APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and *Mr. Justice Pakenham Walsh.*

1929, September, 4.

SRI RAJAH BOMMADEVARA NAGANNA NAIDU BAHADUR AND ANOTHER (DEFENDANTS 1 AND 2), APPELLANTS,

v.

SRI RAJAH BOMMADEVARA SATYANARAYANA VARAPRASADA RAO AND FOUR OTHERS (PLAINTIFF AND THIRD DEFENDANT AND NEW RESPONDENTS), RESPONDENTS.*

Alluvion and diluvion—Slow and gradual accretions to one shore of a non-navigable river—Ownership of, when bed belongs not to the owner of the shore but to another.

Slow and gradual accretions to one shore of a non-navigable river belong to the owner of that shore, even when the bed of the river belongs to another, in the absence of any fixed boundary marking off the shore from the river-bed.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Bezwada in Original Suit No. 50 of 1923 (Original Suit No. 9 of 1921 in the Sub-Court of Bezwada).

The deceased father of the plaintiff sued in O.S. No. 15 of 1896 his brother, the deceased father of defendants 1 and 2, for partition of the Vallur Zamindari, their family property, and got a decree for partition in 1902, under which the southern half of the Zamindari was later on allotted to plaintiff's father while the northern half was allotted to the defendants' father. The whole Zamindari abutted one side of the river Kistna. Plaintiff brought this suit in 1921 for the recovery of 90 acres of

* Appeal No. 327 of 1924.

land alleging that in the partition effected under the above decree the bed of the river also was divided between the brothers, that his father got the river-bed lying east of the North Vallur, but that the defendants later on encroached upon 90 acres of land which were slow and gradual accretions lying between such river-bed and the defendants' bank. The defendants while admitting the division of the mainland denied any division of the river-bed in virtue of the decree and pleaded that each party was allowed to enjoy the river-bed in accordance with his legal rights, viz., that each was to enjoy the river-bed just opposite to his mainland *ad medium filum aquæ*. The Subordinate Judge held that there was a division of the river-bed as pleaded by the plaintiff and that as owner of such river-bed the plaintiff was in law entitled to the 90 acres, viz., the silted portion, though it lay near the defendants' bank. Plaintiff's claim for mesne profits against defendants 1 and 2 was allowed only for 3 years before suit while the claim for mesne profits against the Government, the third defendant, was disallowed. The defendants 1 and 2 preferred this appeal against the decree and the plaintiff preferred a memorandum of objections claiming mesne profits for more years from the defendants 1 and 2 or in the alternative from the Government. The other contentions raised by both sides appear from the judgment.

V. Ramadas for appellant.—There was no division of the river-bed between the parties in pursuance of the decree. Even if there was a division of it, the portion now claimed by the plaintiff was not allotted to him. The decree is silent about it. Even if the river-bed was allotted to him, the 90 acres which are slow and gradual accretions to the shore belong only to the owner of the shore and not to the owner of the river-bed; *Secretary of State for India* v. *Rajah of Vizianagaram*(1),

(1) (1921) I.L.R., 45 Mad., 207 (P.C.).

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Attorney-General of Southern Nigeria v. *John Holt & Co., Liverpool, Ltd.*(1), *Hindson* v. *Ashby*(2), *Foster* v. *Wright*(3). He referred to *Micklethwait* v. *Newlay Bridge Co.* (4), *In re Hull and Selby Railway*(5), *Secretary of State for India* v. *Rajah of Vizianagaram*(6), *Venkatalakshminarasamma* v. *Secretary of State*(7), *Secretary of State for India* v. *Venkatanarasimha Naidu*(8).

