Privy Council Appeal No. 104 *of* 1914.

The Secretary of State for India in Council - *Appellant,*

v.

Sri Rajah Chelikani Rama Rao and Others - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH JULY, 1916.

Present at the Hearing:

LORD SHAW.
LORD SUMNER.
LORD PARMOOR.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD SHAW.]

These are consolidated appeals from two decrees of date the 30th September, 1909, pronounced by the High Court of Judicature at Madras. The appeals relate to certain parcels of land claimed by two zemindars. These zemindars' claims were, on the 19th October, 1903, in certain proceedings under the Madras Forest Act (V of 1882), dismissed by the forest settlement officer of Godaveri. His judgments were affirmed by two decisions of the District Court of Godaveri, dated the 27th July, 1904. These decisions of the District Court were, however, reversed and varied by the High Court by the decrees now under appeal to the Board. The appellant is His Majesty's Secretary of State for India.

The question for determination is whether the appellant is entitled to constitute or incorporate the lands into a reserved forest under the Forest Act. The respondents are objectors and claimants under the Statute.

The physical facts are not in dispute; they have been found by the Courts below. They are quite simple. The lands are islands which have been formed in the bed of the sea near

the mouth or delta of the river Godaveri. The Godaveri is a tidal and navigable river. The islands are within a short distance, much under 3 miles, of the mainland. The lands are now mostly jungle lands.

The Crown desires to constitute them into a reserved forest. The respondents object, and claim the lands. Their assertion is that these lands have been possessed by them and their predecessors in title from time immemorial, and that the lands are theirs. This assertion of property the Crown denies.

By the Statute already named, it is provided (sec. 3) that the Governor in Council may constitute any land at the disposal of the Government a reserved forest; that he shall publish a notification (sec. 4) containing this declaration, specifying "as nearly as possible the situation and limits of such land," and appointing a forest settlement officer "to enquire into and determine the existence, nature, and extent of any rights claimed by or alleged to exist in favour of any person in or over" such land. Provision is made (sec. 6) for requiring, within a period of three months from the proclamation, every person claiming right "either to present to such officer within such period a written notice specifying, or to appear before him within such period and state the nature of such right, and in either case to produce all documents in support thereof." Thereafter the forest settlement officer is to enquire and to record evidence (sec. 8). And (sec. 10) the forest settlement officer "shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part." If the claim be admitted, there are stipulated proceedings for the surrender, exclusion or acquisition of the right. But (sec. 10, ii) "if such claim be rejected wholly or in part, the claimant may, within thirty days of the date of the order, prefer an appeal to the District Court in respect of such rejection only."

What happened in the present case was that the claim was rejected. An appeal by the respondents was thereupon made to the District Court, and a decision was pronounced. It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the Statute just quoted. In their Lordships' opinion this objection is not well-founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench, *Kamaraju* v. *the Secretary of State for India in Council* (I.L R. 11, Madras 309), a decision which was given in 1888 and has been acted on in Madras ever since.

It was urged that the case of *Rangoon Botatoung Company* v. *The Collector, Rangoon* (39 *I.A.*, 197) enounced a principle, which formed a precedent for excluding all appeal from the decision of the District Court in such cases as the present.

Their Lordships do not think that that is so. In the Rangoon case a certain award had been made by the Collector under the Land Acquisition Act. This award was affirmed by the Court, which under the Act meant "a principal Civil Court of Original Jurisdiction." Two judges sat as "the Court" and also as the High Court to which the appeal is given from the award of "the Court." The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried, and the provisions of the particular statute, it was held that there was no right "to carry an award made in an arbitration as to the value of land" further than to the Courts specifically set up by the statute for the determination of that value.

The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation. The objection taken is accordingly repelled.

Upon the undisputed facts as to the formation of these islands in the sea and in the situation described, the case would appear to be the ordinary one described by Hale, "De Jure Maris." He describes how "the king hath a title to *maritima incrementa* or increase of land by the sea; and this is of three kinds, viz.:—

"1. Increase *per projectionem vel alluvionem.*
"2. Increase *per relictionem vel desertionem.*
"3. *Per insulæ productionem.*"

The lands in dispute fall under the third category, which is thus dealt with by Hale:—

"3. The third sort of maritime increase are islands arising *de* "*novo* in the king's seas, or the king's arms thereof. These upon the "same account and reason *primâ facie* and of common right belong to "the king; for they are part of that soil of the sea, that belonged "before in point of propriety to the king; for when islands *de novo* "arise, it is either by the recess or sinking of the water, or else by the "exaggeration of sand and slubb, which in process of time grow firm "land environed with water."

