PRIVY COUNCIL.*

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

v.

MAHARAJAH OF BOBBILI (PLAINTIFF).

1919, May 20 and 22, and July 11.

[On Appeal from the High Court of Judicature at Madras.]

Madras Irrigation Cess Act (Madras Act VII of 1865), sections 1 and 4 as amended by Madras Act V of 1900—Right to take water for irrigation through artificial channel, recognition of—Forfeiture of Estate to Government—Easement—Engagement with Government—Non-liability for cess after period of 80 or 90 years.

An artificial channel from a non-tidal river through which water for irrigation ran through an estate belonging to the respondent was constructed upwards of a century ago by the then zamindar of Palkonda a neighbouring landholder, and the evidence showed that in 1814, the then zamindar recognized the right of the respondent's predecessor in title to irrigate his lands with water from the channel. In 1833 on forfeiture of the Palkonda zamindari for rebellion it came into possession of the Government, but no attempt was made by the then Government to change the footing on which the irrigation rights were enjoyed by the predecessors in title of the respondent, and by the respondent himself, or to lessen or interfere with the continued enjoyment of the easement as of right and without any exaction or charge. No claim in respect of the lands in suit was made until 1907 when a sum was levied on the respondent under the Madras Irrigation Cess Act (Madras Act VII of 1865, as amended by Madras Act V of 1900) which he paid under protest, and brought a suit for a refund of the amount, and for a declaration that he was not liable to pay any cess under that Act. The Act as amended enacts in a proviso "that where a zamindar . . . or any other description of landholder not holding under ryotwari settlement is by virtue of an engagement with the Government entitled to irrigation free of separate charge no cess shall under this Act be imposed for water supplied to the extent of this right and no more."

Held, that "an engagement with the Government" had been created, within the meaning of the proviso to the Act, by the transaction of the zamindari having passed to the Government, and had been accepted by them as binding the parties for a period of between 80 and 90 years during which (including 40 years since the Act was passed) the respondent's zamindari had been enjoyed without any question or doubt that the respondent held under a tenure which gave him the benefit of the proviso in Act VII of 1865.

APPEAL No. 155 of 1917 from a judgment and decree (27th October 1915) of the High Court at Madras, which affirmed a judgment

* *Present*:—Viscount HALDANE, Lord BUCKMASTER, Lord DUNEDIN, and Lord SHAW.

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and decree (9th December 1909) of the District Judge of Vizagapatam.

The suit from which this appeal arose was brought by the present respondent, the Maharaja of Bobbili, for the refund of a sum levied under the Madras Irrigation Cess Act (Madras Act VII of 1865, as amended by Madras Act V of 1900) and paid under protest, and for a declaration that he was entitled to use the water in question for irrigation in a village called Narayanapuram free of cess.

The plaintiff stated in his plaint that the channel from the river Suvarnamukhi through which the water ran for irrigation was constructed upwards of a century ago by the then zamindar of Palkonda, owner of a neighbouring zamindari, now in the possession of Government; that the plaintiff's lands had ever since been irrigated by water from the channel, and that he and his predecessors in title had from time to time repaired the channel, and constructed sluices in it at their own expense, and (paragraph 8) that he was entitled to the irrigation of his lands from the channel free of charge as a riparian proprietor, and by virtue of long user, custom, prescription, and easement, and according to an understanding and agreement between his predecessors in title and the then zamindars of Palkonda and (since the Palkonda estate was forfeited by those zamindars, and became the property of Government) between his predecessors in title and himself on the one hand and the Government on the other.

The defendant in his written statement alleged (inter alia) that both the river and the channel were the absolute property of Government, and were a Government source of irrigation; that there was no such understanding or agreement, nor any right by user, custom, prescription or easement as alleged; and he claimed to be entitled to levy water rate under Madras Act VII of 1865 upon all lands in the village in suit found to be in excess of the permanent settlement wet area on which a second wet crop was now raised.

