Privy Council Appeal No. 40 of 1941

The Secretary of State - - - - - - - *Appellant*

v.

T.R.M.T.S.T. Thinnappa Chettiar 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 15TH APRIL, 1943

Present at the Hearing:

LORD ATKIN
LORD THANKERTON
LORD CLAUSON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from a decree of the High Court of Judicature at Madras dated the 26th January, 1940, which reversed a decree of the Subordinate Judge of Tanjore, dated the 1st September, 1936, by which the plaintiff's suit was dismissed.

The appeal arises out of a suit for a declaration that the inam village of Someswarapuram is exempt from liability to pay water-cess; and also for an order directing the defendant, the Secretary of State for India, the appellant before the Board, to refund the amount paid by the plaintiff as water-cess for fasli 1340 (1930-1931), which the Government had levied under the Madras Irrigation Cess Act (Act vii of 1865), which will hereinafter be referred to as " the Act." The suit was instituted by T. N. Kali Doss, who was the receiver of a half-share of the suit village which had been allotted to one A. L. A. R. Arunachellam Chettiar, the 31st defendant in O.S. 3/1919 in the District Court of Tanjore, West. While the appeal to the High Court was pending, the plaintiff was discharged from his office as receiver, and the respondents before the Board, on whom the rights to the property had devolved were substituted in his place as appellants.

The owners of the suit village are entitled to irrigation free of any charge for water over what is called the *dittam* (mamool) area, which, with respect to the plaintiff's share is 103.8 acres, single crop, and 22.36 acres, double crop. The Government have not charged cess for any water taken or used for the irrigation of this extent. The dispute in the case relates to the Government's right to levy the cess for water taken for the excess area irrigated by the plaintiff. The Government had been collecting cess for the excess water taken for more than 30 years. The payment is attributed to a mistaken notion of the irrigation rights of the plaintiff. It is not however contended that this will stand in the way of his claiming the reliefs asked for in the plaint, if he is entitled to do so under the Act. The law bearing on the point is contained in section I (*a*)—1st proviso of the Act, which runs as follows:

> " Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, or work belonging to, or constructed by Government, it shall be lawful for the Government . . . . to levy at

pleasure on the land so irrigated a separate cess for such water. Provided that, where a zemandar or inamdar, or any other description of land-holder, not holding under ryotwari settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under the Act shall be imposed for water supplied to the extent of this right and no more ".

In the light of this provision of law, the questions arising for determination in this appeal are (1) whether the Government have established that water is supplied to, or used by the respondents, from what may be generally described as a Government source of irrigation; if this is answered in the affirmative, then, (2) whether the respondents have established that they are entitled by virtue of an engagement with the Government to any, and if so, what irrigation free of separate charge under the 1st proviso to section I(*a*) of the Act, in respect of their half-share in the village of Someswarapuram.

It will be convenient at the outset to describe the mode of irrigation followed in the village; and also to refer briefly to the " grant " under which the village came to be owned by its original holders. Their Lordships regret that the respondents have not appeared before the Board; but the learned Counsel appearing for the appellant have placed before them fairly and fully all the material facts.

Someswarapuram is described in the plaint as an " entire inam village ", which means that the whole village was granted as inam. (such grants consisting of a whole village or more than one village are technically called " major inams " to distinguish them from " minor inams " which are grants of something less than a village—see *Secretary of State for India in Council* v. *Mallayya* 63, M.L.J. 649). It is a hamlet of the village of Ichangudi which formed part of what is known as the " Tanjore Palace Estate " granted by the British Government to the heirs of the last Raja of Tanjore in 1862. The village lies in the delta of the Cauvery river about one mile north of its northern bank and separated from it by the village of Ichangudi. The lands of this village are irrigated by water taken from the river by two channels known as Kila Vaikkal (lower channel) and Turi Vadi Vaikkal known as Turiar (Turi river), the head sluices of which are maintained by the Government. Kila Vaikkal takes off directly from the river within Ichangudi limits and its water passes before it reaches Someswarapuram through a sluice maintained by the Government and flows north through Someswarapuram and Virmangudi, a Government village, into a channel called the Manniar channel which irrigates several Government villages. Turi Vadi Vaikkal is a drainage channel which takes off in a Government village about 6 miles west of Someswarapuram and flows in a north-easterly direction through Government villages. Before it reaches the suit village, it is dammed up in a Government village called Perumur, by a masonry weir wherefrom branches off a sub-channel Mettu Vaikkal No. 1, which flows into and irrigates certain wet lands in the village. The Turi Vadi Vaikkal is dammed up further along its course in the suit village itself, and the water is diverted into another channel known as Mettu Vaikkal No. 2, which irrigates the other lands in the village. The Turi Vadi Vaikkal continues its course beyond the taking off points of the two sub-channels and finally falls into Manniar within the limits of Viramangudi. The dams appear to have been constructed more than a century ago by the inamdars and are maintained by them, as appears from the irrigation memoir of the village. The Paimash account of 1830 treats the irrigation channels in the village as part of the village. As already stated, the head sluices of the channels belong to the Government and are maintained by them, while the supply channels are maintained by the inamdars and the kudivaramdars. The water channels have been in existence admittedly for over a hundred years.

