so apply depends, as was admitted by the learned Counsel for the appellants, solely on whether the suit was or was not a suit pending at the passing of the Act.

Their Lordships do not entertain any doubt that it was. The former judgment of the Board did not end the suit; did not finally determine it. It was remitted to the High Court of Madras for further procedure, and for enquiry upon allegations of fact; and at the date of the Statute that procedure was not concluded and the enquiry had not indeed been entered upon. The suit in fact was neither adjudged upon nor even ready for judgment. Their Lordships express their concurrence with the opinions of the learned Judges of the High Court, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants: *Douglas Grant.*

Solicitors for the respondent: *Chapman, Walker* and *Shephard.*

—J.V.W.

APPELLATE CIVIL.

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

RAJA RAMACHANDRA APPA ROW BAHADUR GARU AND OTHERS (PLAINTIFF AND LEGAL REPRESENTATIVES OF THE DECEASED FIRST APPELLANT), APPELLANTS,

v.

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

1911. March, 23, 24. April, 24.

Water-cess Act (Madras) VII of 1865—Levy of cess, what is—Effect of levy not retrospective—'Arrears' in s. 2 of the Act means payments which become due and remain unpaid after levy.

Under Madras Act VII of 1865, Government have the right to levy at pleasure a separate cess for water. The liability to pay water-cess is not incurred in each fasli by the mere fact of taking Government water but only when Government indicates its intention to charge the cess. The cess must be imposed during the fasli.

"Arrears" in section 2 of the Act means payments which have become due and remain unpaid after the levy was made. An "arrear" under the Act

* Appeal No. 107 of 1905.

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presupposes an engagement to pay and the mere use of water implies no such engagement. The Government cannot by the mere act of levying water-cess in a subsequent fasli indicate an intention to claim rent for previous fasli.

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APPEAL against the decree of I. L. Narayan Rao Naidu, Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 51 of 1903.

The facts are sufficiently stated in judgment.

K. N. Aiya for appellants Nos. 2 to 4.

The Hon. the Advocate-General and the Government Pleader for respondent.

THE CHIEF JUSTICE.—This is a suit in which the plaintiff claims a refund of water-cess and a declaration that the lands for which the cess has been paid are not liable to water-cess. The Subordinate Judge dismissed the suit and the plaintiff appeals. The claim for a declaration was not pressed in appeal.

Water-cess on the lands in question was collected in 1895 but it was refunded on the ground that it had been illegally collected—see the order of the Tahsildar (exhibit LL), dated the 18th June 1895. This order states that the order for the refund of the tax was made by "the Collector." The order of the officer who directed the refund on the ground that the cess had been illegally collected, is not in evidence.

Nothing appears to have been done till March 1903 when the Collector served a notice on the plaintiff to show cause why water-tax should not be levied on the land in question. Subsequently the Collector made an order directing that "single" water-tax should be charged on the land during the previous ten years and fasli 1312 (apparently taking things back to the year when the tax had been collected, and refunded under the order of the officer of Government). See exhibit AAA.

The plaintiff asks for a refund of the cess paid by him under protest for the period antecedent to this order, that is for the eleven years up to and inclusive of fasli 1312. He does not now dispute his liability to pay the tax from and after the receipt of the order of the *6th March* 1903. The Government claim the right to collect the tax for eleven years as arrears of water-cess payable under Madras Act VII of 1865. The circumstances in which the tax was collected in 1895, and refunded on the ground that the collection was illegal, are not very clear. But I am quite prepared to hold, for the purposes of this case, following.

Chidambara Rao v. *The Secretary of State for India* (1) that the action of the officer of Government in 1895 did not bind Government in the sense that they could not thereafter "levy at pleasure on the land" a separate cess for the water. But I am not prepared to hold that the order of the Collector notwithstanding the fact that it was not repudiated by Government till eight years later was ineffective for all purposes. Assuming that what was done prior to 1895 amounted to a levy of a separate cess for water under the Act, Government have, in my opinion, not made out (and the onus is clearly on them) that whereas the officer who made the levy was the authorised agent of Government in that behalf, the officer who set aside the levy and directed the refund was not.

Government have recently levied a separate cess for the water and the question is—and this was the main question argued before us—does this levy, under the powers conferred by the Act or under the rules, which, by the Act, Government are empowered to make, operate retrospectively so as to entitle the Government to claim "arrears"?