Issues were settled of which those now material were, (*a*) whether the Suvarnamukhi river belongs to Government? (*b*) whether the plaintiff is entitled to the declaration sued for on any of the grounds alleged in paragraph 8 of the plaint, and

whether the special agreement therein pleaded is legal and valid? (c) what was the extent of wet land in Narayanapuram at the time of the permanent settlement, and at the time of the construction of the channel? what was the extent, if any, of such land under second crop at the time of the permanent settlement, and was that extent, if any, taken into account in fixing the permanent assessment? whether the plaintiff is liable to pay the water-rate imposed?

The District Judge held on the second issue that it was not necessary to come to a finding as to the ownership of the river, the only question being as to water taken from the channel, and as to the channel he held that it was constructed by the then zamindar of Palkonda between 1690 and 1780, and as the Government had succeeded to his rights by virtue of the forfeiture of the zamindari in 1833, it belonged to the Government. On the sixth issue the District Judge said that the plaintiff could have no material rights based on riparian proprietorship, for the channel was an artificial one; but that the evidence showed: (a) that in 1814 the then Palkonda zamindar undoubtedly admitted the right of plaintiff's predecessor to irrigate his land from the channel through five sluices, and that there were now only four: (b) that in 1865, 1901 and 1903, after the Government had acquired the zamindari, the right of the plaintiff to irrigate his lands from the channel was recognized by the Government, and he was allowed to construct masonry sluices from it at his own cost; and (c) that no charge had ever been made for the water so used until 1907, when the tax in suit was levied; that it appeared therefore that the plaintiff had enjoyed the right certainly since some time between 1801 (the date of the permanent settlement) and 1814 down to 1907, without charge; and that from this fact, in his opinion, a grant or agreement in respect of it might reasonably be inferred, and that the Government could only have succeeded to the zamindar's title to the channel subject to rights already acquired. He held, therefore, that there was no evidence to show that the Government had in any way improved the supply of water in the channel flowing to his lands through the four sluices now in existence. As to the eighth issue he said that was immaterial, as the plaintiff was entitled to use the channel as he liked, the only restriction being as to the number

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of sluices; and in the result, therefore, he held that the plaintiff was entitled to a refund of the amount claimed and to the declaration prayed for, and made a decree accordingly.

The defendant appealed to the High Court, and Sir ARNOLD WHITE, C.J., and OLDFIELD, J., remanded the suit to the Trial Judge for further findings (1) as to the ownership of the river; (2) as to whether the 160 acres in respect of which the Government claimed the right to levy water-cess were at the time of the permanent settlement taken into account as wet land, for the purposes of the settlement; and (3) as to whether subsequent to the permanent settlement there had been an engagement with Government under which the plaintiff had become entitled to irrigation free of separate charge as regards those 160 acres.

On the first question the District Judge found that the river belonged to Government: on the second, that the lands in suit were not taken into account at the permanent settlement: and on the third, on the evidence, he found that subsequent to the permanent settlement there was an implied engagement by Government to supply the plaintiff with water from the channel in the same ways as before the forfeiture, that the Government continued to recognize his right to take the water for a period of more than 70 years after the forfeiture, and that an engagement must therefore be implied on the part of Government to allow the plaintiff to continue to take the water through the existing four sluices for the purpose of irrigation, free of separate charge.

These findings were returned to the Appellate Court, and on 17th April 1914, the same Judges as before delivered judgment on the second and third. On the third the Chief Justice said he could not concur with the Trial Judge that there had been "an engagement with Government" subsequent to the permanent settlement within the meaning of the Act: on the second he said he was not prepared to differ from the conclusion of the Trial Judge and Mr. Justice OLDFIELD, that the lands in suit were not taken into account at the permanent settlement. On the third finding, OLDFIELD, J., said he was unable to accept the finding of the Trial Judge, but on the second he upheld the finding.

The case, however, was put down for further consideration on the first finding, whether the river belonged to Government or

not, and came before WALLIS, C.J., and Mr. Justice SESHAGIRI AYYAR.

WALLIS, C.J., said that in the present case the banks and bed of the river at the place in question belonged to the zamindar, and the Government did not own the banks or bed or any part of them until far below the point where the channel in question took off. He held, therefore, that the river could not be considered as one belonging to Government so as to warrant the levy of water-cess under Madras Act VII of 1865.