The history of the grant of Someswarapuram and the other villages which formed the private estate of the last Raja of Tanjore and is ordinarily known as the " Tanjore Palace Estate " is well known and will be found in various reported decisions of the Madras High Court (see *Jijoyiamba*

Bayi Saiba v. *Kamakshi Bayi Saiba* [1868] 3 M.H.C.R. 424, and *Sundaram Ayyar* v. *Ramachandra Ayyar* [1917] 40 Mad. 389, *Maharaja of Kolhapur* v. *Sundaram Iyer* [1929] 48 Mad. 1). It will be found also in the decision of the Board in *Srimant Chota Raja Saheb Mohitai* v. *Sundaram Iyer* (1935-36) 63 I.A. p. 224, on appeal from the decision in 48 Mad. 1. In 1799, Serfoji, the then Raja of Tanjore, surrendered his territory into the hands of the East India Company, but he was allowed to retain possession of certain villages and lands which constituted his private property. When his son the last Raja died in 1855 without leaving male issue, the Company took possession of all his properties including his private property. Thereupon litigation ensued with respect to the latter, and it was finally settled by this Board, in 1859, that the seizure was an act of State, the propriety of which could not be questioned in a Civil Court. (See *Secretary of State in Council of India* v. *Kamachee Boyee Sahaba* (1858) 7 M.I.A. p. 476). After some time, the Government of India which had succeeded the East India Company " sanctioned the relinquishment of the whole of the landed property of the Tanjore Raj in favour of the heirs of the late Raja." (See 63 I.A. 224 at 228.) Under instructions from the Government of India, the Government of Madras, on August 21, 1862, passed an order the material part of which is as follows:—

" In Col. Durand's letter above recorded the Government of India have furnished their instructions with reference to the disposal of the landed property of the Tanjore Raj regarding which this Government addressed them under date the 17th May last. Their decision is to the effect, that ' since it is doubtful whether the lands in question can be legally dealt with as State property, and since the plea in equity and policy, for treating them as the private property of the Raja is so strong that it commands the unanimous support of the members of the Madras Government,' the whole of the lands are to be relinquished in favour of the heirs of the late Raja " (page 228). The Tanjore Palace Estate came into being as a result of this grant. To anticipate, the main question for the Board to consider will be, Did this grant constitute an " engagement " with the Government entitling the grantees to take water for free irrigation, i.e., in other words, What is the nature of the grant and what right, if any, of taking water for irrigation " free of separate charge " passed under it?

Neither in the plaint, nor in the issue which was general, viz., " Is the plaintiff entitled to free irrigation without liability to pay water-cess to the Government? " was the plaintiff's liability to pay the cess *specifically under the Act* raised; but the question was raised by the defendant in his written statement and was dealt with, but very shortly, by the Subordinate Judge at the close of his judgment.

The plaintiff claimed immunity from payment on the grounds that the beds of the channels belonged to him, that as a riparian owner he was entitled to take water freely, and that he had also rights based on easement and prescription. The defendant after answering these specific pleas, contended in effect, that the water used by the plaintiff for irrigation came from a Government source, that the grant of the village conveyed to the grantees only the right to collect the full land revenue, i.e., the melvaram due on the lands, that it did not constitute an assignment of the lands, that the plaintiff can at best claim free irrigation for only a single or double crop as the case may be on such of the revenue paying lands as were registered at the time of the grant, and that the grant did not constitute an engagement express or implied of the kind contemplated by the 1st proviso to section I of the Act. The High Court observes, that this has been the attitude of the Government not only in this but in all other cases relating to inams. Such a contention was disallowed recently by the Board in the *Swamigal* case (1941 L.R. 69 I.A. 22) in respect of an inam granted in 1753, confirmed by the inam commissioner by a deed granted on the 27th July, 1865, in view of the opinion arrived at by their Lordships " that the inam right extended to all the village lands ". Substantially the same question arises for decision in the present case also, though in a somewhat different setting. In the present case, the estate was admittedly not dealt with by any inam commissioner or settlement officer and the terms of the

