

(1930) 10 MAD CK 0017
In the Madras High Court

Malyam Patel Basavana Gowd (dead) and Others	APPELLANT
Vs	
Lakka Narayana Reddi and Another	RESPONDENT

Date of Decision : 23-10-1930

Acts Referred:

Easements Act, 1882 — Section 4

Citation : AIR 1931 Mad 284 : (1931) ILR (Mad) 793 : (1931) 33 LW 681 : (1931) 61 MLJ 563

Hon'ble Judges : Wallace, J; Krishnan Pandalai, J

Bench : Full Bench

Judgement

Wallace, J.—This suit was filed by the plaintiff, as representative ryot of the ryotwari Malyam village, against defendants 1 and 2, as

representative ryots of the ryotwari Kanekal village, for a declaration of the right of the plaintiff's village to take water to its fields from the point A

in the Hagari river, shown on the plan, Ex. E-I, without any interference from the defendants, and for consequential injunction to ensure that right.

These two villages lie on opposite sides of the Hagari river, Malyam on the east and Kanekal on the west. Both villages have registered wet land

irrigated by the river by channels therefrom which are recognised as their irrigation source. When there is water flowing in the river, each village

gets its supply direct from channels taken off from the river banks. When the surface flow in the river ceases the ryots have been in the habit of

tapping the sub-soil flow and leading it to the main channel. The Malyam ryots claim that it has been their custom and right to tap the riverbed sub-

soil water at the point A, and the custom of the Kanekal ryots to tap that water at the point D, and the plaint asserts that in January, 1924, the

Kanekal ryots came some 500 yards further upstream than usual to the point K,

close to the point A, and by starting their channel there drew off from the Malyam channel a considerable portion of its former supply, so that its normal supply was seriously diminished and the wet crops of Malyam suffered in consequence. The suit was filed, therefore, in order to prevent the Kanekal ryots from coming higher upstream than the point D. The Lower Court, the District judge of Bellary, found-and in fact took it practically for granted as it was not seriously contested-that the usual custom was, as contended for by the plaintiff, namely, that the Malyam channel took off at the point A and the Kanekal channel at D, and that the Kanekal ryots in 1924 broke the usual custom by coming up to the point K. But he held that the plaintiff had no legal right to compel the Kanekal ryots to remain at the point D, and further that the plaintiff had failed to prove any damage in consequence of the defendants' action, and he dismissed the suit. The plaintiff appeals.

2. [After striking off the Secretary of State as not being a necessary party to the suit, His Lordship proceeded:]

3. The trial of the suit in the Lower Court shows an inadequate appreciation of some important points at stake, and in consequence information is

lacking on some of these. The plaint is couched in too vague terms and that led to an equally vague written statement. The Lower Court ought to

have directed the plaintiff to be more specific in stating the legal character of the right he claims. It ought further to have elicited in evidence whether

the area over which the plaintiff claims the right to water is all registered wet double crop, since the time of the year to which the suit claim relates is

the time of the second crop. The area claimed by the plaintiff in the plaint as entitled to water, namely, 150 acres, is considerably larger than the

registered double crop area in his village according to the Settlement Register of 1927, and, to judge from the figures in the Tahsildar's report

about that time, Ex. IV seems to represent rather the area on which double crop was raised than the registered double crop area. This difficulty has

not been solved but it may be that the whole area has permission to take Government water. It appears to be, although that is also not certain,

compounded double crop wet (see Ex. IV) with the rate of assessment fixed accordingly. It is further not as clear as it might be whether the plaint

channel and the defence channel are in all their lengths the channels authorised

by Government for the conveyance of water to the respective villages. Exs. B and C, official notes in 1890 for the settlement of 1893, indicate that the recognised channels for Malyam and Kanekal are actually channels which start in the river-bed at points approximately the present points A and D, and this opinion as regards I) is endorsed by the Tahsildar in his report, Ex. IV, in 1924. Ex. B indicates the recognised Government channel for Malyam as Thalaparisha, i.e., river-bed channel head, and Ex. C indicates the Government channel for Kanekal as a fountain head in the river near Gangalapuram. To some extent we have been hampered in hearing the case by these shortcomings. But, in view of the long time the case has been pending, it does not seem worth while to postpone decision in order to call for further information, and I have taken for granted, what at least does not seem to have been contested, that the wet area for which the plaint claim is put forward is registered wet or at least permitted wet, apparently compounded double crop, and that the authorised irrigation channels for Malyam and Kanekal are those which have been usually taken off in the river-bed itself at the points A and D respectively.