SESHAGIRI AYYAR, J., agreed. He said the proprietorship of a river could only be based on the right to the banks and bed of the stream through which it ran, and that on this principle the Government who in this instance owned neither bed nor banks could lay no claim to the water.

The appeal was therefore dismissed.

ON THIS APPEAL

Sir Erle Richards, K.C., and *Konworthy Brown*, for the appellant, contended that both the river and the water channel belonged to Government, at any rate since the forfeiture in 1838, and that the respondent was liable to pay the cess duly levied under Madras Act VII of 1865. It was admitted that there was no engagement, either express or implied, between Government and the predecessor in title of the respondent at the permanent settlement which entitled him to use the water from the channel free of cess; and it is submitted that the High Court has rightly held that no such engagement had been made since the permanent settlement; and if there had been one it would not have been 'an engagement' within the proviso to section 1 of the Act. Reference was made to *Kandukuri Balasurya Row* v. *Secretary of State for India*(1). The lands in suit in the present case were not irrigated from the channel at the permanent settlement. Persons owning the banks of non-tidal rivers in India were not for that reason owners of part or the whole of the river bed: some owners of the bed or part of it are not for that reason owners of the river. In any case, the respondent is not the owner of both banks of the river at the place where the channel takes off, and that is stated in the judgments now under appeal. Further, a zamindar who is permitted, or

(1) (1917) I.L.R., 40 Mad., 886; L.R., 44 I.A., 166.

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otherwise entitled, to use a Government supply of water for the purpose of irrigation is not for that reason alone exempted from liability under the Act.

Upjohn, K.C., Sir W. Garth and *J. M. Parikh*, for the respondent, were not called upon.

The JUDGMENT of their Lordships was delivered by

Lord SHAW.

Lord SHAW.—This is an appeal against a decree of the High Court of Madras, dated 27th October 1915, which affirmed a decree of the District Judge of Vizagapatam, dated 9th December 1909. The suit was brought by the Maharaja of Bobbili, viz., the present respondent, for the refund of a sum levied under the Madras Irrigation Cess Act (VII of 1865), and paid under protest, and for a declaration that he was entitled to use the water from a certain channel for irrigation of the village of Narayanapuram, free of the cess.

The respondent was the owner of a village called Narayanapuram in the district of Vizagapatam. For upwards of a century the lands of this village have been irrigated by the water of the Suvarnamukhi river flowing through an artificial channel known as the Sakarapalli channel. The river runs through the respondent's estate (amongst others), and its banks and bed in its course through that estate admittedly belong to him.

The history of the facts may be stated in one or two sentences. The Suvarnamukhi river rises in zamindari land and flows through zamindari land up to the suit village of Narayanapuram. From this river a channel was constructed by a zamindar of Palkonda, no doubt for irrigation purposes. Apparently in order to obtain a suitable flow, the river had to be tapped at a point considerably above the Palkonda lands, and the river being so tapped the channel proceeded therefrom through the lands of *inter alias* the predecessor of the present Maharaja, who is the respondent.

The Trial Judge is of opinion that the channel was probably constructed somewhere between 1690 and 1780. The evidence is not clear as to the exact date at which certain sluices, four of which still remain, were constructed from the channel for the purpose of irrigating the respondent's lands. The Courts below have come to the conclusion that the irrigation of the village is not proved to have taken place prior to the permanent settlement

of the year 1801, notwithstanding the fact that, as already stated, the Trial Judge is of opinion that the channel itself was constructed many years earlier. It is unnecessary for the Board to enter upon the question whether a conclusion of this kind, which is more of the nature of a conjecture with regard to the probabilities of an obscure situation, could be classed as a concurrent finding of fact precluding a different finding here; but their Lordships must not be held as acceding to the view, founded upon the state of the permanent settlement record, that the absence of express notice of the sources of water supply, warrants the conclusion that such a supply—from the channel admittedly in existence then and for many years before—was not furnished to the respondent's lands.