K. Kuttikrishna Menon for the first respondent (with *V. Surya Narayana*).—The river-bed also was divided under the decree and the bed east of defendants' mainland was allotted to plaintiff's father. They were regarded as belonging to him; see *Secretary of State for India* v. *Venkatanarasimha Naidu*(8). The case of *Venkatalakshminarasamma* v. *Secretary of State*(7), lays down only a presumption as to ownership of accretions; but where the boundaries are well marked or can be clearly proved, as in this case, there is no room for the presumption and the accretions belong to the owner of the river-bed; Dass on Riparian Rights, pages 208, 213, Halsbury, Vol. 28, page 362; Hunt on Boundaries, 5th Edn., page 26; Coulson and Forbes on Waters, 4th Edn., pages 37, 38, *Micklethwait* v. *Newlay Bridge Co.*(4), *Attorney-General* v. *Chambers*(9), *Attorney-General of Southern Nigeria* v. *John Holt & Co.*(1). I am entitled to mesne profits for the previous years also, against all the respondents.

V. Govindarajachari for fourth respondent.—The boundary between the shore and the river is well marked by survey stones in this case. In such a case the accretions belong only to the owner of the river-bed; *Attorney-General* v. *Reeve*(10) and *Ford* v. *Lacey*(11).

V. Ramadas in reply.—There is no fixed boundary. 45 E.R., 28 is disapproved of in *Hindson* v. *Ashby*(2).

P. Venkataramana Rao (Government Pleader).—No mesne profits can be claimed against the Government, *Secretary of State* v. *Varaprasada*(12).

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(1) [1915] A.C., 599, 612, 614. (2) [1896] 2 Ch., 1.
(3) (1878) 4 C.P.D., 438, 446. (4) (1886) 33 Ch.D., 133 at 152.
(5) (1839) 5 M. & W., 328; 151 E.R., 139.
(6) (1916) I.L.R., 40 Mad., 1083. (7) (1918) I.L.R., 41 Mad., 840.
(8) (1919) 11 L.W., 256.
(9) (1859) 4 De. G. and J., 55; 45 E.R., 22.
(10) (1885) 1 T.L.R., 675. (11) (1861) 7 H. & N., 151; 158 E.R., 429.
(12) (1929) A.I.R. (Mad.), 520.

PAKENHAM WALSH, J.—This appeal arises in the following circumstances. The plaintiff's father and the father of defendants 1 and 2 were brothers and owned the Zamindari of Vallur. The plaintiff's father who was the junior brother brought a suit for partition in 1896 and obtained a decree against the father of defendants 1 and 2 (Exhibit QQ) in O.S. No. 15 of 1896, dated 31st March 1902. In the division made at this partition South Vallur fell to the share of the plaintiff's father and North Vallur to that of the father of defendants 1 and 2. The river Kistna had been corroding its banks and the Government started conservancy operations in 1893. The conservancy operations resulted in a gradual accretion to the mainland on the Vallur side of about 704 acres. The father of defendants 1 and 2 claimed the accretions as his own as being the owner of the foreshore. He brought a suit in 1912. The Government opposed his claim on the ground that the river was navigable. The plaintiff's claim in that suit was allowed; vide *Secretary of State* v. *Venkatanarasimha Naidu*(1). The present plaintiff whose father had died was a minor at the date of this litigation and his estate was under the Court of Wards. There was no representation made by the Court of Wards during this litigation that he had any claim to any part of the accretions. The Government was ordered in that suit to pay about three lakhs mesne profits to the plaintiffs. On attaining his majority the present plaintiff has filed the present suit saying that 90 acres out of the 704 acres of accretion belonging to him were wrongly taken possession of by the father of the defendants. He bases his claim on an assertion that at the time of the division the eastern portion of the river-bed

(1) (1919) 11 L.W., 256.

