APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VENKATAPPAYYA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

THE COLLECTOR OF KISTNA (DEFENDANT No. 2), RESPONDENT.*

1889. March 5. April 29.

Act VII of 1865 (*Madras*), *s.* 1—*Water-cess—Overflow from Government works—water supplied or used for purposes of irrigation.*

Surplus water from Government irrigation works flowed on to land of the plaintiffs which they were in the habit of cultivating with dry crops and stagnated there rendering such cultivation impossible. The plaintiffs did not want the water to flow on to their land, but being unable to exclude it, planted paddy as the best crop to cultivate under the above circumstances. Water-cess was levied on the plaintiffs under color of Act VII of 1865:

Held, the water was not supplied or used for purposes of irrigation within the meaning of Act VII of 1865, s. 1, and the plaintiffs were not liable to pay the water-cess.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 292 of 1886, reversing the decree of M. B. Sundara Rau, District Munsif of Bapatla, in original suit No. 50 of 1886.

Suit to declare that the plaintiffs were not liable to pay a water-cess, and to recover a sum of money paid by them as water-cess under protest. The circumstances giving rise to this suit appear sufficiently for the purpose of this report from the following judgment.

The District Munsif passed a decree for the amount sued for and declared that, "so long as the drainage water of its own "accord inundates and stands on the plaintiffs' land without any "action on plaintiffs' part to bring it on to it, they are not liable "to be assessed with water-tax."

The District Judge reversed the decree of the District Munsif holding it to be immaterial, "that an individual may be unwilling "to take water and that the water comes to his field against his

* Second Appeal No. 1148 of 1888.

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"wish, and that Government have a legal right to levy wet rates "upon every field the water reaches."

The plaintiffs preferred this second appeal.

Subba Rau for appellants.

The *Acting Government Pleader* (*Subramanya Ayyar*) for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusami Ayyar, J.).

JUDGMENT.—The appellants hold land at Zupudi in the Bapatla Taluk of the Kistna District, and it was formerly cultivated with dry crops. Lately, the villages lying above Zupudi were irrigated from the Krishna canal, and the excess water flowing from them submerged the appellants' land and stagnating upon it, rendered it impossible to raise dry crops. The appellants could not prevent the water from flowing to their land except by erecting a dam at a heavy cost and they did not do so. In Fasli 1294 they showed a species of paddy, called tiruvarangam paddy, and thereby attempted to raise a crop which might not perish from the land being inundated with excess water in the months of October and November. According to the evidence the crop failed that year and yielded no profits owing to the inundation. The Collector levied water-cess at 2 rupees per acre under (Madras) Act VII of 1865, and the appellants paid it under protest and brought the present suit to obtain its refund. The contention for the respondent was that tiruvarangam being a wet crop, the water-tax of Rs. 2 per acre was imposed on the land in accordance with rule and the practice of the district. It was alleged for the Collector that the excess water flowed on to appellants' land, stagnated upon it, that no wet crop could be raised upon it solely with the aid of rain water, and that the appellants cultivated tiruvarangam crop in the expectation that excess water would flow on to their land, and utilized the excess water when it did flow as anticipated. But the appellants denied their intention to depend on drainage water, and the District Munsif found that, although the crop might be planted without the aid of the surplus water, it could not ripen and grow well without such aid. He observed, however, that in Fasli 1294, the appellants sustained loss rather than derived any benefit. On appeal, the Judge concurred in the finding that the rice crop could not have been raised on the land in question by

rain water alone. The District Munsif considered that the appellants were not liable for water-cess, but the Judge held that no option was given to cultivators under the Act; that the water was either supplied or used; that Madras Act VII of 1865 only declared the existing revenue practice, and that they were liable for water-cess whenever water was supplied or used. On this ground he was of opinion that it was immaterial that the appellants were unwilling to take the water, and that it came on to their land against their wish, and that the Government had a right to levy wet rates upon every field the water reached, and he dismissed the suit with costs. It is urged in second appeal (1) that no water-cess could be lawfully levied under Madras Act VII of 1865, (2) that water was neither supplied nor used voluntarily, (3) that in the circumstances of this case, the levy of water-cess was not in accordance with revenue practice or custom, and (4) that it was competent to the Civil Courts to take cognizance of the suit.