As to the state of matters at the beginning of the 19th century, their Lordships agree with the view of the District Judge when he says:—

"The plaintiff relies upon Exhibit C, as showing that in 1814 the then zamindar admitted the right of plaintiff's predecessor to irrigate his lands from the channel through five *punathas* (sluices). There can be no doubt about this. This document was proved as Exhibit IV, in the connected suit O.S. No. 13 of 1906, on behalf of the defendant. Its existence was then probably not known to the plaintiff, as it was only produced for the first time at the hearing of O.S. No. 13 of 1906. It shows conclusively that while the Palkonda zamindars owned the channel, the plaintiff's right to irrigate his Narayanapuram lands through five *punathas* was admitted and recognized, and that no labour or contribution was provided by the village for repairing the channel. The oral evidence shows that the zamindar (plaintiff) is in fact only enjoying four *punathas* now."

Two outstanding facts accordingly appear with regard to the irrigation of this property, namely, that for over at least one hundred years it has been enjoyed as matter of *right*; secondly, that no pecuniary return was made therefor. In short, the case appears to be the simple one, viz.:—that, for land given as part of the channel artificially constructed for irrigation purposes, a right to draw off water as it passed was conferred upon the respondent's predecessors and himself, and that that right has been enjoyed by them ever since. It is in these circumstances that the question arises whether the respondent is liable to pay an irrigation cess in virtue of the Madras Act VII of 1865,

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as amended by Madras Act V of 1900. No claim in respect of these lands was made until the year 1907. Payment was made under protest, and the present suit to determine liability was instituted.

The case depends upon the proper construction to be put upon the Act referred to. Its preamble is not without importance :—

"Whereas, in several districts of the Madras Presidency, large expenditure out of Government funds has been, and is still being, incurred in the construction and improvement of works of irrigation and drainage, to the great advantage of the country and of proprietors and tenants of land; and whereas 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 is enacted as follows :— . . . "

So far as the preamble goes, the Act would not appear to be directed against lands such as those of the respondent; for it is admitted that no works or action of the Government have either created or increased the supply of water to his lands. It is nevertheless true, as was indicated by Lord PARKER in his judgment in *Kandukuri Balasurya Row* v. *Secretary of State for India*(1), that section 1 of the Amending Act makes operative provisions somewhat in excess of the apparent ambit of the preamble. If so, the section must govern.

It is in the following terms :—

"Sections 1 and 4 of the Madras Act VII of 1865 . . . shall be read and construed as if at the time of the passing of the said Act there were and have been inserted in lieu of the said sections the following, viz. :—

"(*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by Government, and also,

"(*b*) Whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and, in the opinion of the Collector, subject to the control of the Board of Revenue and of the

(1) (1917) I.L.R., 40 Mad., 886; L.R., 44 I.A., 166.

Government, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land,

"It shall be lawful for the Government to 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 which, such water-cess as aforesaid shall be levied and alter or amend the same from time to time.

"Provided that where a zamindar or inamdar or any other description of landholder not holding under *ryotwari* settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more . . ."

The respondent's position is that of a zamindar not holding under '*ryotwari* settlement'; he is, therefore, a person directly pointed to by the proviso just cited, and in view of the history of the lands as already sketched, the question is at once raised as to whether this zamindar is "by virtue of engagements with the Government" entitled to irrigation free of separate charge. If he is, then no cess is leviable in respect thereof; nor would any cess have been leviable under the Act of 1865 as unamended: for by section 4 of the Act of 1865 there is a similar proviso of exemption. The reason for such a proviso is not far to seek. The Government was contemplating irrigation works, and along with these the financing of those operations; and the preamble indicates not obscurely that the financing was to be met by way of a fit return to Government on account of the increased profits which would be derivable from lands irrigated by such Government works. If, however, in consequence of other arrangements, or, as section 1 puts it, 'engagements,' the irrigation had been accomplished and financed apart from expenditure under the statute, then those lands should stand free from the statutory cess.

The question accordingly in the present case is whether there are such 'engagements with the Government'. On this question there was a sharp division of opinion in the Courts below, and it is necessary to state how it is that the Government's claim to be owner of the channel arises. In the year 1833 the Palkonda zamindar rebelled against the Government. His lands were in consequence forfeited to the Crown. As already stated, the artificial channel was at that time constructed, and the

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irrigation as a system applicable to the lands of Bobbili was in full operation. No attempt was made by the Government of the day to change the footing upon which the irrigation rights were enjoyed, or to assert any right in the Crown, as owner of the servient tenement of Palkonda, which would lessen or interfere with the continued enjoyment of the easement by the respondent's predecessors, as of right and without exaction or charge.

