
(1937) 11 MAD CK 0037
In the Madras High Court

A.V. Narayanaswami Pillai

APPELLANT

Vs

Secretary of State

RESPONDENT

Date of Decision : 15-11-1937

Acts Referred:

Citation : AIR 1938 Mad 400 : (1938) 47 LW 199

Hon'ble Judges : Pandrang Row, J

Bench : Division Bench

Judgement

Pandrang Row, J.—This Letters Patent appeal arises out of a suit instituted by one A.T. Venkatanarayana Pillai, who died subsequently,

against the Secretary of State for India for a declaration that he is entitled to use the water of a channel known as Kandianmadai for irrigating his

lands, and also for refund of the penal water rate collected from him in 1924, namely Rs. 203-3-6. The plaintiff's suit for the declaration was

dismissed by the first Court, but he was given a decree for the actual amount of penal water rate levied from him, namely Rs. 193-12-0. On appeal

by the Secretary of State for India against this decree, the Subordinate Judge of Tanjore went further and gave in addition a declaration in favour

of the plaintiff of his right to irrigate the plaintiff's wet lands with the water of the aforesaid channel. A second appeal was preferred by the Secretary of

State and that was allowed with the result that the entire suit of the plaintiff was dismissed with costs throughout by Wadsworth J.

2. The facts of this case are simple and they can be stated in a few words. The irrigation source assigned to the plaintiff's lands according to the

old settlement as well as according to the re-settlement is a channel known as the Dabir channel or Uthamadani channel. The Kandianmadai is a

short channel connecting the Manniar river with the Dabir channel. The evidence very clearly establishes the fact, as found by, the trial Court and

by the lower Appellate Court that the plaintiff was using the water of the Kandianmadai for very many years, and had been indeed permitted by the

Public Works Department to execute repairs to the channel and that his lands were shown as a separate ayacut Under the Kandianmadai, for

many years. It was on this long user of the water that the plaintiff relied upon in support of what he called a lost grant of the right to irrigate his lands

with the water of the Kandianmadai, a contention which was accepted by the lower Appellate Court and disallowed, and in our opinion rightly, as

second appeal. The theory of a lost grant cannot be invoked where the grant sought to be relied upon is one which is not likely at all to have been

granted, and when it is Selear that there was no grant at least 50 years ago. No case in which any grant of the kind now put forward was

recognized or proved has been brought to our notice; nor has our attention been drawn to any rule framed by the Government regulating such

grants. The policy of the Government in this matter is very well known and in fact finds expression in B.S.O. No. 84. The Government always

desire to preserve unfettered their discretion in the matter of distribution of water or regulating its supply; and in view of this policy, it is most

unlikely that any grant would have been made Under due authority of the right to use water from a particular source for all time without reserving

power to the Government to make a change later on. In this particular case it is very clear that the theory of a lost grant has no place. In a similar

case recently where a lost grant of poramboke land was sought to be relied upon, it was held that such lost grant cannot be presumed, for, it is

contrary to the practice prevailing in the Revenue Department from time immemorial of not granting any poramboke land at all unless it was

previously converted into ay an. A lost grant can only be presumed, if at all, as a matter of fact when all the circumstances go to show that there

must have been such a grant, and not where the circumstances show that there could not have been such a grant. In this particular case there is no

ground at all for inferring that there was a valid grant at any time. What actually happened was that the Public Works Department had permitted

the plaintiff to repair the channel at his own cost and to irrigate his lands from the channel and even shown his lands as being included in the ayacut

of that channel. This would not amount to a grant and there is no other grant that can be thought of in the circumstances. Our learned brother

therefore was right in declining to accept the lower Appellate Court's view that there must have been a lost grant in this case in favour of the

plaintiff. To that extent therefore this Letters Patent appeal must fail; in other words it must be held that the declaration granted by the lower

Appellate Court was wrongly granted.

3. The question however remains whether the other part of the plaintiff's claim, namely the refund of the penal water rate collected from him, was

rightly disallowed in second appeal. This part of the claim does not appear to have been prominently brought to the notice of our learned brother.

A penal water rate can be levied Under the Irrigation Cess Act only where the wet land is irrigated by using without due authority the water from

any source different from or in addition to that which has been assigned by the Revenue Courts authorities as a source of irrigation of such land. In

this case even assuming that the permission granted by the Public Works Department for irrigating the plaintiff's lands with the water of this channel

does not amount to an assignment of that channel by the revenue authorities as a source of irrigation to the plaintiff's lands, nevertheless it cannot

be said that such user, i.e. with the permission of the Public Works Department, was without due authority. This particular source, namely the

Manniar river, is a major irrigation work in respect of which the officers of the Public Works Department, exercise complete control so far as

distribution of water is concerned, as can be seen from Board's Standing Order No. 84. The concurrent findings of both the Courts below are to

the effect that the user in the past has been with the permission of the Public Works Department. This user had gone on for over 40 years and the

penal water rate has been levied in respect of such user which merely continued in the fasli year 1333. The authority or permission given by the

Public Works Department is not shown to have been withdrawn or revoked at any time prior to the levy of this penal water rate, and in our

opinion the user of the water during the fasli in question must be deemed to have been with due authority; till such authority is revoked or

withdrawn the user cannot be penalised. To this extent therefore the decree of Wadsworth J. must be modified; the decree of the First Court, i.e.

of the District Munsif, Kumbakonam, is accordingly restored. As the Letters Patent appeal succeeds in part and fails in part the parties will bear their own costs throughout.