capital assets. The case comes within the principle stated by the House of Lords in *Scottish Provident Institution* v. *Allan*(1).

As the answer is against the assessees they must pay the costs of the Commissioner of Income-tax, Rs. 250.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Madhavan Nair.

RAI SAHIB C. MADURANAYAKAM PILLAI (PLAINTIFF), APPELLANT,

1938, November 7.

v.

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

Water—Madras Presidency—Rights and obligations of Government as regards regulation and distribution of water in respect of lands in the old and new ayacuts.

Before 1870 the water in two tanks near the city of Madras, viz., Red Hills tank and Cholavaram tank, was used merely for the purpose of irrigating lands in their vicinity and the water in the Red Hills tank was sufficient in a normal year for the cultivation of one crop at least in an ayacut of over 5,000 acres. In 1870 the Government undertook a scheme to increase the storage capacity of these tanks with the primary object of supplying water to Madras. It contemplated the storage of sufficient water to bring under cultivation a further area, as well as supplying the old ayacut and Madras. The scheme was completed in 1872 and an additional area was brought under cultivation as the result of the increased water

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(1) (1903) 4 T.C. 591.

* Original Side Appeal No. 71 of 1936.

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supply. The owner of certain lands in the old ayacut filed a suit against the Secretary of State for India in Council for a declaration that he was entitled to have sufficient water each year for the cultivation of two crops on his lands without regard to the needs of Madras and for damages on the ground that in certain faslis the crops on his lands were damaged as the result of the Government withholding from him the water to which he was entitled. The suit was resisted on the following grounds: (i) The Government had an absolute right to regulate the distribution of water or to withhold it both with regard to the lands in the old ayacut and those brought under cultivation subsequent to the carrying out of the scheme. (ii) As the primary object of the scheme was to provide a water supply for Madras, any rights which the plaintiff had before the scheme came into operation had been put an end to by the project, the ryots having taken the risk of the water supply being restricted in return for the benefit to be derived from the scheme.

Held: (i) In the Madras Presidency a ryot is entitled to receive the water which his lands have been accustomed to for irrigation purposes without interference by the Government or anyone else. The Government cannot be required to supply water when none is available and it has a right of conserving and distributing the water available in the interests of the particular ayacut. In years of shortage the only obligation of the Government is to make an equitable distribution of water. The ryot has a claim against the Government when it withholds from him the water which he had a right to demand taking into consideration the supply available. The Government is not entitled to economise water in seasons or months of shortage in order that a perennial supply may be available for the city of Madras, if this economy meant that the ryots in the old ayacut would have their customary supply diminished.

(ii) The plaintiff is entitled to have a declaration that he is entitled to sufficient water for the cultivation of one crop per annum without reference to the needs of the city of Madras, subject to the power of the Government to control the distribution of available water in the interests of the landholders whose lands comprised the old ayacut.

The plaintiff was awarded damages for the infringement of his right by the Government.

APPEAL from the judgment of WADSWORTH J., dated 15th September 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 371 of 1929.

T. R. Venkatarama Sastri and *Srinivasaraghavan* and *Thyagarajan* for appellant.

Advocate-General (Sir A. Krishnaswami Ayyar) for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal raises a question of great public importance. The Court is called upon to decide what the powers of the Government are with regard to the distribution of water in two reservoirs, or tanks as they are usually called in India, from which the city of Madras receives its water supply. One tank is known as the Cholavaram tank, and the other as the Red Hills tank. They lie close to one another, some fifteen miles from the city of Madras. Before 1870 when the Government undertook a scheme to increase the storage capacity of these tanks with the primary object of supplying water to Madras, the water in the tanks was used merely for the purpose of irrigating lands in the vicinity. Near to the tanks is the river Cortelliar, but before the scheme was carried out there was no connection between the river and the tanks and the level of the water in them depended on the rain which fell in the catchment area. The evidence, however, discloses that the water in the Red Hills tank was sufficient in a normal year for the cultivation of one crop at least in an ayacut of over 5,000 acres. The scheme provided for the damming of the Cortelliar river, the diversion of water impounded by this dam into a channel in the Cholavaram tank and the construction of another

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channel connecting the Cholavaram tank with the Red Hills tank. The scheme was a costly one, but as it contemplated the storage of sufficient water to bring under cultivation a further area, as well as supplying the old ayacut and Madras, the Government anticipated meeting the cost out of the increase in land revenue which would follow from an extension of the irrigated area. The scheme was completed in 1872 and an additional area was brought under cultivation as the result of the increased water supply. The Government has, however, always regarded the scheme as being in the first instance for the benefit of Madras, and the question which falls for decision is whether the Government is entitled to supply Madras with water without regard to the rights of the cultivators in the old ayacut as they existed in 1870.