I know of no other fiscal enactment in which such a power has been given. The cess is levied on the land. It is a charge on the land irrespective of the fact whether the owner of the land for the time being has had any benefit from the supply or use of the water or not. To create such a charge retrospectively might, especially in cases where there had been a change of ownership, in my opinion, in many cases work a hardship.

Under the Act the Government have a discretion "to levy at pleasure on the land so irrigated a separate cess for such water." They are under no obligation to levy this separate cess. Rules have been made as to the circumstances in which and the rates at which the separate cess is to be levied. It was not suggested that the making of these rules constituted a levy of the cess. If I am right in my view that we cannot hold on the evidence that the tax continued to be "levied" from 1895 or some earlier date, onwards, there can, I think, be no question (in fact I do not think the Advocate-General contended otherwise) that the Collector's *order of the 6th March* 1903 constituted the levy. We are asked by the Advocate-General to hold that the tax is payable for a

(1) (1903) I. L. R., 26 Mad., 66.

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period of time before it was "levied." In my opinion, there is nothing in the Act or the rules which would warrant such a conclusion.

I think the word "arrears" in section 2 of the Act means payments which have become due and have remained unpaid after the levy was made. The section provides that arrears of water-cess payable under the Act shall be realized in the same manner as arrears of land revenue. Under section 3 of the Madras Revenue Recovery Act (II of 1864) the landholders pays the land revenue due on his land "according to the *Kisthandi* or other enjoyment." Section 4 provides that when this revenue is not "so paid" it is to be deemed to be an arrear of revenue. Under the Revenue Recovery Act, an arrear is kist not paid under an engagement. I think an "arrear" of water-cess under the Act of 1867 has the same meaning. The engagement may, of course, be express or implied, but I do not think the mere use of the water, at any rate, when the use was under the *bonâ fide* belief —a belief brought about by the action of the officer of the Government—that Government did not intend to charge for the use, constitutes an engagement. The case of *Harrison* v. *Stickney* (1) and the other authorities cited by the Advocate-General, with all respect to him, seem to me to have very little bearing on the question we have to decide. I, of course, accept the proposition that there is no rule of law which prohibits a retrospective rate—that is, a rate for the purpose of raising funds for the purpose of discharging a liability already incurred. But the contention on behalf of Government is that they have power to collect the rate for a period before the levy is made. *Raja Suraneni Venkata Papayya Rau* v. *The Secretary of State for India in Council* (2) does not touch this point, as in that case as I understand it, there was no claim for "arrears." In that case the right of Government to levy wet assessment and supply water was held to be a right by way of easement and not a right under the Act. As regards the rules, they would seem to contemplate two classes of cases—cases where cultivators of land registered as dry, apply for water (rule II, Standing Orders of the Board of Revenue, Vol. II, p. 3) and cases where water is taken before an application is made (Rule V). The present case obviously does not fall within Rule I. The

(1) (1898) 2 H. L., 108. (2) (1903) I. L. R., 26 Mad., 51.

only rule which applies would seem to be Rule V under which Government have taken power to levy a penal rate.

The defence that the plaintiff did not pay under coercion was not pressed.

I would allow the appeal as regards the claim for a refund of the cess paid for the period prior to the 6th March 1903, that is, Rs. 9,391-10-4 and interest at 6 per cent. per annum from date of plaint up to date of payment on Rs. 9,118-1-8. Time for payment is six months from this date.

Respondent will pay the court fee on the claim for refund here and in the court below. In other respects the parties will pay their own costs.

MUNRO, J.—The material facts are not now in dispute and may be briefly stated. The Government is entitled under Act VII of 1865 and the rules framed thereund er to levy water-cess on the lands to which the suit relates when irrigated by Government water. For a long time the lands were so irrigated but no charge for water was made sa ve on one occasion. The amount thus collected was in 1895 refunded by the Collector on the ground that the charge was illegal, and water continu ed thereafter to be supplied without charge. In 1903 the then Collector found out the mistake that was being made, and by an order dated 6th March 1903 directe l that single water-rate should be charged for ten faslies en ling with fasli 1311, and also for fasli 1312, in which fasli the order was passed. The amount thus held to be due was collected on the 27th May 1903, the plaintiff, appellant, paying under protest. The plaintiff then brought the suit out of which the present appeal arises to recover the amount paid and for other reliefs not now pressed.