The date of formation of these islands is not certain. Plans have been produced showing that from the forties to the sixties of last century they or the larger part of them appeared above the surface of the water. At what date soever they appeared, they were in the high seas at a point thereof not far from the shore of the mainland, and in these circumstances, in the opinion of the Board, they were Crown property.

The case is not complicated by any point as to geographical situation; the question of whether a limit from the shore seawards should be beyond 3 miles, should

be the extreme range of cannon fire, or should be even more if the *locus* be claimed to be *intra fauces terræ*—no such questions arise here. The point is geographically within even 3 miles of British territory; at that point islands have risen from the sea. Are those islands no man's land? The answer is, they are not; they belong in property to the British Crown.

The doubt raised upon this proposition was substantially rested on certain dicta pronounced in the case of *Reg.* v. *Keyn*, L.R., 2 Ex. D., 63. The Crown, admitted to be owners of the foreshore, is, so the suggestion is, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it is said, extend further seaward. It should not be forgotten that the Franconia case had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of 3 miles from the shore.

When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the suggestion appeared to be helpful or sound. Their Lordships do not refer to the settlement of the rights of the Crown as against the Duchy of Cornwall in the Cornwall case—but to much more recent examples of contested rights in or over land *ex adverso* of the foreshore.

In the case of *Lord Fitzhardinge* v. *Purcell* (L.R. 1908, 2 Ch. Div. 139, at p. 166) Lord Parker, then Parker, J., expressed himself thus:—

" . . . . Clearly the bed of the sea, at any rate for some distance " below low-water mark, and the beds of tidal navigable rivers, are " *primâ facie* vested in the Crown, and there seems no good reason why " the ownership thereof by the Crown should not also, subject to the " rights of the public, be a beneficial ownership. The bed of the sea, " so far as it is vested in the Crown, and *à fortiori* the beds of tidal " navigable rivers, can be granted by the Crown to the subject. There " are many several fisheries which extend below low-water mark or " exist in the beds of navigable rivers. The whole doctrine of *incre-* " *menta maris* seems to depend on the beneficial ownership of the Crown " in the bed of the sea, which in the older authorities is sometimes " referred to as the King's royal waste. It is true that no grant by the " Crown of part of the bed of the sea or the bed of a tidal navigable " river can or ever could operate to extinguish or curtail the public " right of navigation and rights ancillary thereto, except possibly in " connection with such rights as anchorage when there is some consi- " deration moving from the grantee to the public. It is also true that " no such grant can, since Magna Charta, operate to the detriment of " the public right of fishing. But, subject to this, there seems no good " reason to suppose that the Crown's ownership of the bed of the sea " and the beds of tidal navigable rivers is not a beneficial ownership

" capable of being granted to a subject in the same way that the " Crown's ownership of the foreshore is a beneficial ownership capable " of being so granted."

It is true that the case cited dealt merely with the right of fowling; but it was necessary in the determination as to that right to settle the true nature of the right in the land itself.

In Scotland the law is firmly settled, and in a similar sense. The question raised in *Lord Advocate* v. *Clyde Navigation Trustees* 1891, 19 Rittie 174, was whether the latter body could dispose of dredgings taken from the river by depositing them in the bed of Loch Long, a sea-water loch. The Crown resisted the claim, maintaining its ownership in the bed of the loch and in the bed of the sea for a distance of 3 miles from the coast. In the Outer House the entire question was fully dealt with by that very learned Judge, Lord Kyllachy, who expressed himself thus: ". . . . with respect to the nature of the Crown's right in what is now acknowledged to be part of the territory of the kingdom, viz., the strip or area of sea within cannon-shot or 3 miles of the shore. Is the Crown's right in that strip of sea proprietary, like the Crown right in the foreshore and in the land? or is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within 3 miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is, therefore, to a large extent *extra commercium;* but none the less is it in my opinion a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property." In the Inner House this view of the law was not dissented from, and Lord Young expressly agreed with it.

