Privy Council Appeal No. 55 of 1924.

Sri Mirza Raja Sri Pushavati Alakh Narayan Gajapatiraj Maharaj Manya Sultan Bahadur Garu, substituted for Rai Saheb V.T. Krishnam Chari - - - - - - - - *Appellant*

v.

The Secretary of State for India in Council, represented by the Collector of Godavari - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JANUARY, 1926.

Present at the Hearing:

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
LORD SALVESEN.

[*Delivered by* LORD SALVESEN.]

This is an appeal from the High Court of Judicature at Madras, dated the 18th March, 1920, which substantially affirmed a decree in judgment dated 31st December, 1915, of the Subordinate Judge at Coeanada in a suit at the instance of the appellant against the respondent. This suit arose out of a dispute as to the ownership of a lanka in the river Godavari in the Province of Madras, the extent of which was estimated, at the commencement of the suit, at 247 acres. The appellant is the owner of large estates, including the village of Kotipalli, situated on the banks of that river. The respondent is the Secretary of State for India, represented by the Collector of Godavari. It is common ground that in 1862 there existed a lanka which was Government property, and for the cultivation of which pattas were issued by the Government of the day to ryots connected with the village of Sanapalli, which lies in the neighbourhood of Kotipalli. This lanka was cultivated under these pattas for a number of years thereafter, and the Government

assessment was duly paid by the cultivators. An example of such a patta has been produced in the present suit. It is dated in 1869, and indicates that erosion on a somewhat minute scale had already commenced to affect the area of the lands in question. Gradually the river encroached more and more upon these lands until, some time between 1880 and 1885, the whole of the lands had been totally submerged. After some years of total submergence a new lanka appeared in the river which, by 1894, was of an area substantially the same as the lands in suit. At that time one, Mudragada Nagayya, was a lessee of the Kotipalli Lanka, under a lease granted by the owner of the estate, now represented by the appellant, the duration of which was 10 years from 1892. Nagayya took possession of the re-formed lands as forming an accretion to the Kotipalli lankas and paid rent to the appellant for these lands as well as for those originally embraced in his lease, and cultivated, through sub-lessees of his own. He did not, however, do so without objection and, from 1897 onwards, petitions were presented by the ryots of the Government village of Sanapalli complaining to the Government that the suit lands formed part of the old Sanapalli village, and requesting the Government to recover them from the appellant and grant them back to the ryots. The Government directed a survey of the lands and, after a lengthy correspondence between the appellant and the Government, the latter claimed the suit lands as Government property. In 1911 the Government sent notices to the appellant under section 7 of the Madras Act III of 1905. These were followed by a notice dated 3rd February, 1912, demanding payment of Rs. 74,971.86, representing the penalty and block rates for the years 1900 to 1911, during which the appellant was alleged to be in unauthorised occupation of the suit lands.

On the 30th July, 1912, the appellant's predecessor in title instituted the present suit. In this he prayed for a judgment declaring his right to the 247 acres already referred to and to all accretions that might be made thereto, and for a permanent injunction against the Government restraining them from interfering with him in his ownership and enjoyment of the same by levying a penal assessment or by other steps. An immense amount of evidence was tendered at the trial, which it was stated occupied over 50 days of judicial time. The issue of fact which was responsible for most of the time occupied was whether the re-formed lands in question were an accretion to the appellant's lands of Kotipalli or constituted a re-formation *in situ* of the lands which had been formerly cultivated by the ryots of the Government. This issue of fact has been decided by both Courts against the appellant and is no longer in controversy.

The issues which still fall to be dealt with concern the legality of the penal assessment imposed on the appellant in 1911, and, as the case was presented to the Board, this assessment was challenged upon three grounds :—

(1) That an assessment, whether penal or otherwise, can only be imposed under the terms of this Act on "any person who shall unauthorisedly occupy any land which is the property of the Government." The appellant conceded that it must be now taken to be a fact that the land in suit is the property of Government and that it had been unauthorisedly occupied, but he maintained that the only persons upon whom the assessment could be levied were those in physical occupation of the land and not upon the owner of the estates of Kotipalli, who had merely granted leases of these lands under a *bona fide* belief that they formed accretions to his property. He founded this particularly upon section 6 (1), which makes the crops or other produce of the lands liable to forfeiture, which provision, he contended, could only be applicable to the actual cultivator and not to the landlord who, by the very fact of granting a lease of the lands, had excluded himself from occupation. Whatever force there may be in this contention, their Lordships do not propose to express any opinion upon it. Their Lordships hold that this contention is not open to the appellant in view of his actings before and throughout the litigation. The plaint contains the following passages :—

> "The lanka in dispute has been in possession and enjoyment of the plaintiff's predecessors and plaintiff for several years."

and in Paragraph 8 the plaintiff also submits that :—

> "Madras Act III of 1905 is not retrospective in its operation and does not entitle the Government to recover assessment from the plaintiff, as he was in possession and occupation long prior to the coming into force of Madras Act III of 1905."