To the charge for fasli 1312 I do not think the plaintiff is entitled to object. Water was taken in that fasli and was charged for within the fasli. The question then is whether the charge for the previous ten faslies was illegal. This will depend upon whether the charge was justified by Madras Act VII of 1865 or the rules framed thereunder.

Under section 1 of the Act whenever water from a Government source is supplied or used for purposes of irrigation, the Government, certain conditions being fulfilled, "may 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

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which such water-cess as aforesaid may be levied, and alter or amend the same from time to time." For the rules made by the Government under this section and relevant in the present case we have been referred to the second and following pages of Vol. II of the Standing Orders of the Board of Revenue, Adition of 1907. The Act also provides under section 2 that arrears of water-cess may be realised in the same manner as arrears of land revenue, that is in accordance with the procedure laid down in Madras Act II of 1864.

It has been contended for the defendant that the water-cess charged for the ten faslies prior to fasli 1312 may be properly regarded as arrears of water-cess for those faslies, and is therefore recoverable under section 2 of the Act. Now an arrear of land revenue is defiend in Act II of 1864 as revenue which is not paid by the date on which it falls due according to the kistbandi. Water-cess is under the rules payable according to the kistbandi, and an arrear of water-cess should, I think, be defined, *mutatis mutandis*, in the same way as arrear of land revenue. It is difficult to concieve how water-cess which was not demanded in respect of the lands in suit till fasli 1312 and which the plaintiff was given to understand was not due as above stated, can be said to have fallen due in faslies prior to 1312 so as to come under the definition of arrears for those faslies. It is contended, however, that the liability to pay water-cess was incurred in each fasli by the mere fact of taking Government water and apart from any order of the authorities demanding payment for the water. A perusal of the Act and Rules shows that this contention is untenable. Under section 1 the Government may at pleasure levy water-cess. Equally "at pleasure" it may not. Until therfore the Government indicates its intention to charge water-cess, no liability is incurred by taking water. Turning to the rules we find in Rule V, which deals with the unauthorised use of water, that the Collector has power to make a penal charge, and may also at his discretion reduce or remit the penalty, so that there is no liability until the Collector has made his order.

It is not alleged, that the Government has itself made any charge for the water taken for the lands in suit. The only charge is the charge made by the Collector by his order of the 6th March 1903. The legality of that order depends upon whether it is authorised by the rules under which the Government has delegated certain

powers. The question is whether the rules justify an order charging water-cess for faslies other than the fasli in which the order is made. One of the underlying principles of the land revenue administration is that all charges should be ascertained and recorded within the fasli to which they relate—See Board's Standing Order No. 12 which deals with the jamabandi or annual settlement. I have no doubt that the principle is meant to underlie rules for charging water-cess, and there are numerous indications in the rules that it does. On the other hand, I can find nothing in the rules which can be construed as a provision for imposing water-cess for prior faslies. The rule which according to the defendants' contention, applies to the present case is Rule V. I think, however, it would be very difficult to hold that the present is a case of unauthorized use of water. If the rules do not apply, and I think they do not, the charge was illegal, and the plaintiff is entitled to recover. Even if Rule V is held to be applicable the defendant is in no better position. Under that rule when water is taken without permission, a water-rate equal to twice the water-rate prescribed in Rule I for the particular crop irrigated is ordinarily to be levied as a penalty. One object of the penalty is, it may be reasonably presumed, to deter the person charged from taking water without permission in future years. For persistent breach of the rules or other sufficient cause the Collector may enhance the penal charge up to five times the ordinary water-rate. "Persistent breach of the rules would imply that the person charged has already been warned and possibly penalised in prior faslies and to that extent, no doubt, what has happened in prior faslies is enquired into. But the charge for persistent breach of the rules is manifestly a charge for the last breach, and not a charge for water taken in prior faslies. The manner in which the penalties are limited is also a clear indication that they are imposed in respect of the last occasion on which water has been taken without permission. Nor can it be successfully argued that the charge may be treated as good for the five faslies ending with 1312 inasmuch as for 1312 the Collector might have charged five times the ordinary water-cess. If the rule applies, the Collector might have done so, but in fact he did not; and we are only concerned with what he did. I think it is clear therefore that the Collector had no authority to pass the order of the 6th March 1903 with regard to faslies prior to 1312. I would therefore

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allow the appeal as regards the charge for the ten faslies ending with fasli 1311, and dismiss it as regards the charge for fasli 1312 and the other reliefs not pressed. I agree with the principle on which costs are awarded by my learned colleagues.