grant are available, unlike the grant of 1753 in the *Swamigal* case where they had to be gleaned from the evidence which consisted " in substance of the proceedings of the inam commission." Another point of difference is that it has been held by the High Court of Madras that the grant of 1862 consisted only of an assignment of the land revenue of the villages (see *Sundaram Ayyar* v. *Ramachandra Ayyar* [1917] 40 Mad. 389), whereas, in the *Swamigal* case the Board had to find with respect to the grant in that case if this was so or not. Notwithstanding these differences, it will be found eventually that the central question for decision in this, as in other cases of this kind, always will be what is the extent, if any, of the right of taking water that passed under the particular grant in each case—the rule expounded by Lord Parker of Waddington in the *Urlam* decision (1917 L.R. 44 I.A. 166), which has become a classic in cases arising under the 1st section of the Act. The decision in each case would *prima facie* depend upon the terms of the grant, or those fixed by the Inam Settlement.

The Subordinate Judge held, that the plaintiff's claim based upon prescription had not been made out, and that he is not entitled to irrigate " any extent he likes in excess of the mamool extent by virtue of any right of easement." For the latter conclusion he relied on *Chidambara Rao* v. *The Secretary of State for India in Council* (I.L.R. 26 Mad. 66) where, it was held that an inamdar who irrigates with water from Government source from which the land was irrigated at the time of the grant, land beyond the extent mentioned in the title deed as wet, is liable to be assessed under the Act for such extra cultivation. As regards the claim to irrigate, based on riparian ownership, he held, with respect to Kila Vaikkal that though the plaintiff was entitled to half the bed of the river at the place where it branched off, he could not claim such right with respect to Someswarapuram lands, as the village lay at an unreasonably long distance, i.e., about a mile, from the river, and with respect to the other two channels also, he could not claim the rights as they were not natural streams but only artificial watercourses. Even if this was not so, he held that the plaintiff's rights could not extend beyond a few feet from the banks of the channels. Dealing with the question specifically raised by the defendant under the Act, the Subordinate Judge held that Turi Vaikkal which irrigated the major portion of the village belonged to the Government; that with respect to it the plaintiff is at liberty to take water to any field he likes, but he should not exceed the *dittam* or mamool area, and that though the water at the place where Kila Vaikkal branched off from the river did not come from a Government source as he owned half the river bed, he as the inamdar was bound " to pass it on to that source " and " his use is therefore limited to that obligation." It may be mentioned here that the learned Counsel for the appellant was not prepared to support this reasoning. The Subordinate Judge further held that, as the plaintiff was entitled only to the melvaram there could be no case of any " engagement " with him within the meaning of the proviso to section I of the Act. As the net result of his findings was that the plaintiff was entitled to free irrigation only with respect to the *dittam* extent, he dismissed the suit.

On appeal, the learned Judges of the High Court, after pointing out that the question of riparian rights did not merit much attention, and that the most important point in the case seemed to be the scope of the grant made by the Government of Madras in 1862, addressed themselves to the consideration of two questions which they formulated thus:—(1) " Is the water that passes through the channels referred to above, the Kila Vaikkals and the Mettu Vaikkals, water supplied from a Government source and (2) if the water is from a Government source, is there any engagement by virtue of which the use of such water is not to be charged with cess "? On the first question, they held that the water in the Mettu Vaikkals Nos. 1 and 2 was supplied from a Government source as these took it from Turi Vadi Vaikkal, which belonged to Government, and that it was safer to proceed on the basis that the water in the Kila Vaikkal was also water supplied from " a work belonging to Government," as it passed through a sluice owned by Government before passing on to the lands in the village. On the second question, they held that

" the entire Government order shows the clear and unequivocal intention of the Government to restore in all its integrity what was taken away by an Act of State on the death of the Raja without reserving for the Crown anything capable of private ownership which was being enjoyed by the last Raja as private property," and that " along with the melvaram that was undoubtedly granted there must have been a grant of water rights also. . . ." It was not disputed that some right to irrigation free of charge must have passed under the grant. The learned Judges held, as was decided by this Board in the *Urlam* case (44 I.A. 166), that the right or easement of taking water which went with the grant " must be measured by the physical conditions such as the size of the channels or the nature and extent of the sluices and weirs governing the amount of water entering the channels and not by the purposes for which the grantor or his tenants have been accustomed to the use of the water prior to the date of the grant." Accordingly, they set aside the decision of the Subordinate Judge, holding that the appellants (the present respondents) " are entitled to claim the benefit of the proviso to section I of the Act to the extent of the quantity of water flowing along the channels—Kila Vaikkal and Mettu Vaikkals in the accustomed manner and that their rights to free irrigation are not limited to the extent or area of the dittam wet lands." Various special features of the case were brought to the notice of the learned Judges to show that principles laid down in the *Urlam* decision were inapplicable, but the arguments based on them were all overruled. These arguments were again pressed before the Board, and their Lordships will deal with them in the course of their judgment.

