1865 there is a similar proviso of exemption. The reason of such a proviso is not far to seek. The government was contemplating irrigation works, and along with these the financing of those operations; and the preamble indicates not obscurely that the financing was to be met by way of a fair return to government on account of the increased profits which would be derivable from lands irrigated by such government works. If, however, in consequence of other arrangements, or, as section 1 puts it, "engagements," the irrigation had been accomplished and financed apart from expenditure under the statute, then those lands should stand free from the statutory cess.

The question accordingly in the present case is whether there are such "engagements with the government." On this question there was a sharp division of opinion in the Courts below, and it is necessary to state how it is that the government's claim to be owner of the channel arises. In the year 1833 the Palkonda zamindar rebelled against the government. His lands were in consequence forfeited to the Crown. As already stated, the artificial channel was at that time constructed and the irrigation as a system applicable to the lands of Bobbili was in full operation. No attempt was made by the government of the day to change the footing upon which the irrigation rights were enjoyed or to assert any right in the Crown as owner of the servient tenement of Palkonda which would lessen or interfere with the continued enjoyment of the easement by the respondent's predecessors as of right and without exaction or charge.

What was the nature of this right of easement? It was to receive and utilise for irrigation purposes from an artificial channel a supply of water. It is, of course, in accord with legal theory that such a right of easement is created by grant, but it is also sound law that a grant of such a right is presumed from long possession, although the actual transaction of making such a grant cannot be discovered or proved. The present case is accordingly in no way singular in this respect, that the acts of parties over a long course of years point to the enjoyment of an easement founded upon a grant by the owner of the servient to the owner of the dominant tenement.

Upon the facts of the present case it appears to be clearly established that for about fifty years, namely, from 1814 till 1865, when the Act was passed, the owners of Palkonda and the zamindar of Bobbili stood in the position of having, the one a servient, and the other a dominant tenement, with the unchallenged enjoyment of the easement of water supply as stated. Had the question now in suit accordingly arisen in the year 1864, there seems little reason to doubt that the right of the respondent would have been settled upon that footing.

But the matter does not end there. The Act of 1865 was passed, and for forty-two years the same state of matters was continued. Had this suit been raised in the year 1866 instead of 1907, a serious question would still even then have arisen, namely, whether the words in the section "engagements with the government" did not require a construction inclusive of engagements with the government or its predecessors in title, as only by such a construction could justice be done to the manifest intention to reserve as against water cess those who had already been furnished with their own water supply.

The position is strengthened by the further lapse of time and, in their Lordships' view, the government must stand committed to the transactions which they have accepted as binding parties for a period of between eighty and ninety years, during which (including forty years since the Act was passed) the zamindari of Bobbili has been enjoyed without any question that the zamindar held under a tenure which gave him the benefit of the proviso in the statute.

This view is in no way in conflict with the view of Lord Parker in the case referred to. On the contrary, it appears to be supported by certain passages in that judgment. His Lordship refers to the permanent settlement in the Madras Presidency under which the government granted to the zamindars "a permanent property in their land for all time to come, and would fix for ever a moderate assessment of public revenue on such lands the amount of which should never be liable to be increased under any circumstances"; and he adds: "Under these circumstances the government could not impose a cess for the use of water the right to use which was appurtenant to the land in respect of which the *jumma* was payable without in fact, if not in name, increasing the amount of such *jumma*, and thus committing a breach of the obligation undertaken at the time of the permanent settlement." With regard to the actual question in the present case, judgment was expressly reserved. Referring to the difficulties which arise in the construction of the Act and the fact that the levy is made on the basis of the area irrigated, irrespective of profits, Lord Parker said: "If in order to avoid this result reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the government arising out of the natural or prescriptive right of the riparian owner."

That question so reserved is the point now in issue. In their Lordships' opinion such an engagement should be implied in the circumstances already set out. The predecessors of the respondent were using the water as of right when the servient zamindari was forfeited to the Crown in 1833; with the owners of that zamindari they had, to use the general term employed in the statute, a good "engagement": in taking the servient estate, this engagement accompanied the transaction, and the engagement was thereafter with the Crown. In short, the forfeiture could not operate against a dominant and unforfeited zamindari. With acquisition by forfeiture the Crown became bound to take the forfeited estate *tantum*

et tale as it stood in the subject who had rebelled, that is to say, to respect the rights and in particular the easements enjoyed by others. Otherwise the scope of the forfeiture would be extended; *pro tanto* it would fall upon innocent and loyal subjects.

This is sufficient for disposal of the appeal. The case was unfortunately much delayed owing to various causes not sufficiently explained. Time also was occupied by a remit for enquiries in regard to the ownership of the river itself from which the water was drawn by the channel. While their Lordships do not differ from the conclusion upon that topic arrived at by the High Court, they are of opinion that the case should be determined on the simpler ground above stated. In their Lordships' opinion the Crown has failed to establish the liability of the respondent.

Their Lordships will humbly advise His Majesty that the appeal be dismissed, with costs.

In the Privy Council.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

MAHARAJA SRI MAHARAJAH SAHEB MEHARBAN DOSTAN MAHARAJAH SRI RAVU SIR VENKATA SWETACHALAPATI RANGA ROW BAHADUR GARU, MAHARAJA OF BOBBILI.

DELIVERED BY LORD SHAW.

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