Privy Council Appeal No. 70 *of* 1928.

Pakala Venkanna and others - - - - - - *Appellants*

v.

Sri Rao Swetachalapati Ramakrishna Ranga Rao Bahadur Garu - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH FEBRUARY, 1931.

Present at the Hearing:
LORD MACMILLAN.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The dispute in this appeal is as to the rights of the parties over an irrigation channel known as the Syanna Batte in the Vizagapatam district of Madras.

The plaintiff, the respondent before the Board, is the Raja of Bobbili within whose zemindari is situated the village of Regidi which is served by the Sayanna Batte together with other villages dependent upon the same supply. The plaintiff instituted his suit on the 25th June, 1917, against the appellants who are *inamdars* of the village of Amidalavalasa. They own 150 acres of cultivated land abutting on the south side of the Sayanna Batte. The Raja claimed a declaration that the appellants had no right to take water from the Sayanna Batte for irrigating their land, and a perpetual injunction.

The array of defendants originally included also the *inamdars* of the neighbouring village of Rajayavalasa, but on objection that the suit so framed involved a misjoinder of parties, their names were struck off.

The Sayanna Batte is fed by a cut from the Nagavalli river which lies to the north. Owing, it is said, to a change in the

course of this river an old channel communicating with it became ineffective, and in or about the year 1864 the Raja opened a new cut some way to the west of the old communication, and brought the river water into the bed of a hill stream called the Desura Gedda which, running from west to east, joined up with the old Sayanna Batte. The bed of this stream was enlarged to take the additional flow, and the whole channel from the Nagavalli river onwards is now known as the Sayanna Batte. A considerable portion of the new cut and the enlarged bed ran through the village lands of Rajayavalasa which are immediately to the west of Amidalavalasa. The work was carried out by the Raja and the channel has ever since been repaired and maintained by him.

The appellants alleged that the Desura Gedda had previously been a source of irrigation to their lands, but this question was not put in issue in the suit and the trial court expressed no opinion upon it. It is, however, their Lordships think, clear that the cut from the river and the eastward extension and enlargement of the bed of this stream could only have been carried out with the consent and goodwill of the *inamdars* of Rajayavalasa and Amidalavalasa, and upon the understanding at least that they would acquire some benefit from it. Subsequent events seem to show that this was in fact the case.

There has been ever since the extended Sayanna Batte came into operation a second and smaller channel called the Uppaya Batte, which takes off from the Sayanna Batte at some point in the Rajayavalasa lands, and carries water down to the lands of the appellants. This was admittedly constructed and kept up by the appellants, and was their only source of supply from the Sayanna Batte. The off-take was at such a level that when the larger channel was fairly full (which would ordinarily be the case between September and December) a natural flow to the appellants' lands was ensured. It was during this season that what has been generally spoken of in the case as the " first crop " was raised on the appellants' lands. In February and March, when the " second crop " was due, the level of the water in the Sayanna Batte would ordinarily be below that of the off-take, and when this occurred no water would flow into the Uppaya Batte unless means were take to raise the water-level above the sill of the smaller channel. The desired result was then attained by the erection in the bed of the Sayanna Batte of a *chappakatu* or temporary groyne which was carried up-stream to such a point as would ensure a flow down the Uppaya Batte. The length of the *chappakatu* would obviously vary with the height of the water in the Sayanna Batte at the time when the irrigation flow was required. In lean years a length of 400 yards or even more seems to have been necessary ; when the river supply was more abundant a much shorter length would be sufficient ; or it might be in exceptional seasons that no *chappakatu* at all would be needed. The result in every case in respect of the

flow to the appellants' lands, as their Lordships understand the position, would be the same, the extent of the artificial dam being only what was required to produce a reasonable flow of water through the off-take into the Uppaya Batte, and the measure of the water so taken being in effect a constant one, viz., the amount of water required for the appellants' second crop cultivation.

In the course of the hearing of the suit, the Raja seems to have realized that he could not hope to maintain his exclusive right to all the water which came down the Sayanna Batte, and he accordingly conceded to the appellants the right to take so much water as would naturally flow over the sill of the off-take into the Uppaya Batte, which meant the water for their first crop, and the dispute before their Lordships is confined to the appellants' right to erect a *chappakatu* to induce an artificial flow when the level of the Sayanna Batte was below the sill of the off-take. The real dispute therefore is as to what may be called the second crop water.

The appellants claimed a right, based upon an agreement come to when the enlarged Sayanna Batte was constructed, or alternatively upon long user, to take sufficient water for both their crops, and their Lordships have no doubt that, if they had this right in fact, the erection of the *chappakatu* was a reasonable and customary method of exercising it when the natural flow down their own channel ceased. It is in evidence that similar means were regularly adopted by the Raja to produce the necessary flow from the Nagavalli river (which is the property of Government) into the Sayanna Batte.