The suit out of which the appeal arises was filed on the Original Side of this Court by the appellant against the Secretary of State for India in Council. The appellant is the owner of some 43·44 acres of lands in the old ayacut. The fact that the lands fell within the old ayacut was denied, but it was held that they did and this finding has not been challenged before us. The appellant asserted that he was entitled to have sufficient water each year for the cultivation of two crops on his lands and this without regard to the needs of Madras. He complained that in faslis 1336 and 1337 (1926–27 and 1927–28) the crops on his lands were damaged as the result of the Government withholding from him the water to which he was entitled. He assessed the total damage at Rs. 5,523–7–6 and asked for a decree for this amount. He also asked for a declaration of his rights. In the written statement filed on behalf of the Secretary of State it was denied that the appellant had the right to be supplied with any definite quantity of water or

to claim damages on the ground that water had been withheld from him. It was said that the Government had an absolute right to regulate the distribution of water or to withhold it both with regard to the lands in the old ayacut and those brought under cultivation subsequent to the carrying out of the scheme. It was also said that, as the primary object of the scheme was to provide a water supply for Madras, any rights which the appellant had before the scheme came into operation had been put an end to by the project, the ryots having taken the risk of the water supply being restricted in return for the benefit to be derived from the scheme. The respondent put the appellant to strict proof that certain of his lands were " wet " lands pertaining to the old ayacut and denied that he was in any event entitled to water for the cultivation of a second crop. The case was tried by WADSWORTH J. who held that the appellant was entitled to sufficient water for the cultivation of one wet crop a year on his lands, but subject to the power of the Government to control the distribution of water with reference to (i) the need for conserving water in the interests of the whole ayacut, and (ii) the need for economising water in seasons or months of shortage in order that a perennial supply might be available in the tank for the use of the municipality. On this basis the claim for damages was dismissed.

With regard to the nature of the appellant's lands the respondent has contended that 38·87 acres out of the total area of 43·44 acres are not really wet lands, that is, lands which are entitled to the supply of water for cultivation purposes. It is said that they are " wet waste lands " and as such have no right to water from the channels under the control of the Government. This contention is based on a deed of conveyance,

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dated 7th August 1866, in which the lands are described as being "wet waste lands". Before us the learned Advocate-General has conceded that the 38·87 acres must be classified either as wet lands or as dry lands, there being no intermediate classification. We consider that all the lands must be classified as wet lands. They were so classified in the settlement of 1875 and have since been so classified. The paimash accounts of 1840 which would have shown the classification in that year were destroyed by an order of the Government, dated 26th March 1938, and cannot be referred to, but there is no reason to believe that the classification then was different. On the question whether before the scheme the appellant's lands carried with them the right to sufficient water for the cultivation of two crops, the learned trial Judge held that the evidence established that except in years of unusually small rainfalls the lands on the ayacut received a regular supply of water for the irrigation of the first crop and a somewhat precarious supply of water for a second crop over a portion of the area. In the minutes of the proceedings of the Madras Government, Public Works Department, dated 26th April 1870, it is stated that the Red Hills tank as it stood before the scheme was carried out would probably suffice for the whole area for the first crop and for a good deal of second crop cultivation. In subsequent official reports reference is made to the fact that lands in the old ayacut were well irrigated before the scheme, but there is no statement to be found which indicates a right to water for a second crop. We concur in the finding of the learned Judge and hold that before the scheme was carried into effect the appellant's lands were in a normal year entitled to receive from the Red Hills tank sufficient water for the cultivation of one crop.