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which adjoins North Vallur was assigned to his father and that as these 90 acres formed part of the river-bed he is entitled to them. Two questions therefore arose in the suit, one of fact and one of law. The question of fact was whether the river-bed was divided at the partition so as to award its eastern half to the plaintiff's father. The question of law is whether, assuming that the river-bed belonged to his father, the accretion to the mainland would belong to the plaintiff or defendants. It is not denied that it is a gradual accretion and has been caused by the planting of nannul grass during the river conservancy operations. The lower Court has found that the river-bed was divided in the manner alleged by the plaintiff and, on the question of law, that he is entitled to the accretion which then formed part of the river-bed. It has therefore given a decree for recovery of possession of the suit land against defendants 1 and 2, subject to the provisions of the Rivers Conservancy Act. It has allowed the plaintiff mesne profits to be recovered from defendants 1 and 2 for faslis 1330, 1331 and 1332; but it has disallowed his claim for mesne profits as against the third defendant, the Secretary of State for India. Against this decree, defendants 1 and 2 have preferred this appeal.

The initial difficulty which the plaintiff has to meet is that the decree on which his whole claim rests—for it is admittedly not based on his possession—is entirely silent as to the alleged division of the river-bed contended for by him. We specially sent for the decree, plans and records connected with it from the District Court, and there is no such division, as the plaintiff alleges, dividing the river-bed, to be found on the record. The contention of the defendants is that the river-bed continued to be enjoyed after the partition in the legal manner, i.e., the party owning land on the mainland

enjoyed the river-bed up to a half of its width and the other half was enjoyed by the party who owned the lanka opposite and as regards the bed between any two lankas each party enjoyed a half if one of the lankas belonged to each of them and the whole if one of them owned both the lankas. That being the normal and legal mode of possession, it rests very heavily upon the plaintiff to show that the method of division by which he got the entire river-bed east of a certain line drawn by the Special Deputy Collector, Mr. Nageswara Rao, P.W. 2, is a fact.

[After discussing the evidence on this point, his Lordship concluded as follows :]

Differing therefore from the view of the lower Court, we hold that the plaintiff has failed to prove that the eastern portion of the river-bed adjoining the North Vallur Estate was granted to his father at the time of the partition; and, if he fails to prove this, it must be held that the partition was made as contended for by the defendants that each riparian or lanka owner enjoyed up to the middle portion of the stream adjoining his share or lanka. In view of this finding, it is unnecessary to discuss at length the second question, whether, assuming that the plaintiff has proved that the river-bed is his, he is entitled to the accretions claimed. But we would hold against him on this point also differing from the view of the law taken by the lower Court.

The principle that the riparian owner owns a half of the river-bed *ad medium filum aquæ* is of course not disputed. In *Venkatalakshminarasamma* v. *Secretary of State for India*(1), which followed *Micklethwait* v. *Newlay Bridge Co.*(2), it was laid down that as regards a grant of land in India described as bounded

(1) (1918) I.L.R., 41 Mad., 840 (F.B.). (2) (1886) 33 Ch., 133.

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by a non-navigable river, the onus of showing that the grant did not cover the bed *ad medium filum aquæ* was on the grantor. That even where the owner of the river-bed is different from the riparian owner, a gradual accretion to the shore will belong to the riparian owner and not to the owner of the river-bed is laid down by the Privy Council in *Secretary of State for India* v. *Rajah of Vizianagaram*(1). There the accretion was in the Gōdāvari river at a point where it was tidal and navigable and the bed was the property of the Government; it was nevertheless held that the accretion belonged to the riparian owner. That case is really sufficient to settle the whole matter before us. But as the learned Subordinate Judge has taken a different view of the law and there has been some discussion on it before us, the matter may be pursued a little further. In *Foster* v. *Wright*(2), it was held that the person who possessed fishery rights in a river was entitled to fish in that part of the river which had covered the riparian owner's lands by gradual encroachment. So also, in *In re Hull and Selby Railway*(3), it was held that, where there was a gradual encroachment by the sea upon land, the land covered by the water belonged to the Crown. In *Hindson* v. *Ashby*(4), the view of ROMER, J., that a strip of land formed by gradual accretion in a river belonged to the landowner and not to the person possessing fishery rights in the river was upheld. But on the facts it was found not to be a case where the accretion was gradual. *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool), Ltd.*(5) is a case where the principles of gradual accretion do not apply; but there are some remarks which bear on the present

