WHITE, C.J., AND SANKARAN-NAIR, J.

RICHARD TAYLOR v. RAJAH OF PARLAKIMEDI.

The letter though written three years after the will must be read with the words in the will that the testator had no doubt that the Zamindar of Parlakimedi will carry out his wishes, and reading the two together, I have no doubt that according to the intention of the testator the will give no beneficial interest to the Zamindar of Parlakimedi and he was to take it for the benefit of Richard Taylor or the next of kin of the testator. It is unnecessary to decide between their claims as Richard Taylor also now claims for the benefit of all of them. I would therefore allow the appeal and declare that the defendant holds the property in his possession for the benefit of the plaintiffs. The costs must come out of the estate. I cannot in conclusion help expressing my regret that the Court of Wards has allowed the matter to come before the Court when the plaintiffs do not claim the amount deposited in Arbuthnot & Co.

The result is appeal is dismissed. Costs will be paid out of the estate.

Solicitors for the respondent—*W. O. David.*

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1908. November 11. 1909. January 4, 5, 6, 26 April 16.

LUTCHMEE DOSS AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

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

Water, right to—Madras Act VII of 1865—Extent of right to tax free water to be implied in grants by Government—Voluntary payment, what amounts to.

A grant by the Government of the right to collect the revenue of certain lands, will, in the absence of a contract regarding water rights, carry with it, by implication, only an undertaking on the part of Government not to refuse to the ryots holding nunja lands, the quantity of water necessary to enable them to irrigate those lands and so to pay the revenue which they had paid to the Government before the grant. In 1826 the Government granted to A by a cowle the revenues of a village T., which was irrigated by a tank. The cowle specified the lands granted and no portion of the bed of the tank was included in the grant. The ryots of T. and those of other villages were drawing water from the tank by turns in shares proportioned to the extent of their acreage. The Government

* Original Side Appeal No. 11 of 1907.

had on certain occasions levied the cost of repairing the tank in accordance with such shares. In a suit by the grantee of T. against Government to recover moneys collected from him as water-cess under Madras Act VII of 1865 :

Held, that the above arrangement regarding the distribution of water by turns and the action of Government in collecting the cost of repairs according to the shares in which the water was so drawn was merely evidence of a customary distribution of the water in the tank according to the areas served by it and was no evidence of the grant of any definite share of the water by Government. The ryots might demand that not less than their share should be sent down to their lands if required for the irrigation of those lands but the Government was not bound to supply them with more than was required for the irrigation of the land irrigated at the time of the grant Where the quit-rent on an inam is fixed on the income derived from the cultivation of a certain extent of land in a certain manner, the inamdar is entitled to use, free of water-rate, such quantity of water as may be required for the cultivation of such extent in the mode in which such income was calculated, whether the water-rate is leviable as a tax or otherwise.

The engagement between the Inam Commissioner and inamdar amounts to on engagement by which the Government undertakes not to take more than a certain share of the income derived from the various sources taken into account in arriving at the amount of such income, as the consideration for relinquishing its reversionary right.

The Inam Commissioner having power to sell the reversionary right of Government had the power to fix the price according to the rules framed by Government and any engagement by him in that respect, not in contravention of such rules, will be binding on Government.

Where the income on wich the quit-rent is calculated includes the income derivable from a second crop on a certain extent of wet land and from a single irrigated crop on a certain extent of dry land, no charge except the quit-rent, can be levied as water-cess or otherwise in respect of such extent for such cultivation.

Payment, made under threat of distress and sale, before the actual issue of the warrant of distress, will not be a voluntary payment if, on non-payment before the specified date, such warrant would be issued as a matter of course.

Narayanasawmy Reddi v. *Osuru Reddi*, [(1902), I.L.R., 25 Mad., 548], referred to

ORIGINAL Side appeal from the decree and judgment of Boddam, J., dated the 21st day of December 1906, in the exercise of the ordinary original Civil jurisdiction of the High Court, Madras, in Civil Suit No. 12 of 1905.

The facts for the purpose of this report are sufficiently set out in the judgment.

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar* for second appellant.

The Hon. The Advocate-General, *John Adam J. C. Adam*, for respondent.

WHITE, C.J., AND MILLER, J.

LUTCHMEE DOSS v. SECRETARY OF STATE FOR INDIA.

JUDGMENT.—The principal question in this appeal is what is the extent of the plaintiff's right to draw water for irrigation from the Tinnanur tank ?

We have no doubt that the plaintiff is not the owner of any part of or share in the bed of the tank. This question seems hardly to have been in dispute in the Court below but was argued before us, though Mr Sundara Aiyar did not consider it necessary for his case to prove his client's ownership.