SANKARAN-NAIR, J.—For the agraharam village of Velupuru quit-rent was charged and inam patta issued in the year 1859 by the Inam Commissioner. In that patta the lands situate in the said agraharam were entered as dry land. In 1868 the wet *ayacut* of the agraharam village was fixed at 177 acres and from that date in all the accounts of the subsequent faslies it was shown that 177 acres were exempted from water-tax, that is, were lands for which water had to be supplied free from sources of irrigation belonging to Government. On the 3rd June 1892, the Deputy Collector, Mr. Suriya Rao Nayudu, localised the mamool wet and passed an order declaring that the extent aforesaid was exempt from any water-tax. However on 31 acres out of this land water-cess appears to have been collected some time after. But on the 27th June 1895, the Collector passed orders refunding to the inamdar owner of the village Rs. 124-0-8 the amount of tax collected as in his opinion no cess ought to have been levied. In 1903 another Collector considered that the Deputy Collector's order, dated 1892, was passed under a wrong impression and without proper inquiry, and cancelled it and levied from the plaintiff (inamdar) the charge which, he was of opinion, ought to have been paid on the extent of land which was irrigated during the ten previous faslies and also the charge payable for fasli 1312.

The plaintiff now brings this suit for a declaration that the lands in his agraharam village were wrongly entered in the patta given to him by the Inam Commissioner as dry lands, that they were really mamool wet lands, that is to say, lands in respect of which he is entitled to be supplied with water by the Government to carry on wet cultivation without any liability to pay water-cess; and to recover from the Secretary of State the sum of Rs. 9,391-10-4 the amount collected by the defendant from the plaintiff on account of water-cess for eleven years from faslies 1302 to 1312.

The Subordinate Judge found that the entry in the patta by the Inam Commissioner was not an error. His finding on this point is not challenged in appeal. With reference to the plaintiff's contention that the *ayacut* of wet cultivation was finally

declared after a full consideration in 1868 by the Deputy Collector and that it was afterwards acted upon by the Collector and such decision is therefore binding upon the defendant, he held that the Inam Commissioner was the proper person empowered by the Government to deal with these questions and the Collector's action in this matter "based as it was on an erroneous principle was *ultra vires*" and not therefore binding upon the defendant. Against this finding also no objection has been taken before us.

The only question therefore which has to be determined is the plaintiff's right to recover the amount levied for water-cess. This cess is levied under Act VII of 1865 which "is an Act to enable the Government to levy a separate cess for the use of water supplied for irrigation purposes in certain cases."

Section 1 of the Act declares that when water from a source belonging to Government is supplied or used for irrigating land "it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water" and it also provides that the Government may prescribe the rules under which, and the rates at which, it shall be levied. Under section 2 arrears shall be realised in the same manner as land revenue is realised. The rules therefore, so far as they are authorised by the Act, have the force of law. Under those rules a cultivator may apply for water to the head of the village who is required to submit it to the Tahsildar. In certain cases the Tahsildar has to submit them to the Public Works Department, and the Tahsildar may then pass final orders on the application. There are printed forms of applications on which orders have to be passed. In that application the applicant has to state the area for which water is wanted and whether it is required only for one year or not. If it is not stated to be for a year only, water will continue to be supplied for the succeeding years without any fresh application. There are water-rates per acre fixed for the extent for which water is supplied. Thus the applicant knows the cess he has to pay for the water that may be supplied to him. When water is taken for land without the sanction of the Tahsildar double water-rate is charged. For persistent breach of rules or for other sufficient cause a penal charge equal to five times the ordinary water-rate may be levied.

The Advocate-General contends that when water is used for the cultivation of the land a liability to pay the water-cess attaches itself to the land and that such liability is not imposed by reason

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of the engagement between the cultivator who applies for the water and the Government as evidenced by the grant of his application in the first case and the supply of water in accordance therewith nor by the imposition of the cess under section 1, clause (*b*), after the Collector has satisfied himself that the conditions referred to therein exist when the water is used without such sanction of Government. If the Advocate-General is right, the Government may enforce that liability at any time and no official, unless specially authorised to do so, can waive it.

The words of the section are that "it shall be lawful for the Government to levy at pleasure on the land irrigated a separate cess." These words do not support the contention advanced that the liability attaches itself the moment water is used.

