PRIVY COUNCIL.

* J.C. 1934, January 16.

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS, APPELLANTS,

v.

RAMESWARAM DEVASTHANAM (BY ITS TRUSTEES) AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Appeal to High Court—Jurisdiction in Second Appeal—Inference of fact—Documentary evidence—Irrigation—Easement—Code of Civil Procedure (Act V of 1908), sec. 100.

The rule that the High Court has no jurisdiction under section 100 of the Code of Civil Procedure, 1908, to reverse the findings of fact of a lower appellate Court, unless the findings are vitiated by error of law, applies although the findings are inferences of fact drawn, wholly or in part, from documents.

A channel, completed in 1872, carried water from a river for the irrigation of two riparian villages, *S* and *A*, of which *S* was the upper riparian property. The channel left the river higher up than a channel which had existed for a long time. In 1910 a Collector made an order regulating the flow of water in the 1872 channel so that village *A* should receive a supply when the water was low. The inamdar of *S* sued the Government and the *A* ryots, contending that *S* village had a prior right of supply, and claiming a declaration. The trial Judge, and the District Court on appeal, dismissed the suit. Both Courts found that village *S* had never had any share in the water from the old channel, and that village *A* had the exclusive right to the customary supply of water through the old channel by long user, going back, the District Judge thought, for some 200 years:

Held, that the High Court had no jurisdiction to reverse the finding, which amounted to a finding that the *A* ryots had acquired an easement and was fatal to the plaintiff's claim.

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* *Present:* Lord THANKERTON, Sir JOHN WALLIS, and Sir GEORGE LOWNDES.

Wali Muhammad v. *Muhammad Bakhsh*, (1929) I.L.R. 11 Lah. 199, 207 ; L.R. 57 I.A. 86, 92, applied.

APPEAL (No. 91 of 1931) from a decree of the High Court (August 27, 1925) modifying on second appeal a decree of the District Judge of Tinnevelly (November 10, 1919) which affirmed a decree of the Subordinate Judge of Tuticorin (January 3, 1917).

The suit raised a question as to the respective rights of the inamdar of the Sethukkuvoithan estate (plaintiff-respondent No. 1) and the ryots of Attur, a Government ryotwari village (appellants Nos. 2 to 4, and *pro forma* respondents Nos. 2 to 23), in the distribution of the water of the river Tambraparni by a Government scheme of irrigation ; both the inam and the ryotwari villages were situate upon the right or south bank of the river, the former being higher up than the latter.

The facts appear from the judgment of the Judicial Committee.

The Subordinate Judge dismissed the first respondent's suit and his decree was affirmed by the District Judge upon grounds which appear in the present judgment. Upon a second appeal to the High Court the learned Judges (RAMESAM and VENKATASUBBA RAO JJ.), modifying the decree, made a declaration that the plaintiff was entitled to low water to the extent adequate to irrigate 228 acres of single crop land and 178 acres of double crop land, provided that at least this quantity of water was available in the channel *JK* ; it was also directed that the Government should remove a drop at point *Q*.

SECRETARY OF STATE FOR INDIA v. RAMESWARAM DEVASTHANAM

DeGruyther K.C. and *Pringle* for first appellant.

Dunne K.C. and *Narasimham* for first respondent.

SIR JOHN WALLIS.

The JUDGMENT of their Lordships was delivered by Sir JOHN WALLIS.—This is an appeal from the concurrent judgments of a Bench of the Madras High Court modifying, on second appeal, the decree of the lower appellate Court which had dismissed the suit, and giving the plaintiff a decree for the principal relief claimed in the plaint. The question is mainly one of fact, and it is well settled that under section 100 of the Code of Civil Procedure the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law. Subsequently to the date of the judgments under appeal, the Board has had occasion to emphasise the fact that this rule is equally applicable to cases, such as this, in which the findings of the lower appellate Court are based on inferences drawn from the documents exhibited in evidence. [See *Anup Mahto* v. *Mita Dusadh*(1).] This question is dealt with in the third and fourth propositions laid down in the judgment delivered by Sir BINOD MITTER in *Wali Muhammad* v. *Muhammad Bakhsh*(2) :

"(3) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials, have

(1) (1933) L.R. 61 I.A. 93, 102.
(2) (1929) I.L.R. 11 Lah. 199, 207; L.R. 57 I.A. 86, 92.

to be construed for the purpose of deciding the question: see *Midnapur Zamindary Company* v. *Uma Charan Mandal*(1).

In the last cited case the question the Board had to decide was the date of the origin of an under-tenure. The first appellate Court fixed the date from the contents of some documents. No oral evidence had been called in this case.

(4) A second appeal would not lie because some portion of the evidence might be contained in a document or documents, and the first appellate Court had made a mistake as to its meaning: see *Nowbut Singh* v. *Chutter Dharee Singh*(2)."

