APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Abdur Rahman.

SRI RAJAH VENKATADRI APPARAO BAHADUR ZAMINDAR GARU AND SIXTEEN OTHERS (DEFENDANTS 1 TO 6, 8, 9, 11, 12 AND 14 TO 18 AND NIL), APPELLANTS,

1938, February 16.

v.

MORIVINENI SEETHARAMAYYA AND NINETEEN OTHERS (PLAINTIFFS AND DEFENDANTS 10 AND 20 TO 30 AND NIL), RESPONDENTS.*

Water—Riparian right—Nature of—Natural right and not a mere easement—Right of access to a stream and proximity to same—Essential ingredients for creation of riparian right—Riparian tenement—What comes under the category of—Riparian proprietor—Who is—Right of—English and Indian law—Distinction between—Who is considered owner of land for finding out the contact of land with a stream, zamindar or his ryot?

Held: (i) A riparian right arises from the right of access to a stream which landowners on its banks have by the law of nature.

(ii) Zamindars and similar proprietors and not their ryots should be considered the owners for deciding the question of the contact with a stream.

(iii) A riparian tenement connotes, in addition to contact with a river, a reasonable proximity to the river bank. What is a riparian tenement does not depend upon any arbitrary rule but must in each case be a question depending upon the circumstances.

(iv) Each riparian proprietor has a right to the water flowing past his lands; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors on the banks on each side to the reasonable enjoyment of it. A riparian proprietor may use the water

* Appeal No. 563 of 1931.

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(*a*) for ordinary or primary purposes, (*b*) for extraordinary or secondary purposes, and (*c*) for purposes foreign to or unconnected with his riparian tenement. The first two purposes are legitimate, whereas the third is not.

(v) Irrigation is a secondary purpose and the English law is that the water should be restored, after the object of the irrigation is answered, in a volume substantially equal to that in which it passed before. The English rule has been modified in its application to India. When only a part of a stream is taken for purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished.

(vi) The right of a riparian owner to take the water is a natural right and not in the strict sense of the word an easement.

(vii) When a riparian owner taking advantage of his position uses the water for purposes unconnected with his riparian tenement, he will be prevented by an injunction from doing so, although no actual injury has been sustained by the other party.

APPEAL against the decree of the Court of the Subordinate Judge (Principal) of Ellore, dated 17th November 1930, in Original Suit No. 20 of 1938.

P. Satyanarayana Rao for *Y. Govindarajulu* for appellants 2 to 5.

B. Lakshminarayana for first appellant.

P. V. Rajamannar and *K. Subba Rao* for respondents 1 to 6.

Cur. adv. vult.

VENKATASUBB RAO J.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—Once the facts of this somewhat difficult case are found, the principles governing it seem well settled by authority. After having heard the matter fully argued on both sides we have come to the conclusion that the findings of the Court below are right and should be accepted.

We are concerned here with two villages, Nadupalli and Velupucherla. The first defendant, the zamindar owning the Medur estate, is the overlord in respect of both the villages. The plaintiffs are the mokhasadars of Velupucherla and defendants 2 to 5 of Nadupalli. It may be mentioned that the zamindar has made common cause with the mokhasadars of Nadupalli and as the real contest is by the latter, defendants 1 to 5 will be referred to as the defendants.

The dispute relates to the waters of a natural stream known as Tammileru. As the lower Court points out, excepting in the rainy season when the current is swift, there is scanty flow; during periods of scarcity a witness deposes there is a general scramble, each man being anxious to abstract as much water as he can. Nadupalli is bounded on the west by this river, Tammileru, and lower down the stream is Velupucherla, but the plaintiffs' lands in it do not abut on the stream, so that the position is shortly this: whereas the defendants are upper riparian proprietors, the plaintiffs for the purpose of this case do not answer the description of lower heritors. But the plaintiffs have long been using the water of a channel (Balive Velupucherla Irrigation Channel) taking off from Tammileru for irrigating Velupucherla lands, admittedly not in contact, as stated above, with the flow of the stream. The lower Court has, however, found that this is an ancient channel and that the plaintiffs' rights must be " referred to a lawful origin ".

To make the point at issue clear, we must here state that there is in Nadupalli a tank shown in the map (the commissioner's plan, Exhibit III) as " Ura tank " which has been receiving water through a " supply channel " (so called in the map) from various sources with which we are not concerned. What gave

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occasion to the present suit was the excavation by the defendants of a new channel 1,650 feet long (called the " suit channel " in the map) which was made to connect Tammileru with the " supply channel " already referred to. It will be manifest from what has been stated that the defendants dug the new channel with the object of drawing off water from Tammileru into the Ura tank. That they have succeeded in producing the desired result has not been denied. There was a good deal of contest in the case whether this channel was newly dug or was, as alleged by the defence, an ancient one. The lower Court has found, and quite rightly, that this is a new excavation. It is with a view to get this new channel closed up that this suit has been brought, and the Court below has decided in favour of the plaintiffs. The defendants who are the appellants here question the correctness of its decision.

