# THE

# INDIAN LAW REPORTS,

## Madras Series.

## APPELLATE CIVIL.

*Before Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Munro.*

SRI RAJA CHELIKANI RAMA RAU AND OTHERS (CLAIMANTS), APPELLANTS IN SECOND APPEAL No. 1434 of 1904,
SRI RAJA BALLAPRAGADA VENKATA SUBBA ROW GARU AND OTHERS (CLAIMANTS AND SECOND CLAIMANT'S LEGAL REPRESENTATIVE) APPELLANTS IN SECOND APPEAL No. 1435 OF 1904,

1908.
January 21
22, 23,
24, 28.
March 27.
1909.
Septembe
30.

*v.*

THE SECRETARY OF STATE FOR INDIA REPRESENTED BY THE DISTRICT FOREST OFFICER, GODAVARI (DEFENDANT), RESPONDENT IN BOTH.*

*Limitation—Adverse possession—Party relying on title by adverse possession against Crown must prove 60 years' adverse possession—Burden of proof shifted on Crown by proof of adverse possession for shorter period.*

A party who rests his title on possession adverse to the Crown must prove such possession for 60 years.

*Secretary of State for India* v. *Vira Rayan*, [(1886) I.L.R., 9 Mad., 175], explained.

Where lands have been notified as a reserved forest under the Madras Forest Act, a claimant desirous of establishing his title against the Crown by adverse possession must prove adverse possession for 60 years before the notification.

Where adverse possession for a shorter period is proved, it lies on Government to show that it has a subsisting title, by showing that such possession commenced within 60 years before such date.

In this part of India, it is a well established rule of common law that waste land, not being the property of an individual or community, belongs to Govern-

Islands formed within 3 miles of the mainland vest in the Crown.

* Second Appeals Nos. 1434 and 1435 of 1904.

BENSON, C.J., AND MUNRO, J.

SRI RAJA CHELIKANI RAMA RAU v. SECRETARY OF STATE FOR INDIA.

SECOND APPEALS against the decrees of F. H. Hamnett, District Judge of Godavari, in Appeal Suits Nos. 591 and 593 of 1903, presented against the decrees of E. A. Smith, Forest Settlement Officer, Kistna, etc., District, in Claims Nos. 1 and 2 of 1902, respectively.

The facts necessary for the report are set out in the judgment.

*T. Subramania Ayyar* for appellants.

The Government Pleader for respondents.

JUDGMENT.—These are appeals by the claimants against the decrees of the District Court of Godavari in Appeal Suits Nos. 591 and 593 of 1903 confirming the decisions of the Forest Settlement Officer of Godavari in Claims Nos. 1 and 2 of 1902. These were claims by the Mallavaram and Nadavapalli Estates, respectively, to land at the mouth of the Godavari which Government by a notification, dated the 2nd December 1901, proposed to form into a reserved forest. Both claims, being intimately connected, were dealt with by the lower Appellate Court in one judgment, and in this Court the same arguments were put forward on behalf of both sets of claimants. It was first contended that, as the appellants were in possession at the date of the notification, the lands should not have been notified as a reserved forest. This contention was properly dealt with and overruled by the Forest Settlement Officer in paragraph 7 of his judgment in Claim No. 1. The appellant's pleader did not attempt to argue the matter before us, but contented himself with stating this objection.

It was further contended that the right of the Crown would be barred if the claimants succeeded in proving 12 years' adverse possession prior to the coming into force of the limitation section of Act IX of 1871, and if Madras Regulation II of 1802 applied to suits to enforce public rights. The contention was based upon certain remarks in the case of the *Secretary of State for India* v. *Vira Rayan*(1). The remarks are at pages 185 and 186 of the report and are as follows:—

"The clause of Act XV of 1877 which precluded the revival "of a right to sue barred was not confined to that Act, but was "extended to Act IX of 1871. The words are 'All references to

(1) (1886) I.L.R., 9 Mad., 175.

"the Indian Limitation Act, 1871, shall be read as if made to "this Act, and nothing herein or in that Act contained shall be "deemed to revive . . . . any right to sue barred under that "Act or under any enactment thereby repealed.' Had this stood "alone and had we come to the conclusion that Regulation II of "1802, section 18, applied to public rights, we should have "agreed with the Judge that 12 years' adverse possession would "have barred the right of the Crown to sue." When these remarks were made it was apparently thought that Regulation II of 1802 was repealed by Act IX of 1871. Regulation II of 1802 was not repealed by Act IX of 1871. This was discovered in the course of the argument before us and the contention was then dropped. We have however referred to the matter because it seemed desirable to point out the misconception on which the remarks in *Secretary of State for India* v. *Vira Rayan*(1) were based. It is now clear that if the claimants had to establish a title by adverse possession they would have to prove such possession for 60 years before the notification.

The main portion of the land in dispute lies between Hope Island on the north and a channel called Neelarva on the south. The District Judge finds that the claimants have been in possession since 1882 of the portions of this tract claimed by each of them.

The District Judge has further found that this tract together with that portion of Yalakalatippa which is shown in exhibit I, consists of islands formed in the bed of the sea at the mouth of the Godavari. This finding is attacked, but there is in our opinion evidence to support it, and we must accept it. No doubt the District Judge is possibly in error in assuming that exhibit I, a map published in 1842, correctly represents the outlines of the coast and adjacent islands in that year. The survey on which the map is based may reasonably be supposed to have been made some time before 1842, and between the survey and 1842, some changes in the outlines may have occurred. This possible error however in no way affects the correctness of the finding now in question inasmuch as the finding applies to the portion of Yalakalatippa shown in exhibit I as well as to the land subsequently formed.

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(1) (1886) I.L.R., 9 Mad., 175.