Not merely is there no reference to the construction which is now proposed to be put upon the Act in the plaint (which, indeed, in terms directly negatives the view now presented), but there is no trace of the contention being tabled throughout the voluminous proceedings in the Courts below. Even the appellant's case, although it is directed entirely to the legality of the penal assessment, does not contain a challenge of it upon this ground. There may have been occasions when the Board have entertained an argument on a pure question of law, although it has not been presented in the lower Court, where all the facts on which the contention depended had been definitely ascertained, but the objection to doing so in the present case goes very deep. The whole controversy between the appellant's predecessor and the Government which preceded the actual imposition of the penal assessment proceeded upon the admission or the tacit assertion, of the appellant that he was in occupation of the lands, or at all events, that he took upon himself the burden of vindicating the action of his own lessees or sub-lessees in cultivating it. Had this point been, at any time, mooted the Government would have had an opportunity of considering upon whom the notice of assessment which they ultimately sent to the appellant should have been given, and upon whom the penal assessment should

have been levied. After a period of nearly 25 years has elapsed between the date when the Government first definitely intimated their claim to the lands in suit, their Lordships are clearly of opinion that it is too late for the Board to entertain this contention. A litigant who has all along maintained a position in support of one, and in this case the more important, branch of his suit cannot be permitted, when he fails upon this branch, to withdraw from the position and assert the contrary, more especially when he thereby places his opponent at a great disadvantage. There could be no clearer case for the application of the doctrine of estoppel owing to the conduct of the litigant.

(2) The second ground of attack by the appellant is based upon section 2 of the Madras Act III of 1905. By that section all lands, wherever situated, are thereby declared to be the property of the Government, subject to the large exceptions enumerated under five heads which expressly preserve private rights. The exception founded on is contained in sub-section (*c*), which exempts from the operation of the clause all lands which are the property "of any person holding under ryotwari tenure . . . or in any way subject to the payment of land revenue direct to Government." The respondent conceded that, before the submergence of the lands in suit, they came within this exception. He also conceded that, after a durkhast is made and a patta granted by Government, the interest of the ryot holding under this form of tenure is permanent, hereditary and transferable, that no ejectment at the instance of the Government is competent for arrears of rent, and that such arrears can only be recovered, as in the case of all Government revenue, by sale of the property held under this tenure. On the other hand, it is common ground that the holder of land under ryotwari tenure is entitled, at any time, to relinquish it, and the standing orders of the Board of Revenue applicable to Madras contain elaborate provisions dealing with this particular kind of tenure, and also with questions relating to the form of relinquishment, remission of rent and the like.

The High Court have dealt very exhaustively with the numerous points which have been argued on the question whether the relinquishment by the ryots of Sanapalli village who held the pattas before their respective lands became submerged can be inferred from the whole circumstances of the case, including a vast amount of documentary evidence. They drew the inference that it must be held as a fact that the ryots did relinquish their holdings (and thereby secured immunity from further assessment in respect of them) as and when the lands became submerged and no longer capable of cultivation, and that, when the lands were re-formed *in situ*, they were the property of the Government and at their absolute disposal. Their Lordships agree with the reasoning of the High Court, and they will only summarise some of the considerations to which they attach most weight.

