APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

1895.
January 30.
April 18.
September 23.

KRISHNAYYA (PLAINTIFF), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT.*

Irrigation-cess Act (Madras)—Act VII of 1865—Lands irrigated under Kistna anicut—Water-cess—Optional or compulsory use of water.

A raiyat occupying land in the Kistna delta made no application for the supply of water, but water from the irrigation channels flowed from time to time on to his land from irrigated lands of a higher level, and he had no option as to whether to accept or refuse the supply. No increased benefit was derived from the water by the raiyat. A sum having been levied from him on account of water-cess, he now sued to recover the amount:

Held, that the plaintiff was entitled to recover.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 452 of 1893, reversing the decree of B. Virasami Ayya, District Munsif of Guntur, in original suit No. 232 of 1892.

The plaintiff was a raiyat occupying land in the Kistna delta, and the plaint alleged that in fasli 1300 he raised on his land a crop of *mosadum* paddy and that the crop was damaged by water which flowed on to it from fields on a higher level which were irrigated under the Kistna anicut, and that he was assessed to pay and paid under protest a certain sum on account of water-cess, which sum he now sought to recover. It was pleaded that the suit was barred by Revenue Recovery Act II of 1864 (Madras), section 59, and that the imposition of a water-cess was rightly made, since the crop of *mosadum* paddy was a wet crop and as such benefited by irrigation, although in a favourable season it is possible to cultivate it with rain water alone.

The District Munsif held that *mosadum* paddy was a crop not merely depending on rain, but needing occasional irrigation not inundation, and that the plaintiff was neither a loser nor a gainer by the water flowing on to his land, and that even if he were a gainer thereby he would not for that reason alone have become liable for the water-cess. On these findings he passed a decree for the plaintiff as prayed.

* Second Appeals Nos. 1438 to 1442 of 1894.

The District Judge on appeal stated the circumstances out of which the claim arose as follows:—

"The river Kistna passes through the hills at Bezwada and then becomes a delta river. It flows on a level higher than the surrounding country, which slopes away from each bank of the river and down to the sea with an even slope of about one foot per mile. More than thirty years ago Government threw across the river at Bezwada a great transverse dam, called the anicut, and thus provided a constant head of water to irrigate the delta. This water was conveyed from each end of the anicut into the delta by the old channels of former flood action or by new channels excavated for the purpose. The system of channels to supply the whole delta is not yet completed and it is a mistake to think that there is a separate channel to each raiyat's holding, as there is a water pipe to each house in a city. The system is much more rough and ready. The water is let off from the channels into the fields nearest the sluices and from these fields it flows down to other fields. It flows from terrace to terrace of rice fields, or it is led along by small distributory channels kept up by the raiyats themselves or it flows down any natural slope to a lower village with its fields, until finally it passes to the Kolern lake, the Romperu swamp or the sea. The ideal system would be to have a channel and a sluice at each man's holding, with a hydrometer to measure the amount of water issued to him, but the existing system is simply that the water is put into the delta and left to flow down to the fields that require it.

"In 1865 the Secretary of State desired to have separate returns of the receipts from the Kistna and Godavari anicuts and to enable Government to obtain these returns, Madras Act VII of 1865 was passed. The land in the Kistna delta was classed as dry land and a charge per acre was made for the water from the anicut channel, supplied or used. I imagine that Government in passing this Act looked on it as making nominal change in the land revenue accounts and had no idea that the Act would affect the rights of the cultivators. I believe that in those days no officer in the Madras Presidency thought that a raiyat could refuse to take the water when it was supplied.

"In 1885 a raiyat in Zupudi of Bapatla Taluk was compelled to pay water rate on land upon which he had attempted to raise a crop of paddy when the excess water from the higher villages flowed down upon it. I expressed the view that the raiyat had no legal option to refuse the water and must pay, but this view was emphatically set aside by the High Court. The case is reported as *Venkatappayya* v. *The Collector of Kistna*(1). This decision caused a sensation in the district.