(1) (1921) I.L.R., 45 Mad., 207. (2) (1878) 4 C.P. D., 438.
(3) (1839) 5 M. & W., 328; 151 E.R., 139.
(4) [1896] 2 Ch., 1. (5) [1915] A.C., 599.

case and they will be quoted later. The learned Subordinate Judge has referred in paragraph 38 to the Bengal Regulation, XI of 1825; but that has been held to be not applicable in Madras; vide *Surya Row Bahadur* v. *Secretary of State for India*(1). The present also is not a case of a small, shallow river silting up gradually. Doss's Tagore Law Lectures on the Law of Riparian Rights, page 209, relied on by the learned Subordinate Judge in the same paragraph is not applicable to the present case. The principles applicable to the present case will be found at page 261 of the same book where the learned author states:

> "*Right to accretions by alluvion.*—This right arises *ex jure naturae* wherever land abuts on a river, whether the bed of the river be the property of the riparian owners as in the case of private rivers, or the property of the Crown as in the case of public rivers."

Vide also his remarks at pages 151 to 156. The learned Subordinate Judge admits that it was argued before him that the Bengal Regulation was not applicable to the Madras Presidency. But he draws an inference from the decision in *Venkatalakshminarasamma* v. *The Secretary of State for India*(2), referred to above, that it logically follows from that decision that in the special cases where the ownership of the bank and the ownership of the river-bed adjoining it are in different persons, all accretions formed in the river-bed must go to the owner of the river-bed. That this does not follow has been decided by the Privy Council in *Secretary of State for India* v. *Raja of Vizianagaram*(3). There is really only one difficulty about the law on the point and that no doubt is a somewhat serious one, namely whether, when there has been

(1) (1911) I.L.R., 36 Mad., 57 at 61.
(2) (1918) I.L.R., 41 Mad., 840 (F.B.). (3) (1921) I.L.R., 45 Mad., 207.

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a demarcation of the river-bed, the results of the accretions formed go to the riparian owner or the owner of the river-bed. The learned Advocate for the respondents relies on 28 Halsbury, page 362 and *Attorney-General* v. *Chambers*(1). This latter case was mentioned in *Hindson* v. *Ashby*(2), by LINDLEY, L.J., who had also decided *Foster* v. *Wright*(3), as being apparently opposed to the decisions in *Leigh* v. *Jack*(4), *Rex* v. *Lord Yarborough*(5), *Gifford* v. *Lord Yarborough* (6), and *In re Hull and Selby Railway Co.*(7). What he says is:

"Whether, apart from the Statute of Limitation, the accretions, or the land left by the water, can become the property of the plaintiffs or cease to be the property of the defendant, is a question of considerable difficulty, and one which, in my view of the facts, it is not now necessary to decide. Passages were cited from Bracton, Britton, Fleta, and Hale de Jure Maris, c.i. and vi., and the Year-book, 22 Ass, fo. 106, pl. 93, to show that the doctrine of accretion does not apply where boundaries are well-defined and known. This may be if the boundary on the waterside is a wall, or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water, except the water itself."

Then he quotes the cases which were opposed to the view and says,

"But it is unnecessary to dwell more on this question, and I leave it for reconsideration and decision when it shall arise."

A full discussion of the law on the point is found in Coulson and Forbes' Law of Waters, fourth edition, pages 82 to 91, and Hunt's Boundaries and Fences, sixth edition, pages 35 to 48.

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(1) (1859) 4 De. G. & J., 55, 71; 54 E.R., 22.
(2) [1896] 2 Ch., I.
(3) (1878) 4 C.P.D., 438.
(4) (1879) 5 Ex., 264.
(5) (1824) 3 B. & C., 91; 107 E.R., 668.
(6) (1828) 5 Bing., 163 H.L.; 6 E.R., 491.
(7) (1859) 5 M. & W., 328; 151 E.R., 139.