It is, perhaps, unfortunate that the question of agreement was not gone into in this suit. There was another suit filed by the appellants against the Secretary of State complaining of the levy upon them of watercess. In that suit the appellants claimed free right to the water under the Raja from whose zemindari their *agraharam* tenure was originally derived. It was there held that no right by agreement was proved, but this finding would clearly not be binding as between the present parties. Subsequently to the decision of this issue, which was confirmed on appeal, the Raja was joined as a party and the suit was remanded for trial on the alternative claim by prescription. From that time onward both suits were heard together and the evidence as to prescription was by consent treated as common to both. The issue as to agreement was not gone into as between the appellants and the Raja, but in the words of the High Court's judgment in the present case, it was regarded as "finally negatived" in the suit against the Secretary of State. Their Lordships think that once the right is conceded to the appellants to take *some* water from the Sayanna Batte the question of the agreement pleaded might well assume a different aspect. The point, however, has not been pressed before the Board and it is not necessary to pursue the question further, except in so far as concerns the user of the water by the appellants for a second crop, which they

assert has been so long continued that it ought to be presumed to have had a lawful origin. In their Lordships' opinion this question must depend upon the establishment by the appellants of two facts, viz.: (1) that they have regularly grown a second crop, and (2) that no other source of water was available to them for this purpose than that of the Sayanna Batte. If both these facts are proved their Lordships think that the somewhat tardy admission by the Raja of a prescriptive right to water in the case of the first crop would go far to support a similar right in the case of the second crop.

The District Judge delivered his judgment in the present suit on the 27th July, 1922. He said that the main question before him was as to the prescriptive right of the appellants to the water of the Sayanna Batte. Upon a careful consideration of the evidence his conclusion was as follows :—

> "It is fully established, both by the plaintiff's witnesses and the documents exhibited by the defendants, that water has been regularly taken for the raising of a second crop. Apart from the Uppaya Batte, there is no other source from which water could have been taken in the dry season."

In the Court of Appeal Phillips J. was of opinion that there was "really no evidence to show that second crops were raised every year," but their Lordships are satisfied upon the examination of the evidence before them that the conclusion of the District Judge upon this point is correct. That second crops were regularly grown is admitted by several of the Raja's witnesses ; the case made by them was not that no second crops were raised, but that the water for them was taken by permission of the Raja. References to a second crop are to be found in documents forming part of the record which go back to 1870, and there is no reason to suspect their genuineness. It is also not disputed before the Board that from 1907 onwards the appellants' lands were assessed by Government for a second crop.

The same learned Judge suggests further that water for the second crop might have come from certain tanks on other land of the appellants, or possibly from a hill stream running from south to north, which, though it at one time discharged into the Uppaya Batte, was for many years before the suit carried over it by an artificial duct. With regard to the tanks, their Lordships think that it is established that they would ordinarily be dry in the second-crop season. The District Judge visited the site and was satisfied that this would be so. With regard to the hill stream, it is clear that from about the year 1895 it could not have been used for irrigation purposes, and there is no evidence that it had ever been an effective source of second-crop water. It would also seem reasonably clear that if there were other sources of water available for the second crop, they would have been at least equally available for the first crop, and there would have been no reason for the construction of the Uppaya Batte at all.

Their Lordships are therefore of opinion that it has been satisfactorily established that for a long period of years—probably

ever since the Uppaya Batte was constructed—second crops have been grown by the appellants upon the 150 acres in question with water taken from the Sayanna Batte, and it is admitted that this could not have been effected in ordinary years without the erection of a *chappakatu* to cause a flow down the smaller channel. Such long continued user must, in their Lordships' opinion, be ascribed to a lawful origin, the probability of which is supported by the circumstances under which the two channels were constructed, and the relations between the parties. The only evidence upon the present record of an arrangement having been come to in the sixties is no doubt the evidence of user, but that, on the view which their Lordships take, is sufficient to raise the necessary presumption in the appellants' favour. The right may well depend not on the terms of the grant but upon the circumstances under which it was made (*see* per Lord Parker in *Pwllbach Colliery Co.* v. *Woodman* [1915] A.C. 634 at 646).

The right which the appellants claim was, their Lordships think, acquired, or in any case the relation out of which it arose was created, before the passing of the Indian Easements Act, 1882. Accordingly, even if it be assumed, which their Lordships are not to be taken as in any way deciding, that the Easements Act would otherwise have been applicable, the rights of the parties here do not depend upon the provisions of that Act (*see* s. 2 (*c*)), and it is unnecessary to discuss the various problems which it is suggested would arise under it.

