APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., *Chief Justice, and Mr. Justice Bardswell.*

1933, February 14.

KONDEPATI AYYANNA (PLAINTIFF-FIRST RESPONDENT), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA, AND FIVE OTHERS (DEFENDANTS 1, 2 AND 4 TO 7—APPELLANT AND RESPONDENTS 2 TO 6), RESPONDENTS.*

Madras Irrigation Cess Act (VII of 1865), *sec.* 1 (*b*) *as amended by Amending Act (V of* 1900)—*Water-cess—Liability for—Test—Reservoir—Meaning of—Government village—Lands of, irrigated by channel taking off from natural stream maintained by Government—Surplus water of, flowing into zamindari villages by distribution channels or by drainage from lands of Government village and there stored in small ponds or natural depressions—Liability for cess for use of.*

The plaintiffs were the owners of lands situated in a zamindari village, C, which adjoined a Government village, A, the lands of which were irrigated from a channel which took off from a natural stream which was maintained by Government. The surplus water of the lands of village A flowed into village C either by distribution channels or by drainage from the lands of village A and were then stored in what were either small ponds or mere natural depressions.

Held that the Government was entitled to levy water-cess for the use of that water by the plaintiffs.

What has to be decided is not whether the water belongs to Government but whether it comes from a river or stream that belongs to Government. In the present case, as the water came from a channel which admittedly belonged to Government while that channel took off from a stream maintained by Government at a part where that stream flowed through

* Letters Patent Appeals Nos. 42 to 51, 93 to 96 and 108 of 1929 and 11 of 1930.

Government land, it might be taken as "belonging to Government" in the sense given to those words in *Secretary of State for India* v. *Subbarayudu*, (1931) I.L.R. 55 Mad. 268 (P.C.); and the natural ponds and depressions in which the water was stored were reservoirs within the meaning of section 1 (*b*) of the Irrigation Cess Act.

Observations of VENKATASUBBA RAO J. in *Syed Hyder Ali Sahib* v. *Secretary of State for India in Council*, Second Appeals Nos. 1519 and 1529 of 1927, as to the nature of the question arising under the Irrigation Cess Act, approved.

APPEALS, under clause 15 of the Letters Patent, against the judgments of PHILLIPS J. in Second Appeals Nos. 360, 363, 365, 366, 367, 370, 371, 373, 374, 376, 361, 362, 372, 375, 378 and 368 of 1924 and 1762 of 1926 preferred against the decrees of the Court of the Subordinate Judge of Kistna at Ellore in Appeal Suits Nos. 438, 441, 443, 444, 445 and 448 of 1922, 17, 27, 28 and 30 of 1923, 439 and 440 of 1922, 18, 29 and 29 of 1923, 446 of 1932 and 442 of 1922 preferred against the decrees of the Court of the District Munsif of Kovvur in Original Suits Nos. 758, 754, 764, 760, 757, 762, 755, 756, 765, 753, 759, 769, 766, 767 and 767 of 1920, 29 of 1917 and 772 of 1920.

S. Varadachariar and *V. Suryanarayana* for appellants.

Government Pleader (*P. Venkataramana Rao*) for respondents.

Cur. adv. vult.

JUDGMENT.

BARDSWELL J.

BARDSWELL J.—The suits under appeal have had a long history. The plaintiffs, who are ryots in the Gundepalli Zamindari, brought them for a declaration that the first defendant, who is the Secretary of State represented by the Collector of Kistna, is not entitled to levy water tax on the lands cultivated by them, for a refund of such tax already collected for three faslis

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and for other reliefs. The trial Court and the first appellate Court found in their favour but, on second appeal, OLDFIELD and SESHAGIRI AYYAR JJ. held that the suits had not been properly dealt with and remanded them for fresh disposal on issues that were then framed. After the remand the first two Courts again both found for the plaintiffs but, on second appeal, PHILLIPS J. dismissed the suits. These letters patent appeals are against his decision.

The lands of the plaintiffs are situated in the village of Chodavaram, a Zamindari village. That village adjoins the Government village of Ananthapalli the lands of which are irrigated from a channel known as the Ananthapalli channel. That channel takes off from the Yerrakalva a natural stream which is maintained by Government. The surplus water of the Ananthapalli lands flows into Chodavaram either by distribution channels or by drainage from the Ananthapalli lands and is then stored in what are either small ponds or mere natural depressions. The question that arises is whether or no the Government is entitled to levy a charge for the use of this water by the appellant-plaintiffs.

It is a matter of the interpretation of section 1 of Madras Act VII of 1865. In that Act as originally passed section 1 ran as follows:

"Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by, Government, it shall be lawful for the Government to levy, at pleasure, on the land so irrigated, a separate cess for the use of the water, which cess shall be additional to any land assessment that may be leviable on the said land as unirrigated or punja; 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."