In carrying out the scheme the engineers placed the level of the municipal sluice at 31·31 feet above mean sea level, but in order to avoid pumping and to allow water to reach Madras by gravitation it was necessary to have at least six feet of water always stored in excess of requirements. In 1892 the Chief Engineer for Irrigation pointed out that the supply by gravitation to Madras could not be well assured till the level was plus 38, and on his recommendation the Government directed that this level should be maintained. In 1908 it was ordered that there should be a complete stoppage of the issue of water for irrigation purposes during the months of July and August, even if the level was in excess of plus 38. In the year 1926 the rainfall was below normal and on 30th November 1927 the Government ordered that no water should be withdrawn for irrigation from either tank till the level of the water in the Red Hills tank had reached plus 44·67, which meant a full tank. On 22nd August 1928 the rules for the issue of water were again changed. It was then ordered that, so long as the level of water in the tank was at plus 38 or lower, no water would be issued for irrigation. If the level rose above plus 38, water would be issued for irrigation from 1st September to 14th October (inclusive), but the supply was liable to be cut off, if in the meantime the water level in the tank fell to plus 38. During the north-east monsoon, the issue of water for irrigation would be stopped from 15th October and would not be resumed till 15th December or until the full tank level (plus 44·67) was reached, whichever date was later. After 15th December the issue of water would be continued till 31st January, if in the meantime the level did not fall to plus 38, but if it did fall to that level the issue would be stopped. In pursuance of the policy

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of safeguarding the supply of water to Madras the supply to the appellant was cut off altogether in the year 1926–27 and in 1927–28 no water was supplied to him in the months of August, September, October and November. In these years the water in the Red Hills tank was far in excess of what it was when the project was undertaken and no attempt has been made by the learned Advocate-General to show that the rainfall in 1926 was so small that the appellant would not have received sufficient water for the cultivation of one crop if the Red Hills tank had not been improved, but had remained as it was in 1870, and it must be taken, at any rate so far as the year 1926–27 is concerned, that the appellant's rights, assuming them to be the same as they were in 1870, were disregarded.

This brings me to the question whether the appellant's rights have undergone a change by reason of the scheme and the answer entails an examination of the authorities. I may say at once that the contention that the ryots in the old ayacut undertook a risk and that for benefits to be derived from the scheme they surrendered their rights cannot be sustained. So far as the Court is aware the ryots were not even consulted with regard to the scheme, and far from surrendering their rights they have from time to time protested against the preference given to Madras.

In *Kristna Ayyan* v. *Vencatachella Mudali*(1) it was held that the Government had an undoubted right to distribute the water of Government channels, but that power did not include the power to disturb existing arrangements to the prejudice of any tenant during the continuance of the tenancy, and this decision was quoted with approval in *Ramachandra* v.

(1) (1872) 7 M.H.C.R. 60.

Narayanasami(1), which was a suit between ryots holding lands under the Government in which the Collector was joined as a defendant. With the sanction of the Collector the first defendant had opened a new irrigation channel, thereby diminishing the supply of water necessary for the cultivation of the plaintiff's land. The trial Court held that the Collector's order was in excess of his powers and issued an injunction directing the channel to be closed. The plaintiff was also granted a decree for damages. This decision was upheld on appeal. In *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(2) WHITE C.J., as the result of the decisions in *Kristna Ayyan* v. *Venkatachala Mudali*(3) and *Ramachandra* v. *Narayanasami*(1), considered it to be settled law that the Government had the right to distribute the water of Government channels for the benefit of the public, subject to the right of a ryotwari land-holder, to whom water had been supplied by the Government, to continue to receive such supply as would be sufficient for his accustomed requirements. The question was again considered by WHITE C.J. sitting with PINHEY J. in *Fischer* v. *The Secretary of State for India*(4) which concerned the rights of riparian owners. It was held that the Government had power, by the customary law of India, to regulate in the public interests, in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels, and of waters introduced into such rivers by means of works constructed at the public expense, and in the public interests, for purposes of irrigation, provided that they did not thereby inflict sensible injury on other riparian owners and diminish the supply they

(1) (1892) I.L.R. 16 Mad. 333.
(2) (1904) I.L.R. 28 Mad. 72.
(3) (1872) 7 M.H.C.R. 60.
(4) (1908) I.L.R. 32 Mad. 141.

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had hitherto utilized. The decision in *Fischer* v. *The Secretary of State for India*(1) was referred to in the judgment of the Privy Council in *Prasad Row* v. *The Secretary of State for India*(2) and with apparent approval, as their Lordships observed that the law of the Madras Presidency as to rivers and streams was certainly different in some respects from the English law.