Mere submergence of land held under ryotwari tenure does not infer a relinquishment by the holder. On the other hand, if he wishes to retain his right to the submerged lands on the offchance of their being re-formed *in situ* at some future date, he must continue to pay year by year the assessment or rent which is due to Government. There are instances referred to in the documentary evidence in which some of these ryots, whose lands were only partially eroded, continued to do so and so kept alive their rights, but, in the ordinary case, the poor cultivator's interest is to relinquish the lands so as to escape paying the annual rent in the hope that, at a future date, should the lands be re-formed *in situ*, he may obtain a new tenure from the Government. On the other hand, according to the standing orders, all land for which a stipulated rent continues to be paid must be entered in the registers which these orders prescribe. The registers contain not merely an enumeration of all the lands in the district to which they apply in individual numbers, but they specify the acreage of the individual plots and also contain a record of the amount of rent leviable from each ryot in respect of the plot or plots he holds. In the case of Sanapalli village it has been found by concurrent findings of the Courts below that, when the land in question became submerged, it was not merely omitted from the ayacut or acreage of the village, but also from the gudikat or rental roll. The submerged land was likewise struck out of the pattas which constitute the evidence of title given to the holders under ryotwari tenure. These pattas are subject to revision from time to time when changes of circumstances occur ; thus, if part of the land to which a ryot has right is eroded and relinquished by him, the rent corresponding to the part relinquished is deducted from the rent previously payable. In the case of the submerged lands the pattas appear to have been surrendered and, at all events, not one of them has been produced. It is common ground that none of the ryots who held pattas of the lands prior to submersion has paid any rent to the Government on these lands. These circumstances support the inference that the ryots concerned relinquished their holdings, which had indeed, in the then existing circumstances, become valueless. The only possible alternative is that we are to infer that the Government, from humanitarian motives, had remitted the rent due by the ryots. Such remissions are competent under the standing orders, but they can only be made by the authority of the Board of Revenue, and the inferior officials, including the Collector, have no power at their own instance to make them. No evidence is adduced of any such remission having been asked or having been granted spontaneously. Further, in the petitions presented to the Government in 1897 and onwards, although in one or two of them there are statements to the effect that the former ryots had not relinquished their holdings, there was no claim ever made by any individual ryot to the effect that an identifiable portion of the

re-formed lands was his property. On the contrary, the petitions proceeded on the footing that it was the duty of the Government to recover the lands in the illegal occupation of the appellant and to re-settle them upon the ryots of the village of Sanapalli without reference to the particular ryots who held the lands before the submergence. One suggested method of the Government so settling them was that the lands should be exposed to auction so that those ryots of Sanapalli who were prepared to pay most for the lands would obtain pattas from Government at the rents which they offered. The evidence to be derived from the petitions points to the ryots of Sanapalli village accepting the position that the Government was entitled to re-settle the lands, but urging that a preference should be given to the ryots of the village by whose inhabitants the lands had formerly been cultivated. A review of the whole facts disclosed by the evidence leads irresistibly to the conclusion that the lands in suit on their re-emergence from the river became once more the absolute property of the Government both under the Madras Act III of 1905, and at common law exactly as they had been in 1862 when the ryotwari tenures were first instituted.

(3) Lastly, it was maintained by the appellant that section 16 of the Madras Land Encroachment Act III of 1905 exempted the lands in question from its operation. The section is in these terms :—

> "Nothing in this Act shall apply to any lands claimed by right of escheat resumption or reversion until such lands have been reduced into possession by Government."

It was argued for the appellant that, as the lands had been throughout occupied by himself or his tenants, they had never been reduced into possession by the Government, and that they were lands claimed by Government within the meaning of the clause. Their Lordships are unable to take this view. They are clearly of opinion that these lands were not claimed by Government within the meaning of the section. Before submersion these lands were the property of the Government, subject only to the rights of the ryotwari tenures which they had created. The moment these rights were relinquished by the ryots the Government were free to deal with them as they pleased. The effect of the relinquishment was to restore to the Government full freedom to dispose of what was originally their own. The appeal on this ground also fails. It is right to note that the apparent hardship of the appellant being subjected to a penal assessment in respect of the unauthorised occupation of lands of which, on plausible grounds, he believed himself to be the owner, has in this case been largely if not entirely obviated by the judgment of the High Court declaring the levy illegal for the years prior to the coming into force of the Madras Act III of 1905. This part of the judgment has not been challenged by either party.

Their Lordships will therefore humbly advise His Majesty that the decision of the High Court of Judicature at Madras should be affirmed and the appeal dismissed with costs to the respondent.

In the Privy Council.

SRI MIRZA RAJA SRI PUSHAVATI ALAKH NARAYAN GAJAPATIRAJ MAHARAJ MANYA SULTAN BAHADUR GARU, SUBSTITUTED FOR RAI SAHEB V.T. KRISHNAM CHARI

v.

THE SECRETARY OF STATE FOR INDIA, IN COUNCIL, REPRESENTED BY THE COLLECTOR OF GODAVARI.

DELIVERED BY LORD SALVESEN.

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