By an amending Act, V of 1900, this section down to the words "constructed by Government" became clause (*a*) of section 1, and there was introduced a new clause (*b*) which runs thus:

(And also) "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 Revenue Officer empowered to charge water-cess, subject to the control of the Collector, the Board of Revenue and the Government) such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land;'

after which follows the rest of the original section with some modification that does not now concern us. The part of clause (*b*) about the opinion of the Revenue Officer, etc., as to the irrigation being beneficial was introduced by Madras Act VIII of 1914, and there is no question here of the opinion not having been expressed or of its being one that can be questioned in a Court of Law. The question is simply one of whether, allowing that the irrigation was beneficial, a charge for the use of the water can be made.

As has been pointed out by PHILLIPS J., what has to be decided is not whether the water belongs to Government but whether it comes from a river or stream that belongs to Government. In this case it comes from the Ananthapalli channel which admittedly belongs to Government while that channel takes off from the Yerrakalva at a part where that stream flows through Government land, so that it has to be taken as "belonging to Government" in the sense given to those words in the Privy Council decision in *Secretary of State for India* v. *Subbarayudu*(1). In *Secretary of State for India* v. *Swami Naratheeswarar*(2)

(1) (1931) I.L.R. 55 Mad. 268 (P.C.). (2) (1910) I.L.R. 34 Mad. 21.

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there is a decision by a Bench of this Court in a case where water flowed from what was admittedly a Government source into a taruvai (sheet of water) of which two-fifths belonged to the plaintiff, an inamdar, while the rest belonged to Government. The portion of the taruvai owned by the inamdar was the deeper portion and he was compelled to raise wet crops on dry lands because so much water came into the taruvai from the Government source as to cause it to overflow. In spite of this and in spite of the fact that some of the water in the taruvai was rain water, it was held that he was liable to pay the water-cess under section I (*b*). PHILLIPS J. has followed this decision but Mr. Varadachari contends that it is no longer good law. He refers to the Full Bench decision in *Chinnappan Chetty* v. *The Secretary of State for India*(1), but, as has been pointed out in the judgment on second appeal, the question then for consideration was that of whether, when a river flows first through ryotwari tracts, then through a zamindari and then again through a Government village, it was not a river belonging to Government at the place where it passes through the zamindari. This is not such a case. In *Rayudu* v. *Secretary of State for India*(2) RAMESAM J. has suggested a doubt as to the correctness of the decision in *Secretary of State for India* v. *Swami Naratheeswarar*(3) in the following passage which has been quoted by PHILLIPS J.—

"One might concede that where water from the Government source directly irrigates the inam, the inam is certainly liable to pay water-cess, but where the water from the Government source naturally flows into a tank or stream within the inam and then the water is used for irrigation it is only natural rights that are being enjoyed and therefore the inam is not liable for water-cess."

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(1) (1919) I.L.R. 42 Mad. 239 (F.B.). (2) (1927) I.L.R. 50 Mad. 961.
(3) (1910) I.L.R. 34 Mad. 21.

So far, however, as these remarks refer to tanks they appear to be contrary to the language of section 1 (*b*) which expressly makes liable to charge water which flows from a Government source into a reservoir and is thereafter used for irrigating any land under cultivation. A tank is certainly a reservoir and the natural ponds and depressions in which water is stored in the cases now under notice would equally come under that category. As has been pointed out by VENKATASUBBA RAO J. in an unreported decision, *Syed Hyder Ali Sahib* v. *The Secretary of State for India in Council*, to which RAMESAM J. was himself a party, in Second Appeals 1519 and 1529 of 1927 :

"The Irrigation Cess Act provides that, when water of a certain description is used for irrigating any land, it shall be lawful for the Government to levy cess for such water. The Act is not concerned with the question whether the water has or has not become the property of the person using it."

I do not find anything in *Secretary of State for India* v. *Subbarayudu*(1) that has any bearing upon what appears to be the plain meaning of section 1 (*b*) as to water that flows into a reservoir from a Government source whether by direct or indirect flow, percolation or drainage. The Privy Council decision in the *Urlam case*(2) has no bearing on this particular point. The tax, then, which has been imposed on the appellant-plaintiffs for the use of water would appear to be correct and in accordance with section 1 (*b*) of Madras Act VII of 1865 unless it can be shown that their case falls under the first proviso, to which I have now to refer.

That proviso runs thus :

"Provided that, where a Zamindar or Inamdar or any other description of landholder not holding ryotwari settlement is by virtue of engagements with the Government entitled to

(1) (1931) I.L.R. 55 Mad. 268 (P.C.). (2) (1917) I.L.R. 40 Mad. 886 (P.C.).

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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."

In their plaints the plaintiffs have set up mamool rights in accordance with a definite arrangement and "the immemorial usage". The definite arrangement or agreement of 1843 which was set up has been found against, but the learned Subordinate Judge, on first appeal after the remand, has held that in the circumstances the presumption of a lost grant could be reasonably inferred. PHILLIPS J. has remarked that only before the Subordinate Judge, when the suits had reached their fifth Court, was the theory of a lost grant raised, and that it was a new theory which could not be allowed to be taken at so late a stage. It certainly does not appear to have been taken when the suits first came before this Court on second appeal as the issues that were then framed raised the question of whether the plaintiffs were entitled to irrigation free of charge on any of three grounds,

(a) the agreement of 1843,

(b) any agreement entered into at the Permanent Settlement,

(c) by virtue of any easement.