4. The general law of this Presidency governing the rights to water as against Government of a ryotwari wet landholder is well settled and admits of no doubt. The ryot is entitled to be given such supply of water as is necessary and sufficient for the irrigation of his registered wet fields. He must accept that supply from the irrigation source approved by Government as the source of supply for his fields and he must accept the method or machinery by which Government supplies that water. He has no right to insist that his supply shall come from any particular source or any other source than that recognised by Government or that it shall come by any particular channel, nor can he prescribe against Government for such right by user otherwise for any length of time. It is open to Government to alter at any time the manner and method by which it supplies the necessary water to him and he has no grievance or cause of action thereon. It follows that between him and Government there is something in the nature of a contractual obligation under which Government undertakes to regulate, distribute and furnish to him his necessary supply in the manner authorised by it as the proper and usual manner until and unless Government has provided

him with another equally efficient. The leading cases on this subject are *Kristna Ayyan v. Venkatachella Mudali* (1872) 7 M.H.C.R. 60, *Ramachandra v. Narayanaswami* ILR (1892) M. 333 : 2 M.L.J. 279, *Sankaravadivelu Pillai v. Secretary of State for India in Council* ILR (1904) M. 72 : 15 M.L.J. 32 *Rama Odayan v. Subramania Aiyar* ILR (1908) M. 171 : 18 M.L.J. 178, *Fischer v. Secretary of State* ILR (1908) M. 141 : 19 M.L.J. 131 and *Nynappa Servai v. Veeran* ILR (1908) M. 423.

It has never been very definitely laid down whether this right is of the nature of a proprietary right or a contractual right, nor is it necessary to distinguish so long as the nature and scope of the right is clearly defined.

5. It is not a mere right to water so that, as the defendants here contend, the ryot has no right whatever recognisable in law until the water has

actually reached his field, and "therefore the only remedy for him if the water in his visual irrigation channel has been abstracted by a neighbour

whose land is irrigated by a different channel would be to petition Government for his proper supply of water. Government by undertakings the

obligation to supply him with water also undertakes that it shall be at his disposal by the usual and customary method, that is, by channel

constructed either by Government or by the ryot or both, until and unless some other method is adopted. This obligation by Government is in

certain cases subject to the reciprocal obligation of the ryot to keep the main channel free from silt and sometimes himself to construct the minor

interfield channels. By custom certain main channels are earmarked by Government for certain villages or areas of wet-cultivation. As between two

such villages, or areas each taking off from the same source by its own channel, the right of each to water, be it contractual or proprietary, as

against Government is to its necessary and sufficient supply, and, as against each other, to that supply as soon as that supply has passed into its

own channel ear-marked for it. The same principle *mutatis mutandis* applies to individual wet ryots of the same village *inter se*. To accept the

defendants' contention that each wet land ryot has no legal right as against another in the water ear-marked for him in his own channel until the

water actually reaches his fields would lead to the consequence that any wet ryot can, not only with impunity but with the direct approval of the

law, abstract from his neighbour's channel the whole of the water intended for

his neighbour's field provided he does it before that water has reached his neighbour's field. That would be a disastrous proposition for the Courts to uphold and fortunately it has, so far as I can see, no support in law or in precedent. While, therefore, the wet ryot cannot insist as against Government that he has any right to have his supply carried by any particular channel and cannot object to Government altering the channel of supply, he has a right as against other wet ryots and even, subject to Government's right to give him an equally efficient supply, as against Government to the protection of law for that supply once it has passed into the channel at present ear-marked for his supply. That is the general principle and I have to see if any of the circumstances of this case alter its application.

6. The plaintiff founded his plaint which, be it remembered, was framed before Government was made a party, on a claim that the Malyam ryots had by their long user and open enjoyment acquired a prescriptive right to take to their lands from the point A all the water which would naturally come to A without interruption by any one else, and that that right had been infringed by the defendants' action in moving the head of their channel from D to K. It is clear from what has been said that no such prescriptive right can be acquired. One ryot cannot prescribe against another or against Government for supply by any one particular channel. His user of a particular channel is in no sense adverse to the user by another of another channel, since each uses it by authorisation of Government. Nor is it an easement by which he is conveying property of his own over a servient tenement. The plea of easement was in fact abandoned in the Lower Court. The most that the plaintiff can claim against defendants is that he and the other ryots of Malyam village have a legal right, contractual or proprietary, to have their usual supply furnished by the channel implicitly or explicitly recognised by Government as the usual method of supply for the time being, until and unless an equally efficient supply and method of supply are adopted. But if that customary supply and manner of supply according to this contractual or proprietary right has been interfered with, not by Government but by private parties, such interference, *prima facie*, is an invasion of the plaintiff's rights and will give rise to a civil cause of action. On this point, see *Ramachandra v. Narayanaswami* ILR (1892) M. 333 : 2

M.L.J. 279 and Rama Odayan v. Subramania Aiyar ILR

(1908) M. 171 : 18 M.L.J. 178, which will be dealt with later and Adinarayana v. Ramudu ILR (1912) M. 304 : 24 M.L.J. 17, which clearly

recognises that wet field owners have this right to the water of their supply channels, while these exist as definite channels.