Their Lordships agree with the High Court that the question of riparian rights is not of importance in this case, as the lands irrigated by Kila Vaikkal lie far away, separated from the river by the Ichangudi lands, and as the two channels Mettu Vaikkals, Nos. 1 and 2, are artificial water courses, and further, as water is being taken not direct from the Turiar within the limits of the village, but by bunding it up at a place outside and within a Government village where no riparian right could be claimed. The important question to be considered is, What is the nature of the grant made by the Government of Madras on August 21, 1862, to the heirs of the late Raja of Tanjore? and what rights of taking water passed to the grantees under the grant? Though the learned Judges of the High Court seem to have some doubt as regards the character of the water taken by the Kila Vaikkal, as to whether it is water supplied or used from a Government source of irrigation, they have, as stated before, proceeded on the basis it is water belonging to Government. Their Lordships will also proceed on this assumption, without, however, deciding the question. As regards the two Mettu Vaikkals, there can be no question that the water in them belongs to Government.

Their Lordships have already given the history of the grant of 1862. Nothing is mentioned in recorded history about the Palace estate villages—so far as their Lordships are aware—prior to the year 1799. In that year, when Serfoji, the father of the last Raja, ceded his territory to the East India Company he was allowed to retain possession of his private estate. This is said to consist now of about 200 villages. It is not known under what conditions he continued to hold the property. It must not be forgotten that Serfoji was a Sovereign Prince at that time, and the property was his private estate. Nothing has been brought to their Lordships' notice to show that he held it subject to the payment of any revenue or to show that his rights of enjoyment as proprietor of his estate were in any manner conditioned or limited by any terms. Their Lordships must assume that he held the estate as its absolute owner with all the rights of enjoyment appertaining to such ownership. It was while the property was being thus held that it was seized with the Raj by the Company; and some time after, the private estate was restored to the heirs of the last Raja in its entirety. In the language used by this Board in *Srimant Chota Raja Saheb Mohitai* v. *Sundaram Ayyar* (*supra*), " on June 23, 1862, the Government of India, which had succeeded the East India Company, informed the Government of Madras that they sanctioned the relinquishment of the whole of the

landed property of the Tanjore Raj in favour of the heirs of the late Raj." In the order passed by the Government of Madras under this instruction, on August 21, 1862, already quoted, the Madras Government says that the decision of the Government of India is to the effect that " the whole of the lands are to be relinquished in favour of the heirs of the late Raja." The word " relinquished " is significant. This decision can have only one meaning, i.e., that the private property was restored to the heirs of the late Raja in all its integrity and without reservation of any kind of right in favour of the Madras Government. The grant was an irresumeable inam. (*Sundaram Ayyar* v. *Ramachandra Ayyar* [1917], 40 Mad. 389). The matter is put beyond any doubt if reference is made to the reasons given for making this relinquishment. It is said in the order that the lands are to be relinquished, " since it is doubtful whether the lands in question can be legally dealt with as State property, and since the plea in equity and policy for treating them as private property is so strong that it commands the unanimous support of the Madras Government." It is clear to their Lordships that by this relinquishment the Government granted in 1862 to the Raja's heirs what the Raja of Tanjore possessed as his private property in 1855, restoring to him his full proprietory rights over it. This construction of the grant does not contravene the rule of law brought to their Lordships' notice that grants by the Crown should be " construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words " (see Broom's Maxims, 10th Edition, p. 410, also *Feather* v. *The Queen*, 6 B. & S. 257; *Bashiram Saha Roy* v. *Ram Ratan Roy* [1927], L.R. 54 I.A. 197, at 203), as the language of the grant, as their Lordships have endeavoured to show, is clear and unequivocal and can bear only the meaning put upon it by them.