The agreement of 1843 has, as stated already, been found against, while the plaintiffs have not and could not base their claim on any sanad at the time of the Permanent Settlement, as at that time the upper village of Ananthapalli did not belong to Government, but was included in the Nuzvid Zamindari. The right of easement has been found against on first appeal though the trial Court held that that right had been established. PHILLIPS J. has accepted the view of the learned Subordinate Judge as to this without comment. Mr. Varadachari contends that at any rate the matter of long

user has to be considered and that this has been set up in the plaint, while in the written statement of 9th January 1915 there has been a denial of customary right. In making the denial the written statement urged that the allegations in the plaint on the subject were very meagre, the reference being to what is stated in the plaint as to the claim of the plaintiffs being based on the "arrangement and the immemorial usage". It is also pointed out that the District Munsif who first tried the suits found that the plaintiffs were entitled to free irrigation in respect of the suit lands as they had cultivated them from time immemorial and had not extended their area of cultivation. It cannot, therefore, be said that the point of the plaintiffs having obtained right from long user was taken and considered only at a late stage of the suits. Mr. Varadachari argues that from the fact of long user which has certainly gone on for sixty years and more, it should be taken that there was at least an implied engagement by the Government for the appellant-plaintiffs to have the use of the water. He has referred in this connection to *Secretary of State for India in Council* v. *Maharajah of Bobbili*(1) and *Secretary of State for India* v. *Subbarayudu* (2), but neither of these decisions is upon facts corresponding to those now under notice. The former was a case of water being taken from a channel part of which flowed through the land of a Zamindar whose right to take water from that part of it which flowed through his land was in question. The latter was one of taking water from a river by a party having riparian rights. In the former case, too, it was found that the former owners of the Palakonda Zamindari, to whose position the Government had succeeded, had

(1) (1919) I.L.R. 43 Mad. 529. (2) (1931) I.L.R. 55 Mad. 268 (P.C.).

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agreed to the taking of water from the channel through five sluices by the Zamindar of Bobbili whose right so to take water was in question in the suit. Here there has been no such agreement. As has been pointed out by the Subordinate Judge who decided the first appeal, the agreement, Exhibit A, which the plaintiffs set up and which he did not find to be genuine, was not between one Zamindar and another, but between the Kapus and the Karnams of one village and the Zamindar of the other. Even if Exhibit A were genuine what was agreed to by the Kapus and Karnams could not bind their Zamindar, neither could it bind the Government which succeeded to his position; while the fact that the plaintiffs have set up this agreement of 1843 implies that there had been nothing in the way of an engagement prior to that year. Is there anything in the circumstances from which it can be inferred that there has been an implied engagement at any later time? I think not. For one thing it is very doubtful whether the charge could have been made under section 1 of Act VII of 1865 and before the addition of section 1 (*b*) by Act V of 1900, in which case during the period from 1865 to 1900 the Government in not imposing the tax was not foregoing the making of a charge which it was entitled to make. Certainly it was only by the introduction of section 1 (*b*) that its right to make the charge was made clear and the tax appears first to have been imposed in fasli 1321, that is, 1911-12. And further, as is shown in paragraph 7 of the first appellate judgment, there has not been a continuous and consistent use of the water by the plaintiffs or their predecessors by the aid of which they could raise their crops and which could be deemed beneficial. In some years there has been insufficient water for the raising of crops and in some years there has been an excess of

it. When such is the case I do not see how there can be either an implied engagement or the acquisition of an easement. Nor is it a case of natural flow. It is a matter of water over-flowing from higher lands to lands lying lower down. The supply of water is precarious and, when, in the circumstances, the plaintiffs cannot be held to have obtained any prescriptive right, they cannot insist on its coming down in any sufficient quantity to enable them to raise crops or even on its coming down at all. It is not at all the case of water flowing naturally down a river or stream or any naturally formed watercourse. Mr. Varadachari has referred us to illustration (*j*) to section 7 of the Indian Easements Act but that does not seem to have any application to the circumstances of this case.

In my view the decision of the learned Judge under appeal is correct. These appeals must, therefore, be dismissed with costs.

BEASLEY C.J.—I agree.

A.S.V.

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Before Mr. Justice Ramesam and Mr. Justice Mockett.

1932, October 5.

IN RE NUKALA VENKATANANDAM AND TWO OTHERS (APPELLANTS), PETITIONERS.*

Court Fees Act (VII of 1870), *sec.* 7 (*iv*) (*f*)—*Partnership—Accounts of—Appeal relating to—Valuation of, for purposes of court-fee—Appellant's right to give his own valuation—Amount ultimately found due to appellant larger than amount of valuation—Levying of additional court-fee in case of—Procedure for.*

In an appeal relating to the accounts of a partnership the appellant, whether plaintiff or defendant, can give his own

* Civil Miscellaneous Petition No. 3403 of 1932.