The first question, therefore, for their Lordships' consideration is whether in the light of this ruling the High Court had any jurisdiction to reverse the judgment of the lower appellate Court.

The Rameswaram temple in the narrow straits between India and Ceylon, which is regarded by Hindus as one of their most important shrines, is the owner of a revenue-free inam for the performance of certain services in the temple on the south bank of the Tambraparni river in the extreme south of the peninsula, known as the Sethukkuvoithan estate, and hereinafter referred to as the *S* village; and the present suit was instituted by the temple trustee against the first defendant, the Secretary of State for India in Council, in respect of an order passed by Mr. Lionel Davidson, then Collector of Tinnevelly, regulating the distribution of water under the Tambraparni project between the *S* village and the adjoining village of Attur, which is situated lower down the river. The Attur ryots were subsequently impleaded as supplemental defendants 2 to 21. Defendants 2, 4 and 8 have joined with the first defendant, the Secretary of State

(1) (1923) 29 C.W.N. 131 (P.C.). (2) (1873) 19 W.R. 222 (P.C.).

SECRETARY OF STATE FOR INDIA v. RAMESWARAM DEVASTHANAM.

SIR JOHN WALLIS.

for India in Council, in preferring this appeal to His Majesty in Council, and the other defendants have been cited as respondents.

Prior to the introduction of the Tambraparni project the lower portion of the river, which here flows from west to east, had been harnessed for irrigation by six anicuts or dams with channels taking off above the anicuts ; and on the south bank, below the last of these anicuts but higher up than the two suit villages, there had been a sluice *C* and a channel *CG* known as the Attur channel, which, after passing through some Government villages and the *S* village, discharged into the Attur tank.

The Tambraparni project, which was first put forward in 1855 and taken up in 1868, consisted in the construction of a seventh anicut at a place called Srivaikuntam, sixteen miles from the mouth of the river and three or four miles above the sluice *C* of the Attur channel, with north and south main channels taking off above the new anicut and leading to the coast towns of Tuticorin and Tiruchendur, and branch channels taking off from these main channels.

The present case is only concerned with the branch channel *JK*, which took off from the south main channel, crossed the old Attur channel by an aqueduct *E*, seven miles below the new anicut, and, after passing through certain villages which it was intended to irrigate between the Attur channel and the river, discharged into the *S* village tank, in which a vent was constructed to pass the water into the Attur channel for the supply of the Attur tank. This method of supplying the Attur tank was adopted because when the

water in the river was low the new anicut diverted the supply which the Attur tank had till then received through the sluice *C*. This system remained in force from 1872, when the anicut was completed, until 1877, when, owing to complaints of the Attur ryots, one of the walls of the aqueduct *E* was lowered so as to allow water to drop into the Attur channel at this point. There were further changes in 1882, when a Government order was passed directing the destruction of the aqueduct *E*, the closing of the vent in the *S* tank, and the construction near the point *E* of a sluice *N* for the supply of the channel discharging into the *S* tank and a drop to pass water into the Attur channel. The result would have been that all water not drawn off through the sluice *N* would have passed into the Attur channel and supplied the Attur tank.

Instead of a drop, what was constructed was a dam *M* which entirely cut off the Attur supply when the water was low until an opening was made in the dam a year later. In 1893 the Chief Engineer for Irrigation, in the course of an inspection tour, condemned this dam, which, he said, had been erroneously styled a drop, as entirely disturbing the Attur regime, with the result that, in place of the sluice *N* and the dam *M*, shutters were constructed which enabled the supplies to the channels leading to the *S* tank and to the Attur channel to be regulated. According to the finding of the District Judge, at first the shutters were so worked as to give the Attur ryots a supply of the low water, but after March 1901 the Attur shutters were kept closed until there was a head two feet nine inches of water in the channel, with the

SECRETARY OF STATE FOR INDIA v. RAMESWARAM DEVASTHANAM.

SIR JOHN WALLIS.

result that the Attur supply of low water was cut off. The Attur ryots thereupon presented a petition to Mr. Buckley, then Collector of Tinnevelly, who directed that this system should cease and that, as the Attur old channel appeared to have taken off above the old *S* village channel, the Attur ryots should be given the preference when water was not sufficient for the standing crops under both tanks. On the 26th April 1909, the Attur ryots presented a further petition to Mr. Lionel Davidson, the then Collector, in which they complained that effect had not been given to Mr. Buckley's order, and intimated that, if the existing invasion of the rights were allowed to continue, they would be obliged to seek redress in a Court of law. Mr. Davidson referred this petition to the District Executive Engineer, an officer belonging to the Public Works Department, for early remarks, with the observation that the petitioners' sole request was that Mr. Buckley's order should be duly enforced. This incident was closed some months later by an official letter from the Executive Engineer of the District on the 12th February 1910, submitting proposals which he considered would give the Attur ryots a somewhat better supply of low water than they had received through the opening in the dam *M*. This he considered would be only fair in view of their prior rights and the larger area they had under cultivation. These proposals were accepted by Mr. Davidson, who passed the following order of the 21st April 1910, which has given rise to the present suit and is the subject of this appeal :—

"I have inquired into this question, hearing orally the arguments of Kuppa Avadhani on behalf of the Attur ryots and Minakshisundaram Pillai on behalf of Sethukkuvoithan ryots.