"In the present suit the plaintiff has lands on a low level and the excess water from the higher villages flowed upon his lands. He had cultivated the land with *mosadum* paddy. The evidence shows that this paddy can be cultivated with an abundant rainfall, but that if the rain be not sufficient to make water stand on the field, the paddy must be irrigated. The evidence also shows that the rainfall that year was deficient and that plaintiff, by the help of this excess water which flowed to his land, did reap a crop. Plaintiff and his witnesses say that the water was a yard deep and damaged the crop, but I suspect that to be an exaggeration. Plaintiff made no application for water. Upon these facts the question before me is whether the Collector can demand water rate."

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In the result the District Judge reversed the decree of the District Munsif and dismissed the plaintiff's suit.

Pattabhirama Ayyar and *Venkatarama Sarma* for appellant.

The Government Pleader (Mr. *E. B. Powell*) for respondent.

SHEPHARD, J.—It seems to me desirable before we decide this appeal, which raises an important question, that we should have before us more distinct findings on the facts. It appears from the District Munsif's judgment that several questions of fact were raised before him and the District Munsif records his opinion upon them. In the judgment of the District Judge there is only one of the fourteen paragraphs of which it consists, which touches the particular facts of the case.

Without any discussion of the evidence, the District Judge finds that the rainfall was insufficient and that the water which flowed to plaintiff's field did in fact save the crop and produce a harvest, whereas the Munsif finds that the plaintiff was neither a gainer nor a loser by the water. In my opinion, however, the circumstance that the plaintiff was in fact a gainer is not sufficient to justify the dismissal of the suit, or to distinguish the case from *Venkatappayya* v. *The Collector of Kistna*(1). The facts of that case are not very clearly stated in the report. Apparently, the plaintiff there, was, by reason of the submersion of his lands, driven to growing *tiruvarangam* paddy—a crop requiring irrigation. The crop failed, but it is not said that it failed in consequence of the excess water. The *ratio decidendi* appears to be that the plaintiff was practically compelled to use the water in order to obtain any crop. According to this decision, the question is not whether in the result the plaintiff derives benefit from the water, but under what circumstances he came to use it. If he had no choice in the matter, then, as I understand the decision, he cannot be said to have used the water within the meaning of the Act. I think the District Judge should be asked to return a finding on the question whether the plaintiff used the water for purposes of irrigation within the meaning of the Act.

BEST, J.—The finding of the Judge is that *mosadum* paddy—a crop of which was raised and reaped by the plaintiff—though it can be cultivated with an abundant rainfall, must be irrigated if the rain be not sufficient to make water stand on the field; that in

(1) I.L.R., 12 Mad., 407.

the year in question the rainfall was deficient and that it was by the help of the water that flowed to his land that plaintiff reaped a crop. The case is, therefore, distinguishable from *Venkatappayya* v. *The Collector of Kistna*(1), where there was a failure of the paddy crop which the raiyat endeavoured to raise, to avert, if possible, the loss that would otherwise be incurred by reason of the land being rendered unfit for dry cultivation. The learned Judges who decided that case are careful to limit their decision to the "facts "found in the case" and upon those facts they held—and rightly so—that to compel the then plaintiff to pay the cess would be to violate the rule that requires the construction to be placed on statutes to be reasonable, for it is clear from the preamble of Act VII of 1865 (Madras) that the cess is only payable on account of the "increased profits" derivable from lands irrigated by the works referred to therein. Stress is laid on behalf of appellant on the following passage in the judgment above referred to. "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." These last words are significant. It is not necessary that there should have been an actual request for the water, the request can be "implied." Immediately afterwards, in considering the word "used," the learned Judges say "the term "ordinarily presupposes freedom either to use or abstain from "using the water and the language of the section does not "suggest an intention to exclude this freedom," and further at p. 410 they say "the reasonable construction is that the use "contemplated by the Act is a voluntary use though not pre-"ceded by an application." A previous request can be implied therefore if there has been a voluntary use of the water. I concur in remitting for trial the issue suggested by my learned colleague.

The District Judge is requested to submit his findings within one month from the date of receipt of this order, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

In compliance with the above order, the District Judge F. H. Hamnett submitted the following findings:—

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"The appellants had no choice but to use the surplus water or to run the risk of serious damage, if not the total loss of any dry crops they might attempt to raise on the lands. The use of the water was not, therefore, optional, inasmuch as the appellants had no freedom to either take or refuse the water.