The plaintiffs' " immemorial user " (to quote the words of the lower Court) of the water in the manner alleged by them has been admitted by the defendants. The learned Judge, as already observed, says that their user must be referred to a " lawful origin ". That statement seems sufficient for the present purpose, as it is unnecessary to enquire how this undisputed right originated. But to clarify the position, it may be stated that the plaintiffs do not claim as against Nadupalli owners, i.e., those higher up the stream that they acquired a right by prescription. At any rate, that position has been made clear by Mr. Rajamannar, their learned Counsel, in his lucid argument. Prescription involves the idea that the right acquired is in derogation of another person's right. But the plaintiffs do not suggest here that the right they acquired in any way impaired the fullness of the defendants' legal right. The simple question then is, did the defendants

by making the new excavation and drawing off water into their Ura tank infringe the plaintiffs' admitted rights? The lower Court has in effect decided (and we think correctly) that, while the plaintiffs are entitled to relief, their acquired right has, however, no operation as against the natural rights of the Nadupalli mokhasadars.

This raises the question, is the abstracting of the water by the new excavation in excess of the defendants' natural riparian rights? The channel having been found to be a new excavation, the Subordinate Judge, it may be mentioned, has negatived the prescriptive right set up by the defendants to divert the water into the Ura tank. Then the question, as already stated, is, was the user justified by the defendants' natural rights?

This question must be answered with reference to the following considerations:

(i) A riparian right arises from the right of access to the stream which landowners on its banks have by the law of nature. In other words, it is necessary for the existence of a riparian right that the land should be in contact with the flow of the stream (Coulson & Forbes on Waters, 5th edition, page 81). Even if the portion on the bank be a narrow strip, the back lands enjoy riparian rights if they be in the same ownership as the bank (*ibid*, page 111).

(ii) In the case of zamindars and similar proprietors, are they to be considered the owners or the ryots for deciding the question of the contact with the stream? The contention, in this respect, of Mr. P. Satyanarayana Rao, the appellants' learned Counsel, must prevail. It seems consonant to reason to hold that a zamindar should be treated as a proprietor for this purpose. The rights possessed by the tenants may be very valuable, such as permanent occupancy rights, but that does not justify the view that zamindars are not the proprietors of the soil. The Permanent Settlement Regulation (Madras Act XXV of 1802) declares that the British Government has

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resolved to grant to zamindars and other landholders a permanent property in their land and the sanad granted to them is styled a deed of permanent property and they are called proprietors of land. If *Gopichetti Narayanaswami Naidu* v. *Madula Venkanna*(1) is to be understood as laying down a different rule, we must, with all respect, express our dissent from it.

(iii) The ownership of the zamindar, as distinguished from that of the ryot, being then the decisive factor, is the whole of the land a riparian estate on the ground that it belongs to a single owner? The proposition that every piece of land in the same occupation, which includes a portion of the river bank and therefore affords access to the river, is a riparian tenement is, as LAWRENCE J. observes, far too wide: "Nobody in their senses would seriously suggest that the site of Paddington Station and Hotel is a riparian tenement, although it is connected with the river Thames by a strip of land many miles long."; *Attwood* v. *Llay Main Collieries*(2). *See* also Coulson and Forbes on Waters, 5th edition, page 111. A riparian tenement, as the learned Judge points out, connotes in addition to *contact* with the river, a reasonable *proximity* to the river bank; *vide* the observations of ABDUR RAHIM J. in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi*(3) and of SADASIVA AYYAR J. in *Lakshminarasu Avadhanulu* v. *Secretary of State for India*(4). What is a riparian tenement does not depend upon any arbitrary rule (the depth of *half a furlong* suggested by SADASIVA AYYAR J. was not intended to be absolute), but must in each case be a question depending upon the circumstances.

(iv) Each riparian proprietor has a right to the water flowing past his land; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors on the banks on each side to the reasonable enjoyment of it; *Embrey* v. *Owen*(5). As observed by Lord MACNAGHTEN (citing Lord CAIRNS) in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*(6), a riparian proprietor may use the water (*a*) for ordinary

(1) 1914 M.W.N. 481.
(2) [1926] 1 Ch. 444, 459.
(3) (1917) 33 M.L.J. 415, 424.
(4) (1917) 34 M.L.J. 223, 226.
(5) (1851) 6 Ex. 353; 155 E.R. 579, 586.
(6) (1875) L.R. 7 H.L. 697.

or primary purposes, (*b*) for extraordinary or secondary purposes and (*c*) for purposes foreign to or unconnected with his riparian tenement. The first two purposes are legitimate; whereas the third is not; *McCartney* v. *London-derry and Lough Swilly Railway*(1).

(v) Irrigation is a secondary purpose and the English law seems to be that the water should be restored, after the object of the irrigation is answered, in a volume substantially equal to that in which it passed before; *see* Lord CAIRNS in *Swindon Waterworks' case*(2) and Lord MACNAGHTEN in *McCartney's* case(1). The rule has been somewhat modified in its application to India. The Judicial Committee observed :

" Now in speaking of the returning of the water it must be remembered that both Lord CAIRNS and Lord MACNAGHTEN were speaking of a diversion of the whole stream. When only a part of the stream is taken, and that for the purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished "; *Secretary of State for India* v. *Subbarayudu*(3).