Last of all may be mentioned the case of *the Lord Advocate* v. *Wemyss*, 1900, A.C., p. 48. The action had reference to the ownership of minerals in the bed of the sea and below low-water mark. This, of course, was entirely a question—not as to rights upon or over that portion of the bed of the sea, but as to the actual ownership of the corpus or thing itself—of which corpus the minerals formed a part. Upon this question the statement of Lord Watson was expressed as follows: " I see no reason to doubt that by the law of Scotland the solum underneath the waters of the ocean, whether within the narrow seas or from the coast outward to the 3-mile limit, and also the minerals beneath it, are vested in the Crown."

In the opinion of the Board, this is also the law of India. The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire.

It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that

the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle. There is nothing to recommend a local jurisdiction over a space of water lying above a *res nullius*. As to practical results: the confusion that might be produced by leaving islands, emergent within the 3-mile limit, to be seized by the first comer is clear beyond controversy. He might be a foreign citizen: he would of course hoist the flag of his own nation, and that nation might proceed to fortify the emergent lands; in short, it is not difficult to figure the anomalies and difficulties which the abandonment of the plain ground taken by Lord Watson would involve to this and to other nations.

The law in the sense now affirmed has not been denied effect in the Courts of this country, even when its enforcement has operated to the advantage or supposed advantage of foreign States. Lord Stowell dealt with such a position of affairs in "*The Anna*," 5 C. Rob., 373. The case had reference to the capture of a vessel while on a voyage from the Spanish Main to New Orleans. The place of capture was 2 miles off certain islands. Those islands, at the mouth of the Mississippi, were, much as in the present case, formed by the silting up of sand and slob, but yet surrounded by navigable channels and in the open sea. The case sought to be made was that such islands were no part of American territory, and formed no datum for measuring the seaward mileage therefrom. This argument was rejected. Lord Stowell observed:—

"Consider what the consequence would be if lands of this "description were not considered as appendent to the main land, and "as comprised within the bounds of territory. If they do not belong "to the United States of America, any other Power might occupy "them; they might be embanked and fortified. What a thorn would "this be in the side of America! It is physically possible at least "that they might be so occupied by European nations, and then the "command of the river would be no longer in America, but in such "settlements. The possibility of such a consequence is enough to "expose the fallacy of any arguments that are addressed to show "that these islands are not to be considered as part of the territory "of America. Whether they are composed of earth or solid rock "will not vary the right of dominion, for the right of dominion does "not depend upon the texture of the soil."

Their Lordships do not doubt that the general law, as already stated, is supported by the preponderating considerations of practical convenience, and that, upon the particular case in hand, the ownership of the islands formed in the sea in the estuary or mouth of the Godaveri River is in the British Crown.

In these circumstances the question before the Board would appear to be extremely simple. Under the Indian Limitation Act no adverse possession can be effectively pleaded against the Crown for a period of less than sixty years. The question

simply is: Do the claimants establish such adverse possession? If they do not, the basis of their claim fails. This was the way in which the matter was looked at, first by the forest settlement officer, and then by the District Court. In their Lordships' opinion the attitude of both these tribunals was correct in law.

Before the reversal of their decisions by the High Court is remarked upon, the following facts may be noted :—

It appeared that certain squatting had taken place, and that two zemindars, whose successors are respondents in this appeal, were rivals in seeking to set up some kind of right in the islands. They did not arrive at any settlement of their disputes until in or about the year 1882. The forest settlement officer in the course of a careful examination into the circumstances and rights, held that there was no evidence of adverse and exclusive possession and enjoyment prior to 1883, and that accordingly such possession and enjoyment so proved had not lasted long enough to establish a right against the Government.