There is no evidence at all in the present case that the boundary of the river was demarcated at any time. The learned Advocate for the respondents sought to establish such a state of things from the following statement of D.W. 2:—

"There are survey stones between the metta lands and the plaint lands. There are only the big stones planted at a distance of one furlong each by the River Conservancy Department."

The witness admits that he never inspected the plaint lands subsequent to the suit to see whether there were any survey stones. But in any case there is no evidence at all that the Conservancy Department planted any stones to demarcate the boundary of the river. Then it is attempted to be argued that because the defendants' riparian lands were surveyed, the western boundary of these lands must be taken to be the limits of the estate and also to be the eastern boundary of the river. Apart from the fact that it is not shown that defendants had any notice of such survey, this argument is clearly illusory, because as remarked before, if land on the bank of a river which is gradually silting up is surveyed at any particular time, though this will of course show the then limits of the riparian owner's property, it does not mean that it is the demarcated and fixed limit of the river-bed, and in the present case it is not even clear from the evidence that survey stones were planted along this western boundary of the defendants' land. In *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool), Ltd.*(1), it is observed:

"It need no longer be matter of doubt that the operation of the rule of adding to the ownership of riparian lands the property of the soil *ad medium filum* is not interfered with on

(1) [1915] A.C., 599 at 612.

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account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation or colouring does not in fact include any part of the bed of the river or of the street."

Hunt's Law of Boundaries and Fences, 6th edition, page 48, deals with this question of a marked boundary, where the author says:

> "Finally, it is submitted that the true solution of this troublesome question of accretion is to be found in the question—Yea or nay, was the boundary according to the intendment of the parties interested in its delimitation fixed by reference to a physical feature, subject to the incident of alteration through natural causes which is necessarily inherent in such a feature; or was it fixed by reference to the position of that physical feature as it then subsisted."

Now, taking the plaintiff's case as he puts it, there cannot, we think, be the smallest doubt that the proposal of the Special Deputy Collector, which the plaintiff says was carried into effect, was to give the river-bed to the plaintiff's father irrespective of any fixed boundary of such river-bed. There is not the smallest mention in any of his proposals of any fixed boundaries he proposed to give as those of the river-bed. Even in the plaint, this is clearly the attitude taken up. In paragraph 5, the plaintiff states that at the time of the partition the Special Deputy Collector drew a line bisecting the Kistna paya between certain lankas in such a manner that the river portion on the eastern side thereof and the lankas therein might fall to the share of South Vallur (i.e., the plaintiff's estate). In paragraph 6 he says that in accordance with the aforesaid partition the plaintiff's estate alone was entitled to the river portion on the eastern side and the lankas, and he further states in that paragraph that all the accretions newly formed such as lankas, etc., springing up in this plot passed only to the plaintiff's estate. It is not asserted in the plaint

that the western limit of the defendants' metta lands was to be considered as the eastern boundary of the river. On the point of law, therefore, even assuming that the plaintiff's father was assigned the river-bed east of the line drawn by the Special Deputy Collector, the accretions will still belong to the defendants who are riparian owners and the suit must fail and the appeal must be allowed.

The memorandum of cross-objections put in by the respondent must therefore also be dismissed. They relate to mesne profits paid by the Government to the defendants 1 and 2 as a result of the decree in the previous litigation. It becomes unnecessary to consider the question whether such money can be pursued by the plaintiff and recovered from the hands of defendants 1 and 2. But we may say as regards the alternative claim for its recovery from the Government that it is clearly untenable for the reasons stated by the learned Subordinate Judge in paragraph 47 of his judgment. Vide also *Secretary of State* v. *Varaprasada*(1).

The appeal will therefore be allowed throughout with costs in both the Courts and the plaintiff's suit dismissed. The memorandum of cross-objections is also dismissed with costs.

KUMARASWAMI SASTRI, J.—I agree and have nothing to add, as my learned brother has dealt fully with all the points raised.

N.R.

(1) (1929) A.I.R. (Mad.), 520.