(vi) The right of a riparian owner to take the water is a natural right and not in the strict sense of the word an easement and is not capable of being lost by non-user (*ibid*).

(vii) When a riparian owner taking advantage of his position uses the water (as here) for purposes *unconnected* with his riparian *tenement*, he will be prevented by an injunction from doing so, although no actual injury has been sustained by the other party. This is put upon the ground that the wrongdoer, if not prevented, will at the end of the statutory period, gain a prescriptive right to continue the unlawful use for ever; *per* Lord MACNAGHTEN at page 309 and Lord LINDLEY at page 313 in *McCartney's* case(1) above cited.

These are the principles touching riparian rights which become applicable to the facts as found by the lower Court. Its findings are (*a*) that the channel is a new excavation recently dug, (*b*) that a large quantity of water is impounded in the Ura tank, (*c*) that the water is used not only for irrigating some distant

(1) [1904] A.C. 301, 306. (2) (1875) L.R. 7 H.L. 697.
(3) (1931) L.R. 59 I.A. 56 ; I.L.R. 55 Mad. 263.

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lands stretching far away from the river bank in Nadupalli, but also other lands *totally unconnected with* the riparian tenement and (*d*) that the plaintiffs have not succeeded in proving that they sustained any actual injury.

On these findings the question is, to what reliefs will the plaintiffs be entitled? The lower Court has granted an injunction restraining the defendants "from taking the water of Tammileru through the suit channel (the new excavation) to Nadupalli Ura tank." To this extent the lower Court's decree is right, but the learned Judge has, unnecessarily in our opinion, added two further directions and that in the defendants' favour: *firstly*, that they may store water in a *separate tank* to be used for irrigating lands within a distance of half a furlong from the river bund; *secondly*, that they are entitled to use the new excavation for taking Tammileru water into the tank to be *newly dug*. The making of these declarations does not fall within the purview of the suit, which was brought simply with a view to get the new channel filled up. The Judge has attempted to define the limit of the defendants' riparian right, although there was no material before him which could enable him to do so. The only question before him was whether or not the defendants' alleged act was wrongful, and he was not called upon to define the extent of their natural rights. That the lower Court's decree is apt to lead to confusion and complication is obvious enough. At what distance from the river bank is the new tank to be built and what are its dimensions to be? Is the water to be permanently impounded in the proposed tank? As regards the impounding of the water, some argument has been addressed to us, but we do not think that is a question that arises here. We may in this

connection refer usefully to the observations of Lord WATSON in *Debi Pershad Singh* v. *Joynath Singh*(1). His Lordship points out that the pleadings in that case were silent in regard to the size and character of the dam in question or, as to the quantity of water which it had the effect of diverting, and goes on to say that " without an investigation into facts which have neither been averred nor made the subject of proof ", it would be most unsatisfactory to proceed to give a decision. These observations apply here with very great force.

There is one other matter to which we may refer. The learned Subordinate Judge observes that the defendants may go higher up the stream for the purpose of putting up Kongarakutta (sand bunds). This obviously affects interests of parties not before us and in view of what we have said that the extent of the defendants' riparian rights does not fall to be determined here, it is unnecessary to enquire how far the learned Subordinate Judge's view on this matter is right.

It seems to us that the decree to be passed here may be modelled on the decree passed in the case of the *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*(2). It is declared that the plaintiffs are entitled to use Tammileru and its waters as the same have been accustomed (before the interference therewith, complained of) to flow down to and into their channel (the Balive Velupucherla Irrigation Channel), so far as the said stream and waters are required for the supply of their said channel, but subject to such reasonable use by the defendants as riparian owners higher up the stream, and it is ordered

(1) (1897) L.R. 24 I.A. 60, 69; I.L.R. 24 Cal. 865.
(2) (1875) L.R. 7 H.L. 697.

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that an injunction be awarded restraining the defendants from diverting into their Ura tank, the said stream and waters. To this must be added, having regard to the circumstances here, a mandatory injunction directing the defendants to fill up the newly excavated channel.

The appeal fails and is dismissed with costs. It is unnecessary, in view of the decree we have made, to make any special order upon the memorandum of objections. There will be no order as to costs in the memorandum of objections.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar and Mr. Justice Pandrang Row.

1938, March 22.

A. SUBRAMANIA IYER (SECOND DEFENDANT), APPELLANT,

v.

K. S. VENKATARAMA IYER AND SEVENTY-TWO OTHERS (PLAINTIFFS AND DEFENDANTS 1 AND 3 AND NIL), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 172—Republication of settlement record after confirmation by Collector—Exercise by Board of Revenue of its revisional powers under sec. 172 before—Jurisdiction—Proceedings under Ch. XI of Act—Money rent in respect of village where only rent in kind in vogue—Fixing of—Power of—Sec. 172—Paddy rent fixed by Board—Conversion of, into money rent at price fixed by Board itself—Order of Board under sec. 172 having effect of—Validity of.

(i) There is no warrant for the view that the Board of Revenue has no jurisdiction to exercise its revisional powers

* Appeal No. 289 of 1934.