In the District Court the same result was reached and the same finding on fact was made. The matter is accordingly concluded so far as possession goes; the Board accepts, as it must accept, the finding. Confirmation of the District Court's judgment would have followed that finding as a matter of course but for the view taken by the High Court on a point of law. It is thus expressed :—

"The District Judge then holds that as the title was originally in "the Crown the claimants must prove adverse possession for sixty "years. Here the District Judge is clearly wrong. Though the title "was originally in the Crown, still, as the possession of the claimants "for twenty years prior to the notification is found, it rests upon the "Crown to prove that it has a subsisting title by showing that the "possession of the claimants commenced or became adverse within "the period of limitation, *i.e.*, within sixty years before the notification, "*Secretary of State* v. *Vira Rayan*, *I.L.R.* 9 *Mad.* 175; *Secretary of State* "*for India* v. *Bavotti Haji*, *I.L.R.* 15 *Mad.* 315; *The Secretary of State for* "*India* v. *Kota Bapanamma Garu*, *I.L.R.* 19 *Mad.*, 165. As the several "islands were formed gradually and probably appeared and became "capable of occupation at different times, it may be that there is proof "that some, if not all, of them came into existence as land capable of "occupation within sixty years prior to the notification. In the case "of such land the title of the Crown must be subsisting title. In the "case of lands which came into existence as land capable of occupation "more than sixty years prior to the notification, the Crown must show "by evidence that it had a subsisting title at some time within that "period.

"We must, therefore, ask the District Judge to return a finding as "to whether the Crown has subsisting title to the whole or any "portions of the claim land lying between Hope Island on the north and "Neelarva on the south."

Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled then that the onus of establishing property by reason of possession for

a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, "I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions." Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

The application of this elementary doctrine is singularly clear, for there is a double finding of fact, a finding not disputed even in the High Court, that no adverse or exclusive possession was proved before the year 1882. The case of the respondents must accordingly fail.

This conclusion is in no way varied by reason of the shape of the present proceedings. In November and December 1901, in pursuance of the Act, the Governor of Madras in Council published a notification proposing to constitute the lands into a reserved forest. The respondents put in their claims before the forest settlement officer on the 14th and 23rd February, 1902. It apparently did not occur to them at that stage to view the law otherwise than has been stated above, because in the one petition the claim was that—

"for over seventy years your petitioners estate has been in the "exclusive and absolute enjoyment of the land and forest now said to "be reserved as Government forest,"

and in the other petition the claim was—

"that the long and peaceful enjoyment of the same by the petitioners "and their predecessors in title the petitioners have acquired a title "by prescription to the said lands and forests, and the rights, if any, "of others to the same are excluded by lapse of time."

In their Lordship's opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a suit in an ordinary court of justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that article 144 of the Limitation Act XV of 1877 (Schedule II) applies, the period of twelve years thereunder being, however, extended to a period of sixty years by article 149. In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the plaintiff. In their Lordships' opinion the situation of a claimant under afforestation proceedings is the same upon this point. Reference may

be made to *Radha Gobind Roy Saheb* v. *Inglis* in 7 *C.L.R.* 364, decided by this board. Reference was made to various cases decided in lower Courts and stress was especially laid upon the decision in the Malabar Case, *The Secretary of State for India in Council* v. *Vira Rayan* (I.L.R., 9 Madras 175). The facts therein were essentially different from the present. After a historical survey of the peculiar position of the lands there in question the learned Judges found "That the land appertains to the district of Malabar, and we agree with the Judge that there is no presumption in that district and in the tracts administered as a part by it, that forest lands are the property of the Crown." The ratio of the decision was found in this historical circumstance peculiar to Malabar. None of the cases cited have affected the authority of the case of Radha Gobind Roy.

Finally, their Lordships have some difficulty in understanding the view of the High Court to the following effect:—

"Though the title was originally in the Crown, still as the possession "of the claimants for twenty years prior to the notification is found, it "rests upon the Crown to prove that it has a subsisting title by showing "that the possession of the claimants commenced or became adverse "within the period of limitation, that is, within sixty years before "the notification."

In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, their Lordships' opinion is, as stated, that this is erroneous. But (2) with reference to the "subsisting title," it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years, that fundamental fact remains, and that fact forms "subsisting title." And (3) it is no part of the obligation of the Crown to fortify their own fundamental right by any enquiry into possession or the acceptance of any onus on that subject.

Their Lordships will humbly advise His Majesty that these appeals should be allowed, and that the judgments of the District Court of date the 27th July, 1904, should be restored. The respondents will pay the costs of this appeal and in the Courts below.

In the Privy Council.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

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PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

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