"I now consider the question whether the appellants had the intention of deriving an increased profit by the use of the water.

"What should, in my opinion, be the real important question is whether the appellants derived any increased profits by the use of the water as compared with the profits they would ordinarily have got by raising dry crops. There is no clear evidence on this point, but it may be presumed that wet crops, if properly irrigated, yield a much larger return than dry crops, otherwise the raiyats would not pay an extra tax of Rs. 4 an acre over the dry assessment for the use of Government water. This would be a legitimate inference to draw if water was obtained in the way it is usually supplied to wet fields. In the present case the tax imposed was eventually reduced to Rs. 2 an acre and I gather from exhibit III that this tax must have been imposed on the ground that the crops raised were wet crops irrigated by drainage water, of which the Jamabundy officer (or his superior, the Collector) was satisfied, the supply was too precarious to allow of the cultivation of a regular wet crop. We start then with the fact that the supply is a precarious one. It is very doubtful whether wet crops raised with such a precarious supply would be more remunerative than good dry crops raised on the same land. The Revenue Inspector proves that the lands in these particular cases only yielded 2½ tooms an acre as compared with 15 tooms, the average yield of ordinary wet lands. The value of 2½ tooms would not be more than about Rs. 5, and this is not in excess of what the lands might have yielded if cultivated with dry crops, the assessment of the lands (as dry lands) being Rs. 2 an acre and the assessment being supposed to be about half the nett yield of the lands. It is urged that fasli 1300 was a bad year and that the appellants would probably have got no dry crops at all. This might be so, but in June or July when the appellants planted their *mosadum* crops, it was too early for any one to predict whether the rains were going to fall or not. When they planted the crops, therefore, they could have had no intention of deriving an increased profit from the use of Government water, which they could not have realized from dry crops, assuming that dry crops were cultivable in spite of the flow of surplus water over the lands. I find, therefore, that there is no proof that the appellants derived any increased profit or intended to derive any increased profit as compared with the profit which their lands, if capable of cultivation as dry lands, would have yielded in an ordinary season, and that, on this ground, and there was no use of the water for irrigation purposes within the meaning of the Act, which presupposes that the tax is only paid for use of water which is intended to yield increased profits.

"I have also found above that the use of the water was no optional but compulsory."

These appeals coming on for final hearing, the Court delivered the following judgment:—

JUDGMENT.—It is now found that it was practically impossible for the plaintiff to divert the water and prevent it coming

over his land and that no increased benefit was derived from the water.

The inference drawn by the Judge is that the use of the water was not voluntary. On these findings, following the decision in *Venkatappayya* v. *The Collector of Kistna*(1), we must allow the appeal, reverse the decree of the District Judge and restore that of the District Munsif.

The appellant is entitled to costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subramania Ayyar.

DAIVANAYAGAM PILLAI, APPELLANT,

v.

RANGASAMI AYYAR, RESPONDENT.*

1894. October 31. November 1. 1895. August 21.

Civil Procedure Code—Act XIV of 1882, *ss.* 2, 244, 311, 588—*Order refusing to set aside a Court sale—Second appeal.*

A judgment-debtor, whose property had been sold in execution of a decree and purchased by the decree-holder, applied that the sale be set aside on the ground that the person, at whose instance execution had proceeded, had been improperly brought on to the record. The application was rejected by the Court of first instance and an appeal by the applicant was dismissed:

Held, that no second appeal lay to the High Court.

APPEAL under Letters Patent, section 15, against the judgment of Muttusami Ayyar, J., dismissing a second appeal preferred against the order of T. M. Horsfall, District Judge of Tinnevelly, in civil miscellaneous appeal No. 12 of 1892, which affirmed the order of S. Saminatha Sastri, District Munsif of Ambasamudram, in miscellaneous petition No. 1843 of 1892.

The petitioner in the District Munsif's Court was one Daivanayagam Pillai, the second defendant in original suit No. 90 of 1890, and the petition stated that his property had been attached in execution of the decree in that suit, that after the date of the

(1) I.L.R., 12 Mad., 407.

* Letters Patent Appeal No. 20 of 1895.