It is said that the grantees of 1862 have been held in *Sundaram Ayyar* v. *Ramachandra Ayyar* [1917], 40 Mad. 389, to have been given the land revenue alone without the kudivaram rights. Their Lordships are not called upon to express an opinion whether the villages are " estates " within the meaning of the Madras Estates Land Act, and they consider that their proper course is to construe the grant of 1862 upon the materials to which they have referred. This argument would seem to mean that the grantees would not derive any right to water, certainly not any right to free irrigation, but that cannot be maintained. Having regard to the nature of the grant of 1862, their Lordships think that the Tanjore Palace Estate, if treated as an inam, must be treated as a peculiar kind of inam, —their Lordships observe that the word inam is nowhere used in the grant and the estate appears commonly to have been spoken of as a mokhasa grant, which it is not—and that under it, amongst the rights obtained by the grantees, were included rights which entitled them to use the water for purposes of free irrigation from the sources from which it used to be taken before the grant. When Someswarapuram and other villages forming the Palace Estate were severed from the property of the Government and granted to the heirs of the Raja, the right to take water into the accustomed channels passed to the grantees by implication, by virtue of the grant. The real question is not whether any water right was granted, but what is the measure of that right? The measure of that right and its limitations are of the kind so clearly defined in the *Urlam* decision and need not be repeated here.

This brings their Lordships to consider the application of that decision to the facts of the present case, which was the main argument pressed before the Board. It was strenuously urged that the principle underlying that decision upon which non-liability to pay cess for water taken for excess cultivation was based should not be extended to the present case for several reasons. In that case, it was held that the sannad issued under the Permanent Settlement Regulation XXV of 1802 constituted an engagement within the meaning of the proviso to the Act and that the zemindar was not liable to be charged for the water taken by him from a Government source of irrigation in excess of the mamool, whether for the second crop on mamool wet land or for any crop on land in excess of the

mamool wet, on the ground that water cess was in the nature of a land tax, and as the jama or peishkush was permanently fixed, the Government could not impose a cess for the use of water the right to which was appurtenant to the land in respect of which the jama was payable without increasing the amount of the jama, and thus committing a breach of the obligation undertaken at the time of the Permanent Settlement. It was argued that as there was no settlement of the jama in this case at the time of the grant, the basis for the application of the *Urlam* decision is utterly lacking, and so, the imposition of water cess cannot be said to constitute an additional burden or the breach of any obligation undertaken by the Government not to increase the jama. The argument is fallacious. It is true that there was no express agreement at the time of the grant not to levy any rent on the estate, but having regard to the intention of the Government to restore the estate to the heirs of the Raja in all its integrity as an act of equity and policy, the decision not to settle any jama should be understood as an implied agreement not to levy any quit rent on the estate. There is no evidence that the estate was subject to assessment prior to the grant. No jodi or quit rent has been levied since. The word " unsettled " in the description " unsettled mokhasa " used in the irrigation memoir of the village of Ichangudi, referred to, by Mr. Pringle in support of his leader's argument signifies nothing about the Government's right or intention to settle a jama on the estate. It means that jama was not fixed at the time of the grant, and nothing more. No jama was settled, for the obvious reason that the Government, while restoring the estate to the Raja's heirs, as an act of grace did not wish to detract from the grant by levying any rent. As pointed out by the High Court, " what the non-settlement of the jama really means is that the jama was fixed at nil; in other words, the Government, in view of the fact that the grant is being made as a favour and grace by way of restoration of the village, which had belonged to the last Raja did not think it proper to demand any jama or quit rent in respect of these villages when they made the grant in 1862 ". Their Lordships agree with this view.

The other points of difference emphasised in the High Court, viz., that the head sluices of the channels belong to the Government in this case and the channels do not end in the village, but proceed further beyond, have but little bearing on the question, as no more than the accustomed supply of water is taken, and it is not alleged that the plaintiff has interfered with the sluices or increased the size or height of the dams or the width of the channels, or that injury has in any way been caused to the rights of anyone else to the enjoyment of water flowing in the channels. In their Lordships' opinion, the suggested differences do not render the *Urlam* decision inapplicable in deciding the present case. In this connection, their Lordships will also observe that, having regard to the principles established in the decisions in the *Urlam* and *Swamigal* Cases (*supra*), the soundness of the decision in *Chidambara Rao* v. *The Secretary of State for India in Council* (*supra*) as laying down any general principle respecting the liability of an inamdar to pay " cess " for extended wet cultivation, cannot any longer be maintained. Accordingly, they hold, agreeing with the High Court, that the grant of 1862 constitutes an " engagement " with the Government within the meaning of the first proviso to section I of the Act and that the respondents " are entitled to claim the benefit of the proviso . . . to the extent of the quantity of water flowing along the channels—Kila Vaikkal and Mettu Vaikkal in the accustomed manner and their rights to free irrigation are not limited to the extent or area of the dittam wet lands."

The appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed. As the respondents have not appeared there will be no order as to costs.

(25684) Wt. 8220—23 140 5/13 D.L. G. 338

In the Privy Council

THE SECRETARY OF STATE

v.

T.R.M.T.S.T. THINNAPPA CHETTIAR AND OTHERS

DELIVERED BY SIR MADHAVAN NAIR

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