I am also satisfied that the Government cannot at any time at their pleasure impose the cess; the cess in my opinion has to be imposed within the fasli, *i.e.*, before the crop on the land has been harvested. If this view is right, that would also show that the liability arises only by the imposition and not by the use of the water, otherwise the Government would be able to recover it at any time. This appears to be the case from the words of the section itself and also from the rules. Section 1, clause (*b*), provides that in the circumstances therein referred to, the Collector has to satisfy himself that the irrigation is beneficial to, and sufficient for, the requirements of the crop on the land irrigated. This can only be properly done when the crop is on the land and as it appears to me that it was not contemplated that the Collector is to decide these questions by taking evidence after the year is over. Whether the irrigation is beneficial and whether it is sufficient for the requirements of the crop can only be satisfactorily settled by personal inspection. It would depend upon various circumstances about which evidence can scarcely be forthcoming afterwards. The fact that the jurisdiction of the Civil Court is ousted in this respect also supports this view. This is also consistent with the rules which require that jamabandi, *i.e.*, the annual settlement "must be completed within the fasli year at the latest" and that such annual settlement should be "conducted with a view to ascertain and record the demand of *all* the items of land revenue within the taluks." (The word "all" is in italics in the rule itself). A different rule cannot apply to clause (*a*) of section (1). It seems to me to be clear therefore that if lands

have been cultivated with water from Government sources then it is the duty of the Government officials at the time of the Jamabandi within the fasli and before the crop is harvested to impose the charge leviable if such water has been used without the sanction of the authorised officials.

The fact that there is another rule which provides for the persistent breach of the rules would also go to show that double water rate is to be imposed within the fasli. Under the Act therefore the Collector was not authorised to levy the water-cess for ten years.

If the plaintiff-inamdar may now be declared liable for water which was used by the cultivators how is he to apportion the liability or recover any additional rent from the tenants? It would be extremely difficult to ascertain their liabilities *inter se* and even if ascertained recovery of arrears for a comparatively long time would in some cases be impossible and in other cases difficult. If the Government demand is collected during the fasli these difficulties are avoided.

If the charge could be levied years after, if the Collector, as he claims in this case, is entitled to recover in fasli 1313, the water-cess for faslies subsequent to fasli 1302, a *bonâ fide* purchaser may be called upon to pay the cess due long before his purchase, of which he had no notice and about which there may have been previous orders (as in this case) exempting the owner from payment.

These considerations support the inference derivable from the natural meaning of the words that the liability arises from the imposition of the cess, not by the use only and that the cess has to be imposed before the expiry of the fasli year when the crop is on the land.

It also appears to me that the rules framed by the Government under the Act which have got the force of law in so far as they are authorised by the Act itself show that the plaintiff is not bound to pay this assessment. The rules which I have set forth above contemplate two classes of cases, where water is used with sanction applied for and granted and water is used without such sanction. The present case does not fall within the first class where the cess payable is ascertained nor within the second class which refers to unauthorised use of water. The Tahsildar is the person to sanction the application for water, but an officer to whom

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he is subordinate, the Deputy Collector had issued orders, under which water had to be supplied to the plaintiff and when the Tahsildar on one occasion collected a water-cess, the District Collector directed a refund. It cannot be said that there was any authorised use of water for which a 'penal' charge can be levied.

As I have already pointed out it is unnecessary to make applications for water every year once the application is granted until the order granting it is cancelled.

Every year's demand has to be ascertained within the year itself and among the objects of the Jamabandi is stated to be the careful inspection of cultivation, the consideration of all claims to remission and the collection of all kists as they fall due. If the Collector had the power to declare in 1903 that the land is liable to pay water-cess, his predecessor had also the power, it appears to me, to decide that such land is not liable to pay the cess. The Collector in 1903 may cancel the orders issued before just in the same way as the Collector who passed the order in 1895 could have cancelled it himself, as there is no law preventing him from doing so. But until the order is cancelled by himself or by a superior authority, there is no reason why those interested should not be bound thereby.

I am therefore of opinion that the claim of the Collector to impose assessment on the lands for the ten faslies in question cannot be sustained. As to the fasli 1312, as the Collector's order was in force till it was cancelled and it was alleged that no water was taken during the rest of the fasli, the claim to impose assessment during that year also cannot be sustained. The plaintiff is entitled to a refund with interest at 6 per cent. I accordingly agree to the decree suggested by my Lord Chief Justice.