The water-cess in question was levied under Madras Act VII of 1865, and it is therefore competent to the Civil Courts to see whether it was levied in accordance with the provisions of that Act. It is provided by section 1 that "whenever water is supplied or used for purposes of irrigation from any river, stream, "channel, tank, &c., or work belonging to, or constructed by, "Government, it shall be lawful for the Government to levy at "pleasure on the land so irrigated a separate cess for the use of "the water, which cess shall be additional to any land assessment "that may be leviable on the said land as unirrigated or punjah; "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."

The point for decision is whether water was, upon the facts found in this case, either supplied or used within the meaning of the section. The appellants did not apply for the water, and it was not allowed to flow to their land by reason of such application, and we cannot therefore say that water was supplied, inasmuch as the expression implies in its ordinary sense a previous request express or implied. Was it then used? The term ordinary presupposes freedom either to use or to abstain from using the water, and the language of the section does not suggest an intention to exclude this freedom. The preamble states that large expenditure has been, and is still being, incurred in the construction and

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improvement of works of irrigation and drainage to the great advantage of proprietors and tenants of land, and that 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 discloses only an intention that those who obtain a supply or use the water in view to deriving increased profits should be under an obligation to pay the water-cess. Can it be said when the Government or one or more of its tenants to whom water is supplied for profit, inundates a raiyat's dry land against his will for about two months every year, and thereby renders it unfit for dry cultivation, and when the raiyat in endeavouring to use his land sows tiruvarangam paddy trusting to the precarious chance of raising a crop which may grow in spite of the inundation, and when that crop fails, that he uses the water in view to profit by it? If he uses it, he uses it as the only mode of repairing the injury to his land and averting the loss likely to arise from it, and we cannot say that he uses the water within the meaning of the Act, if regard is to be had to the rule that the construction we are bound to place upon statutes must be reasonable. It is urged by the Government Pleader that the appellants may recover compensation for the injury done to their land from the party who is answerable for it, and that they must be taken to use the water within the meaning of the Act; though their land is flooded against their will and though tiruvarangam paddy was sown because there was a chance of its yielding a crop notwithstanding the inundation. We are unable to accede to this contention. If it were to prevail, the Government might be enabled to take advantage of their own wrong if they were under an obligation to protect the appellants' land against its being periodically flooded with the water which they bring in the canal. If holders of lands above Zupudi are the cause of the injury and are liable for the loss arising therefrom, even then the Government would be in the position of a landlord who supplies water to his tenant for their mutual profit with the knowledge that the tenant usually allows it to inundate the land of another tenant and to stagnate thereon so as to become a nuisance and without arranging for the abatement of the nuisance or providing against its recurrence. In either view of the case, we must decline to accept the suggestion. The reasonable construction is that the use contemplated by the Act is a voluntary use, though not preceded by an application, and

that it presupposes a freedom either to take or refuse the water. We are aware of no usage whereby a raiyat's land can be held to be lawfully inundated every year. We are unable to concur in the opinion of the Judge that the appellant used the canal water within the meaning of Madras Act VII of 1865.

It is then urged that the Collector was at liberty to claim wet assessment on the ground that a wet crop was raised, that a wet assessment was due by virtue of the right of the Crown to a share of the produce, and that any assessment imposed or levied in the exercise of the prerogative of the Crown is not open to be revised by a Court of Justice. But it is not denied that the water-cess was levied under the color of the Act in the case before us, and it is not therefore a case in which either a share of the wet crop has been claimed or a wet assessment has been demanded as an equivalent by virtue of the prerogative of the Crown. When a special cess is demanded in the professed exercise of a special power conferred by a legislative enactment and when that enactment directs when and how it is to be collected, Courts of Justice are bound to see that the power is exercised in accordance with the provisions of the Act, unless their jurisdiction is expressly or by necessary implication taken away by the Act.

We set aside the decision of the Judge and restore that of the District Munsif with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

SRINIVASA (PLAINTIFF), APPELLANT,

v.

DANDAYUDAPANI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889. April 24. May 1.

Hindu law—Will—Gift to class—Vested and contingent interest.

A will, made by a Hindu, contained the following clause: "I bequeath to my elder daughter Rs. 25,000, subject to the condition that she shall invest the same in lands . . shall enjoy the produce . . and shall transmit the *corpus* intact to her male descendants."

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* Appeal No. 165 of 1888.