In *Basavana Gowd* v. *Narayana Reddi*(3) WALLACE and KRISHNAN PANDALAI JJ. were called upon to state the legal position where the ryots of wet lands in two Government ryotwari villages, situated on opposite sides of a Government river, drew water for irrigation from channels under the control of the Government which were taken off at particular points in the river bed, and the ryots of one village moved the head of one of the channels to the detriment of the ryots of the other village. The Court held that a ryot of a ryotwari village acquired a legal right to the water when it reached his customary channel for the irrigation of his lands, and not merely when the water had reached his fields. It was open to the Government to alter at any time the manner and method by which it supplied the necessary water to a ryot, but by undertaking the obligation to supply him with water the Government also undertook that it should be at his disposal by the usual and customary method, that is by a channel constructed either by the Government or by the ryot or both, until and unless some other method was adopted. The ryot could not insist as against the Government that he had any right to have his supply carried by any

(1) (1908) I.L.R. 32 Mad. 141. (2) (1917) I.L.R. 40 Mad. 886 (P.C.).
(3) (1930) I.L.R. 54 Mad. 793.

particular channel and could not object to the Government altering the channel of supply, but he had a right as against the other ryots and even, subject to the Government's right to give him an equally efficient supply, as against the Government to the protection of law for that supply once it had passed into the channel earmarked for his supply. If the customary supply and manner of supplying according to the contractual or proprietary right were interfered with by private parties, such interference was an invasion of the ryot's rights and would give rise to a cause of action. The most recent decision by a Bench of this Court is that given in the case of *Secretary of State for India in Council* v. *Nageswara Iyer*(1). This appeal was heard by VARADACHARIAR and MOCKETT JJ. who accepted as correct the statement of the law in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(2). They pointed out that the rights and obligations as between the State and the ryot in this country, so far as supplying water for irrigation purposes was concerned, rested largely on unrecorded custom and practice. The ryotwari holder was ordinarily spoken of as entitled to the customary supply of water, but the obligation of the Government was not to find the required supply of water, but only not to interfere with the necessary supply if and so far as water was available.

The effect of these decisions is that in the Madras Presidency the ryot is entitled to receive the water which his lands have been accustomed to for irrigation purposes without interference by the Government or any one else. The Government cannot be required to supply water when none is available and it has a

(1) 1936 M.W.N. 684. (2) (1904) I.L.R. 28 Mad. 72.

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right of conserving and distributing the water available in the interests of the particular ayacut. In years of shortage the only obligation of the Government is to make an equitable distribution of water. The ryot has a claim against the Government when it withholds from him the water which he has a right to demand taking into consideration the supply available. In the face of the authorities the plea advanced on behalf of the Government that it has the right in law to supply Madras with water without regard to the claims of the ryots in the old ayacut cannot be accepted. It is, of course, manifest that the needs of the city of Madras are of very great importance and in the absence of rights in others no one could reasonably complain of the policy of the Government in giving this large city a preference in the supply of water, but when others have acquired rights the law requires that they shall be respected. It follows that in our opinion the declaration granted to the appellant does not do justice to the appellant. The Government is not entitled to economize water in seasons or months of shortage in order that a perennial supply may be available for the use of Madras, if this economy means that the ryots in the old ayacut will have their customary supply diminished. The appellant will have a declaration that he is entitled to sufficient water for the cultivation of one crop per annum without reference to the needs of the city of Madras, subject to the power of the Government to control the distribution of available water in the interests of the landholders whose lands comprise the old ayacut. This declaration is not to be deemed to confer on the appellant greater rights than those which existed in 1870 or to diminish the powers of Government with regard to the distribution of the supply.

The position of the ryots in the area which has been brought under wet cultivation since the inauguration of the scheme does not call for discussion in this case. The ryots in the new area are in a different position to the ryots in the old area, and it may very well be that their rights to water are subject to the requirements of the city of Madras.

It is clear that, as the result of the Government cutting off the supply of water for irrigation purposes altogether during 1926–27, the appellant suffered damage, and it is agreed that the damages shall be assessed at Rs. 450. No loss has been proved in respect of the following year and the claim for damages in respect of that year will be dismissed.

The result of the appeal is the appellant will have a declaration in the terms indicated in this judgment and a decree for damages in the sum of Rs. 450. As the appellant has succeeded on the main point he will be awarded costs here and below.

Solicitor for Government: *H. M. Small.*

G.R.