The learned Judges of the High Court, founding upon the Act, seem to have thought that the right claimed by the appellants was of too indefinite a character to be capable of acquisition by prescription. Their Lordships do not feel this difficulty. The right which they hold to be established is the right to take from the Sayanna Batte such water as is reasonably required for the cultivation of a second crop of the customary character upon the 150 acres to which the dispute refers, and for this purpose to construct, whenever necessary, a *chappakatu* of the required length in the bed of the Sayanna Batte. An equally indefinite right was established in *Beeston* v. *Weate*, 5 El. & Bl. 986. There the plaintiff had been in the habit of going on the defendant's land for the purpose of damming a brook " at such times as the lowness of the water in the brook rendered it necessary," so as to force the water into an artificial channel which ran across the defendant's land to the plaintiff's land. The water was used for the plaintiff's cattle, but it was not always available, as at certain seasons of the year it was used by the occupiers of the defendant's land for irrigation. The indefiniteness of the right to dam the brook when necessary and to take the water when available was not considered to be any bar to its acquisition by prescription.

Much has been made in argument of certain occurrences which took place in 1888 and 1907 respectively. In 1888 the Raja's agents dammed the off-take of the Uppaya Batte. The appellants complained and the dam was removed. Their Lordships do not think that this incident throws any light on the

question before them seeing that the appellants' right to the natural flow down the smaller channel is now admitted.

In 1907 water was apparently short and objection was taken to the *chappakatu*. The Raja's people removed it twice ; each time it was re-erected by the appellants ; the Raja's agent applied to the civil authorities to allow him police assistance to remove it again, but this was refused : the Raja was referred to a civil suit to establish his right, but no suit was filed, and the *chappakatu* remained. Their Lordships cannot think that this incident in any way weakens the case of the appellants. Ineffectual opposition to the exercise of what is claimed to be a right is evidence rather in support of the right than of its non-existence.

Much of the judgment of the High Court is devoted to consideration of the evidence as to the erection of the *chappakatu*. Accounts were produced by the appellants in which the costs of maintaining the Uppaya Batte appeared. Only one item in these refers specifically to a *chappakatu*, viz., a debit in 1897 of 12 annas for the purchase of weeds (or grass) " for *chappakatu* at the head of the channel." The learned Judges thought that the absence of other entries militated strongly against the regular erection of these dams. Their Lordships do not agree. It is not the case of the Raja that a *chappakatu* was only erected in 1897 : it is admitted that it was erected in many other years (notably, for instance, in 1907), but, as his witnesses say, by permission. The explanation would rather be that this was the only occasion on which it was found necessary to purchase materials for it. Having regard to the temporary character of the dam, it is, their Lordships think, clear that the main item would be for labour and this is regularly debited, though not specifically in respect of the *chappakatu*. Such materials as would be required would ordinarily be available on the spot.

With regard to the plea of permissive user, the only documentary evidence by which it is supported is a petition dated the 26th February, 1888, to which some of the appellants were parties. Their Lordships think that this document was rightly discounted by the District Judge for the reasons given in his judgment. The principal appellant, the owner of the Chidikada estate, was not a party to it. The oral evidence for the Raja is vague and unconvincing.

A question was also raised as to certain *tampara* or low-lying lands which formed part of the appellants' 150 acres, and it was urged that for these irrigation was unnecessary. Their Lordships do not think that any special exception should be made in respect of them. It is obvious that if the channel water is not required for their cultivation in any particular year it will not be used.

The only remaining matter with which their Lordships need deal is a question of boundary. The Raja in his plaint claimed a declaration that the boundary between his village of Regidi and the appellants' village of Amidalavalasa was the south bank of the Sayanna Batte, which meant in effect that the whole bed of

the channel was in his estate. The District Judge decided against him, holding, in accordance with the result of a recent Government survey, that his boundary was the north bank. The High Court, by way of compromise, fixed the boundary line as the middle of the channel. This decision was challenged by the appellants before the Board, but at their Lordships' suggestion the point was not pressed, and it was eventually agreed that this part of the judgment of the High Court, which, in their Lordships' opinion, does substantial justice between the parties, should stand.

For the reasons given their Lordships are of opinion that the appeal should be allowed: that only so much of the decree of the High Court dated the 17th November, 1925, as declares the boundary between Regidi and Amidalavalasa, should stand, and that for the rest the respondent's suit should be dismissed, and they will humbly advise His Majesty accordingly. The respondent must pay the costs in India and before this Board.

In the Privy Council.

PAKALA VENKANNA AND OTHERS

v.

SRI RAO SWETACHALAPATI RAMAKRISHNA RANGA RAO BAHADUR GARU.

DELIVERED BY SIR GEORGE LOWNDES.

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