What was the nature of this right of easement? It was to receive and utilize for irrigation purposes from an artificial channel a supply of water. It is, of course, in accord with legal theory that such a right of easement is created by grant, but it is also sound law that a grant of such a right is presumed from long possession, although the actual transaction of making such a grant cannot be discovered or proved. The present case is accordingly in no way singular in this respect, that the acts of parties over a long course of years point to the enjoyment of an easement founded upon a grant by the owner of the servient to the owner of the dominant tenement.

Upon the facts of the present case it appears to be clearly established that for about fifty years, namely from 1814 till 1865, when the Act was passed, the owners of Palkonda and the zamindar of Bobbili stood in the position of having, the one a servient, and the other a dominant tenement, with the unchallenged enjoyment of the easement of water-supply as stated. Had the question now in suit accordingly arisen in the year 1864, there seems little reason to doubt that the right of the respondent would have been settled upon that footing.

But the matter does not end there. The Act of 1865 was passed, and for forty-two years the same state of matters was continued. Had this suit been raised in the year 1866 instead of 1907, a serious question would still even then have arisen, namely, whether the words in the section 'engagements with the Government' did not require a construction inclusive of engagements with the Government or its predecessors in title, as only by such a construction could justice be done to the manifest intention to reserve as against water cess those who had already been furnished with their own water-supply.

The position is strengthened by the further lapse of time and, in their Lordships' view, the Government must stand committed to the transactions which they have accepted as binding parties for a period of between eighty and ninety years, during which (including forty years since the Act was passed) the zamindari of Bobbili has been enjoyed without any question that the zamindar held under a tenure which gave him the benefit of the proviso in the statute.

This view is in no way in conflict with the view of Lord PARKER in the case referred to. On the contrary, it appears to be supported by certain passages in that judgment. His Lordship refers to the permanent settlement in the Madras Presidency under which the Government granted to the zamindars

"a permanent property in their land for all time to come, and would fix for ever a moderate assessment of public revenue on such lands, the amount of which should never be liable to be increased under any circumstances";

and he adds:

"Under these circumstances the Government could not impose cess for the use of water, the right to use which was appurtenant to the land in respect of which the *jumma* was payable without in fact, if not in name, increasing the amount of such *jumma*, and thus committing a breach of the obligation undertaken at the time of the permanent settlement."

With regard to the actual question in the present case, judgment was expressly reserved. Referring to the difficulties which arise in the construction of the Act and the fact that the levy is made on the basis of the area irrigated, irrespective of profits, Lord PARKER said:

"If in order to avoid this result reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner."

That question so reserved is the point now in issue. In their Lordships' opinion such an engagement should be implied in the circumstances already set out. The predecessors of the respondent were using the water as of right when the servient zamindari was forfeited to the Crown in 1833; with the owners of that zamindari they had, to use the general term employed in

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the statute, a good 'engagement': in taking the servient estate, this engagement accompanied the transaction, and the engagement was thereafter with the Crown. In short, the forfeiture could not operate against a dominant and unforfeited zamindari. With acquisition by forfeiture the Crown became bound to take the forfeited estate *tantum et tale*, as it stood in the subject who had rebelled, that is to say, to respect the rights and in particular the easements enjoyed by others. Otherwise the scope of the forfeiture would be extended; *pro tanto* it would fall upon innocent and loyal subjects.

This is sufficient for disposal of the appeal. The case was unfortunately much delayed owing to various causes not sufficiently explained. Time also was occupied by a remit for inquiries in regard to the ownership of the river itself from which the water was drawn by the channel. While their Lordships do not differ from the conclusion upon that topic arrived at by the High Court, they are of opinion that the case should be determined on the simpler ground above stated. In their Lordships' opinion the Crown has failed to establish the liability of the respondent.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: *Solicitor, India Office.*

Solicitor for the respondent: *Douglas Grant.*

J.V.W.