There is no doubt that the tank did not belong to the plaintiff's predecessors before the grant of the cowle, exhibit O, in 1826, and there is nothing in that cowle or in the schedule A attached thereto—a schedule which according to the cowle specifies the lands over which the right to collect the revenues is granted to suggest that the ownership of the tank was thereby conveyed to the inamdar. On the other hand the schedule rather indicates that it was not so conveyed, and there are circumstances which render any such alienation improbable. There is evidence in this case that part of the tank-bed is situated in the village of Veppampatti and if that is true—and it comes from the plaintiff's own witness—it is highly improbable that the Government would have made over the tank to the inamdar of Tinnanur. Even if that is not true it is certainly true that the tank serves not only Tinnanur but also another inam village and some Government villages, and it is unlikely that the inamdar of Tinnanur would have been made sole owner of a tank of this kind

Mr. Sundara Aiyar contended that, however, the question of ownership of the tank-bed may be decided, his client must be held to be owner of a share in the water of the tank, or to have rights by way of easement to make use of a definite share of the water for irrigation of the lands of Tinnanur, if for no other purpose, and that inasmuch as he has not attempted to draw from the tank more than his share he is not bound to pay anything to the Government for the use of the water he has taken.

Now, the cowle, exhibit O, says nothing of water rights, and we cannot presume that the Government intended to grant to the inamdar any water rights other than those which would pass by implication with the grant of the rights over the land. What was granted was the right to collect the revenues of the village, and what passed by implication therewith so far as water rights are concerned would seem to be an undertaking not to refuse to the

ryots holding nanjai lands, the quantity of water necessary to enable them to irrigate those lands and so to pay the revenue which they had paid to the Government before the grant.

The evidence to which we propose to refer does not prove that the ryots of Tinnanur as a body were entitled to a definite share of the water of the tank as against the Government. It shows that after the grant of 1826 (it is not clear whether the same system was in force before that time) there was an arrangement by which the different villages served by the tank drew water by turns of different duration, arranged no doubt originally with reference to the extent of land irrigated in each village : by this arrangement, Tinnanur got $5\frac{3}{4}$ shares out of $9\frac{1}{2}$, Annambattu one share and the other Government villages the remaining $2\frac{3}{4}$ shares, and upon the basis of this arrangement, the Government arranged on one occasion with the inamdar to share the cost of repairing the tank. The inamdar in the agreement made on that occasion (exhibit Q) is described as being interested to the extent of $5\frac{3}{4}$ shares out of $9\frac{1}{2}$ in the water drawn for purposes of irrigation. These shares are also referred to in the correspondence between the officers of Government on the subject of repairs (*vide* exhibits T and O), and in the pleadings in suits against the inamdar for contribution (*vide* exhibits U and OO). From exhibit U it appears that the Government styled the inamdar a co-owner of the tank, but there is no evidence that he ever held that position and he has never claimed it, though he has claimed to be the sole owner.

There is oral evidence as to the distribution of the water by turns and on the plaintiff's side the fact that the Government has not before the first of the years to which this suit relates demanded water-cess from the inamdar.

This evidence merely shows that there was a customary distribution of the water in the tank between the areas to be served by it ; from exhibit U, it is clear that the Government did not rely on this distributary system as deciding the amount of contribution due from the inamdar, though they used it for that purpose in exhibit Q ; in the suit in which exhibit U is the judgment they calculated their claim on the acreage irrigated On the defendant's side, there is the very strong negative evidence of the grant. If the Government were granting a definite share of the water to the inamdar the cowle (exhibit C), would have said so. Of course, if

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the plaintiff could show that the ryots were entitled to a definite share that would be enough for him but there is nothing to show that. They may be entitled to demand, that not less than 5¾ths out of 9½ shares of the water shall be sent down to their lands if that amount is required for the irrigation of those lands, but there is no proof that the Government is bound to supply them with more than is required for the purposes of irrigation of the lands irrigated at the time of the grant. There is thus no proof of any engagement between the Government and the inamdar by which the inamdar is entitled to a definite share of the water in the tank, and that being so, the Government has a right by virtue of Madras Act VII of 1865 to levy a cess for water supplied for irrigation.

The inam granted in 1826 was enfranchised in 1871, a quit-rent being fixed at one-fourth of the average annual income, and second crop charge collected by the inamdar on an average extent of 141 acres of nanjai land and 36 acres of punjai land, was taken into account in arriving at the income. It is contended by the plaintiff that at least to this extent the inamdar is entitled to free irrigation, and on the other hand the Advocate-General urges that the water-cess levied is a tax and the Government does not by granting an inam undertake not to levy taxes on the grantee.