BENSON, C.J., AND MUNRO, J. — SRI RAJA CHELIKANI RAMA RAU *v.* SECRETARY OF STATE FOR INDIA.

The District Judge has next found that the title to the islands in question originally vested in the Crown. It is admitted before us that all the islands were formed within 3 miles of the main land. The rule of English law is that islands arising out of the sea belong *primâ facie* to the Crown—*vide* the "Law of Waters, Coulson and Forbes", 2nd Edition, page 31. In the absence of local usage or statutory enactment to the contrary the same rule would apply in British India—vide *Secretary of State for India* v. *Kadirikutty*(1). It is argued however that the rule of English Law abovementioned no longer holds good owing to the decision in *Reg.* v. *Keyn*(2). The reason generally given for the rule is that the King is the owner of the soil beneath the sea. Since the case of *Reg.* v. *Keyn*(2), this reason can apparently no longer be resorted to in support of this rule. But that circumstance by itself is no reason why the ancient rule should not continue to be followed. If it were necessary to find support for the rule it could, no doubt, be found in the well established rule of the common law of this part of India that waste land which is not the property of an individual or a community belongs to the Government, or it may be correct to regard the title of the Crown as similar to the title by escheat as suggested in *Secretary of State for India* v. *Kadirikutty*(1) with reference to the observations of the Privy Council in the case of *The Collector of Masulipatam* v. *Cavaly Venkata Narrainapah*(3); "private ownership not existing, the State must be owner as ultimate Lord."

The District Judge then holds that as the title was originally in the Crown the claimants must prove adverse possession for 60 years. Here the District Judge is clearly wrong. Though the title was originally in the Crown, still, as the possession of the claimants for 20 years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, *i.e.*, within 60 years before the notification. *Secretary of State for India* v. *Vira Rayan*(4), *Secretary of State for India* v. *Bavotti Haji*(5), *The Secretary of State for India* v. *Kota Bapanamma Garu*(6). As the several islands were

(1) (1890) I.L.R., 13 Mad., 369 at p. 376.
(2) (1876) 2 Ex.D., 63.
(3) (1860) 8 M.I.A., 500 at p. 525.
(4) (1886) I.L.R., 9 Mad., 175.
(5) (1892) I.L.R., 15 Mad., 315.
(6) (1896) I.L.R., 19 Mad., 165.

formed gradually and probably appeared and became capable of occupation at different times, it may be that there is proof that some if not all of them came into existence as land capable of occupation within 60 years prior to the notification. In the case of such land the title of the Crown must be a subsisting title. In the case of lands which came into existence as land capable of occupation more than 60 years prior to the notification, the Crown must show by evidence that it had a subsisting title at sometime within that period.

We must therefore ask the District Judge to return a finding as to whether the Crown has a subsisting title to the whole or any portions of the claim land lying between Hope Island on the north and Neelarva on the south.

Further evidence on both sides on this question may be adduced before the District Judge as the true point in issue was not correctly understood by the parties at the trial. The finding should be returned within five months from date of the receipt of this order and ten days will be allowed for filing objections.

The remaining land in dispute consists of the plots B and C in the plan exhibit II. As to these plots the finding of the District Judge is that they arose as islands out of the sea subsequent to 1842, and we are of opinion that there is evidence to support the finding. The plots thus came into existence within 60 years of the notification. The title to them was originally with the Crown and there has not been sufficient time for that title to be lost. The claim with regard to these plots was therefore rightly rejected.

In compliance with the above order, the District Judge submitted the following finding :—

I accordingly find that the Crown has no subsisting title to the whole or any portion of the claim land lying between Hope Island on the north and Neelarva on the south.

These Second Appeals coming on for final hearing after the return of the above finding, the Court delivered the following

JUDGMENT.—We accept the finding and allow the claim to the lands dealt with in this finding. The decrees of the Courts below will be modified accordingly.

The appellant in Second Appeal No. 1435 of 1904 will get full costs throughout.

In Second Appeal No. 1434 of 1904 the appellant has succeeded in part only. Each party will pay and receive proportionate costs.

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## APPELLATE CIVIL.

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

1909. March 1, 2, 3, 5, 17.

S. R. M. A. RAMASWAMI CHETTIAR (PETITIONER), APPELLANT,

*v.*

OPPILAMANI CHETTI AND ANOTHER (DECREE-HOLDER AND PURCHASER), RESPONDENTS.*

*Decree, execution of—Who ought to be made representative—Person with the best* primâ facie *title sufficiently represents estate.*

A decree-holder who has to apply for execution against the legal representative of the deceased judgment-debtor, may select, from among several rival claimants, as legal representative, the one whom he believes honestly to have the best *primâ facie* title and the representation, in the absence of fraud or collusion, will be sufficient, even though it is subsequently found out some other person is the true legal representative.

*Khiarajmal* v. *Daim,* [(1905) I.L.R., 32 Calc., 296], explained.

APPEAL against order of V. Subramaniyam, Subordinate Judge of Tanjore, in Execution Application No. 619 of 1905 in Execution Petition No. 45 of 1903 (Original Suit No. 23 of 1889).

Application under sections 244 and 311 of the Civil Procedure Code of 1882 to set aside sale of villages in execution of a mortgage decree.

One O obtained a mortgage decree against K as guardian of his minor son P. Subsequent to the decree P attained majority and died issueless. K thereupon took possession of the properties under color of a will alleged to have been executed in his favor by P. Certain persons claiming to be the sapindas of the deceased P, and, as such his heirs, sold their rights in the estate of P to one R. R filed a suit to set aside the alleged will of P and to recover possession of the properties. While the suit was pending O applied for execution of the decree making K the legal representative of the deceased P, and the two villages in respect of which

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* Civil Miscellaneous Appeal No. 183 of 1905.