It is not disputed that there was originally an open space of some 3 square feet in the dam existing before the present regulator was constructed, and the low water-supply admittedly flowed through that opening to Attur. The Attur ryots have without proper authority for some eight or nine years past been denied that supply by an order of the Public Works Subdivisional Officer. This order was repudiated by the late Executive Engineer, Mr. Lutman, and Mr. Buckley as Collector definitely set it aside and recorded his opinion that the Attur ryots had preferential claims. In these circumstances I approve the Executive Engineer's proposal, which is that when the depth of water above the sill of the Attur regulator falls to a level of 2 feet 6 inches, one of the present shutters shall be completely closed and the other lowered to a level 6 inches above the sill so as to leave an open vent-way of 3 square feet (6 feet by 6 inches)."

The case made in the plaint was that as upper riparian proprietor the plaintiff had a prior right to a supply of water from the river; that his village *S* had been irrigated by a channel taking off from a sluice *A*, and the Attur village by a channel taking off from a sluice *B* lower down; that the Attur irrigation through sluice *B* having become impracticable, owing to the deepening of the river bed, a sluice *C* had been constructed higher up the river, and a channel, *CG*, leading to the Attur tank; that this sluice and channel had been constructed for the benefit of both villages, and that the *S* village had always enjoyed prior rights of supply when the water in the channel was low. After setting out the changes that had taken place under the Tambraparni project, which have already been sufficiently described, the plaint alleged that the Collector's order of the 21st April 1910, which prevented water flowing as usual into the *S* tank, was illegal, and a cause of damage to the plaintiff. The plaint

SECRETARY OF STATE FOR INDIA v. RAMESWARAM DEVASTHANAM.

SIR JOHN WALLIS.

accordingly prayed for a declaration of the plaintiff's right to have a head of two feet nine inches of water maintained as before for the supply of the *S* tank and for damages. There were also prayers for other reliefs which were either not pressed, or arose out of the plaintiff's claim to share in the waters of the Attur channel before the introduction of the project which was rejected by the District Judge, whose finding on this point has not been disturbed by the High Court.

The case was tried before the Subordinate Judge of Tuticorin, who dismissed the suit, and his decree was affirmed on appeal by the District Judge of Tinnevelly. It was found by both Courts, on a careful consideration of the available evidence, that the plaintiff's *S* village had never had any share in the waters of the old Attur channel, and that the Attur village had acquired the exclusive right to the customary supply of water through the sluice *C* and the old Attur channel by long user, going back, the District Judge thought, for some two hundred years.

The Attur sluice *C*, being situated higher up the river than both villages, this, in their Lordships' opinion, amounted to a finding that the Attur ryots had acquired an easement against all the lower riparian proprietors, including the plaintiff, to draw off their customary supply of water through this sluice and channel, a right in no way depending on their position as riparian proprietors lower down the river. The District Judge also found that the plaintiff had failed to prove that the Government had contracted with him to give the *S* village a priority of supply. These findings, in their Lordships' opinion, are

sufficient to dispose of the case, as the plaintiff has failed to prove that he sustained any damage by reason of Mr. Davidson's order, which was based on the priority as to the supply of low water in the river which the Attur ryots had enjoyed before the introduction of the Tambraparni project interfered with their customary supply. Far from being prejudiced by the project, the plaintiff's *S* village, as found by the District Judge, on the evidence before him, obtained thereby a supply of river water for the *S* tank which it had been unable to obtain in the exercise of the plaintiff's riparian rights within the limits of the *S* village by the sluice *A* and the channel leading therefrom.

Unless the District Judge's aforesaid findings were contrary to law within the meaning of section 100 of the Civil Procedure Code, the High Court had no jurisdiction to modify his decree, and, after hearing this question fully argued for the respondent and considering the judgments of the lower appellate Court and the High Court in the light of the decision referred to at the beginning of the judgment, their Lordships are of opinion no such error of law has been made out.

Their Lordships are therefore of opinion that the judgments and decree of the High Court should be set aside and the decree of the District Judge restored, and they will humbly advise His Majesty accordingly. The plaintiff-respondent will pay the appellants' costs, both here and in the High Court, but one set only.

Solicitors for first appellant: *Solicitor, India Office.*

Solicitors for first respondent: *T. L. Wilson & Co.*

A.M.T.