

Privy Council Appeal No. 119 of 1931.

The Secretary of State for India in Council, through the Collector
of Tanjore - - - - - *Appellant*

v.

S. Subramanya Ayyar, Trustee of the Rameswaram Devasthanam *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 20TH FEBRUARY, 1933.

Present at the Hearing :

LORD ATKIN.

LORD THANKERTON.

SIR JOHN WALLIS.

[*Delivered by* LORD ATKIN.]

This is an appeal from a decree of the High Court at Madras in a case in which the plaintiff, who is trustee of a temple, brought a suit for a declaration that the temple was entitled to free irrigation in respect of the village of Viranvayal in Madras.

The question depends upon the wording of the Madras Irrigation-Cess Act of 1865 as amended. The substance of that is that, by Section 1 (*a*), whenever water is supplied or used for the purpose of irrigation from any river, stream, channel, tank or work belonging to or constructed by government, it shall be lawful for government to levy a cess. There is a proviso as to *zamindars* or *inamdars* possessing rights which they may have got from previous engagements from government. The village in question lies on the left bank of the river Korayar, and before the year 1890, which appears to be the first year that really comes into question in this case, there can be no doubt on the findings of the Court that the village was accustomed to be irrigated by drawing water from a channel which ran at about the northernmost part of the village. The river runs from west to east and just before reaching the village it takes a right-angled turn and begins to run almost due south.

This village at this time and for some time before, exactly how long it is not known, had been drawing water from a channel which led to a tank from which the village lands were irrigated. At that time there was no protection in the nature of a river bank of any size on the left bank of the river, and in consequence the village lands, or a large portion of them, were liable to be flooded at flood time. In 1890, at the request apparently of the temple and at its expense, the government built a bund or embankment running from the northernmost point south for some distance, which had the effect of keeping the flood water off the greater part of the village lands, still leaving some portion which would then be on the west side of the bank liable to be flooded. At that time the government, also at the expense of the temple, had reconstructed the channel and executed masonry work so as to secure that there should be a permanent channel. That channel was conveyed by a tunnel or culvert through the bund, and between the bund and the river the government inserted a sluice or sluices which would control the supply of water through the channel. In that way the village continued to be irrigated down to 1920, when a change was made in this respect, that a little below the intake into the channel they built a dam across the river with sluices in it which served to regulate the supply of water both immediately above and below the dam. That had the effect which the villagers had achieved before year by year by erecting temporary dams, and it had the effect of ensuring a reasonably constant supply of water into the intake of the channel at times when the river was flowing at its lowest ebb. The action was brought, as has been said, by the trustee of the temple for a declaration that the temple was not bound to pay cess. They had been paying cess for some ten or fifteen years, but they said they had paid it under a mistake as to their rights and they claimed repayment of the amount that they had paid. It is obvious that the amount which they were entitled to claim would be affected by the Limitation Act but as to that no question arises in this particular suit, the question being whether they ought to have paid it at all. The government claim that they were liable to pay either because this was a river which belonged to the government, or because the water was supplied from a work constructed by the government, and it appears to their Lordships to be plain that the issues raised by the suit were of a narrow kind.

The first was as to whether this river from which the water was derived for irrigation belonged to the government. That was a point which had been in controversy in principle for a considerable time in Madras. The facts in this case were that the temple authorities were riparian owners and that they owned the soil of the river *ad medium filum*. It has been finally decided by the judgment of this Board in the case of *Secretary of State for India in Council v. Sannidhiraju Subbarayudu*, 1931 (59 I.A. 56), that where the riparian owner owns the bed of the stream up to the *medium filum* the river could not be said to belong to the govern-

ment ; in other words, if the government sought to establish that the stream belonged to them, they would have to show that they owned the whole bed of the river. The claim of the government to payment of cess therefore failed in that respect and was not contended for before their Lordships.

The other question that was raised was that this water was supplied from works constructed by the government, and that turns upon what the works constructed by the government were which were relied upon in the written statement. It appears to their Lordships that the High Court took the correct view in that respect in coming to the conclusion that the only works which were relied upon at the trial before the Subordinate Judge, and the only works which were relied upon in the written statement and in respect of which issue was taken were the works which have been described in respect of this channel. The issue that was raised was whether the channel is recent and was constructed or maintained by the government as alleged in paragraphs 5 and 6 of the written statement. The High Court have come to the conclusion that the claim was limited, as just stated. "The next question," says Mr. Justice Ramesam who delivered the judgment, "is whether the government can levy the water-cess on account of the works they have constructed. They pleaded that the channel was constructed at their expense in the written statement. This question is now found in favour of the plaintiff." In fact, the High Court had sent down that issue for further hearing. The second Judge to whom the case was remitted had found that this channel had not been constructed by the government, but that it had been constructed at the expense of the temple. Then Mr. Justice Ramesam goes on to say : "In appeal the learned government pleader attempted to argue that there are other works constructed by government. In the first place the construction of these other works was not relied on by government in the written statement, nor did the parties go to an issue on that matter." Their Lordships are quite satisfied that that statement is correct and, being correct, it is quite impossible for them to entertain the further question that is now sought to be raised by the appellant and which their Lordships desire to make quite clear must be left open in a dispute between other parties.

Mr. Dunne suggests, first of all, that the fact that this river was the subject of an irrigation scheme and that the flow of water had been regulated by works, it might be up-stream or it might be down-stream so as to affect the flow of water below and to affect the plaintiff, would show that the plaintiff was taking water from works constructed by the government. Their Lordships express no opinion about that.

Secondly, it was said that the particular work in question, the work of the regulator, the dam, which as it has been said, was built just below the intake to the channel, was a work which affected the water which was being taken and that it might be said

that the plaintiff took water from that work. That again in a similar case is a matter which will be open between the parties in that case; it cannot be open as between the parties to this appeal and their Lordships express no opinion about it. The pleadings have been on narrow issues which have been stated by the High Court, and such matters as have just been referred to were not open before them. Therefore, it follows that on the two issues that were open both have been decided against the government and, therefore, it follows that the plaintiff was entitled to the relief granted to him.

In the result this appeal must be dismissed and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

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In the Privy Council.

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v.

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DELIVERED BY LORD ATKIN.

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