Assuming that the water-cess is a tax and not rather the price of a commodity, the engagement between the Inam Commissioner and the inamdar amounted to this: a certain income is derivable from taxes of different kinds including taxes for the use of water for 36 acres of dry lands and for second crop on 141 acres of wet lands. Of this income the inamdar takes three-fourths and the Government one-fourth as the value of its reversionary right.

This amounts to an engagement by which the Government undertakes not to take more than one fourth of the income derived from the various sources taken into account, and one of these sources is the charge collected from the ryots for irrigation known as fasal jasti or tirva jasti according as it is levied on the irrigation of nanjai or punjai land. The Advocate-General has not shown us how this charge is to be distinguished from the water-cess leviable under the Act of 1865 and we do not think there is any true distinction. There was then an engagement between the

inamdar and the Inam Commissioner by which the latter undertook that the Government would content itself with one-fourth of the fasal and tirva jasti on the average area then chargeable with these payments, and it will be a breach of that engagement if on that area the Government now levies a further charge for water. The Advocate-General suggested that an engagement of this kind was beyond the powers of the Inam Commissioner. The power of the Inam Commissioner, speaking generally, was to sell to the inamdar, the reversionary right of the Government, and to fix the price in accordance with rules laid down by the Government and the Advocate-General has not shown us that these rules were transgressed in the settlement with which we are dealing. We are therefore bound to presume that they were followed.

To the extent of 141 acres of nanjai and 36 acres of punjai we think there is an engagement by which the inamdar is entitled to use the tank water for irrigation for second crop on the nanjai and for watering one crop on the punjai free of any charge that is not included in the quit-rent.

The learned Judge below allows free irrigation for 42 acres of second crop land, stated by the kurnam to be registered as such in the accounts. It does not appear when it was so registered but it is not found in exhibits G 1 and G 2 : it is not unfair therefore in the absence of other evidence to infer that it was not so registered prior to the inam settlement, and consequently that it ought to be included in the area for which prior to that time, fasal justi was charged, *i.e.*, in the 141 acres for which the inamdar is entitled to irrigation free of cess.

There remains the question of compulsion and upon that point we are unable to agree with the learned Judge who with great reluctance felt bound to hold that the payment by the plaintiff was voluntary. There was here a threat that if the money was not paid within a given time, it would be collected by distress and sale of the plaintiff's property. It is true that when the given date arrived it would have been necessary to issue a new distress warrant before actual seizure of the property, but the fact does not in our opinion affect the efficacy of the threat ; the issue of the warrant would inevitably follow the default in payment. It is not necessary to decide whether or not the acts of the officers of the Government amounted to coercion within the meaning of

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section 15 of the Indian Contract Act: even if they fall short of that it may be open to the plaintiff to recover (*Narayanasami Reddi* v. *Osuru Reddi*(1)); and we have no doubt that here the payment was made to avoid a threatened distraint and was not voluntary

We must in these circumstances substitute for the decree of the learned Judge a decree declaring the right of the plaintiff to irrigate free of charge over and above the extent admitted by the Government, 36 cawnies 9 visams and 14 chataks of punjai land, and a second crop on 141 cawnies 1 visam and 2 chataks of nanjai and directing the refund to him of such amount as this modification may render necessary.

As regards costs we think the plaintiff should recover his costs of the appeal and the parties should pay their own costs in the Court below.

The Government Solicitor for the respondents.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Sankaran-Nair.

1909. April 14, 15, 19, 22.

THE ADMINISTRATOR-GENERAL OF MADRAS AND AS SUCH THE ADMINISTRATOR OF THE PROPERTY AND CREDITS OF PATRICK MACFADYEN (DECEASED) (PLAINTIFF), APPELLANT.

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND SUCH THE ASSIGNEE OF THE REAL AND PERSONAL ESTATE AND EFFECTS OF SIR GEORGE GOUGH ARBUTHNOT, AN INSOLVENCY DEBTOR (DEFENDANT), RESPONDENT.*

Contract Act IX of 1872, s. 253 (10), 263—Indian Insolvency Act, s. 7—Insolvency of sole surviving partner—Official Assignee takes subject to the rights and obligations of such surviving partner.

On the death of a partner, the partnership is dissolved under section 253 (10) of the Indian Contract Act and under section 263, the rights and

(1) (1902) I.L.R., 25 Mad., 548. * Original Side Appeal No. 20 of 1908