7. Against this conclusion the defendants contend, first, that the plaintiff acquires no legal right to the water until it has reached his field, a contention

with which I have already dealt; secondly, that in this case the ordinary Presidency law as set out above will not apply because these river-bed

channels from A and D are too undefined and uncertain to be the subject-matter of any legal right; third, that the water tapped is subsoil water and

in that no property rights accrue; fourth, that no action will lie without proof of actual damage, which, they contend, has not been proved. As to the

point 2, the argument must be that the course of the channels is too indefinite to justify the conclusion that they are intended to be the sources of

supply to the villages. But obviously this cannot stand on the facts proved. On the evidence there can be no doubt, as the District Judge has found,

that Malyam village was in the habit of taking its channel at point A and the Kanekal ryots at the point D until the crucial year 1924. Defendants'

own witnesses admit that the usual point of take off for their channel was opposite to the hamlet of Gangalapuram in Kanekal village, i.e.,

somewhere near D. These witnesses in fact assert that the Kanekal village ryots had not even in 1924 gone higher up than D; but that was

obviously a false case, and need not be pressed against them here. I take it that until 1924 Kanekal village had usually taken off at the point D and

that points A and D are sufficiently definite and familiar to the villagers. This matter seems to me concluded by the fact which appears from Exs. B

and C already noted that these river-bed channels taking off at A and D are the recognised Government sources of supply. If these are definite

enough for Government and the ryots so to recognise them, they are definite enough for all practical purposes. The points B and E where the two

channels leave the river-bed seem also to be fixed points. I think the contention that the channels are too undefined to give rise to a cause of action

is not justified.

8. On the third point it is sought to apply the principles of English law applicable

to underground streams defined and undefined as set out chiefly in

Acton v. Blundell (1843) 152 E.R. 1223 and later cases, English v. Metropolitan Water Board (1907) 1 K.B. 588 and Chasemore v. Richards

(1859) 7 H.L. Cas. 349, cited by the respondents and Grand Junction Canal Co. v. Shugar (1871) 6 Ch. A. 483 cited by the appellant. It is urged

by the respondents that no one can predicate, or prescribe for, a proprietary right or easement in underground streams. Although both sides have

to a certain extent relied upon English cases, my considered view is that conditions in England are so different to those in the district of Bellary that

I deprecate calling in aid English law on this subject and confess that I do not myself find it of any assistance here. In the first place, irrigation rights

such as have been set out above to supply of water for irrigation from recognised Government sources are unknown in England and such rights are

therefore unknown to English law. Secondly, the running of a river current down its natural bed in the dry season a few inches below the sandy

surface is a phenomenon unknown in England. The underground water to which the English cases apply is usually water between layers of

subterranean rock or clay so hidden that no one can guess what their course is.

9. In this country, it is fairly safe to say that the undercurrent of a river is probably flowing down the river-bed and that its course is defined in the

sense that one will probably be able to tap it somewhere in the river-bed, and the water thus is found in, and has not left, the recognised irrigation

source, namely, the river. Finally, the English cases are usually contests between owner of the surface property under which the subterranean water

originally was and the owner of the surface under which it was subsequently found and the crucial question was whether the ordinary rights of

ownership extended to such water. Here there is no question of rival owners of the surface lawfully using their own lawful property and claiming

that ownership of the surface imports ownership of and property in sub-soil water, but a question of the rights of rival claimants to water which is

the property of a third party, namely, Government. No doubt the principles of these English cases have been referred to and applied by this High

Court in a case Adinarayana v. Ramudu ILR (1912) M. 304 : 24 M.L.J. 17, but there the question was whether the plaintiff could claim rights in

water which merely spread over his neighbour's field casually and not in a

defined channel. The parties to that suit were zemindari ryots and no question arose of the rights of ryotwari ryots to the water of a river-bed in a sub-surface channel which is their recognised source of irrigation. In the present case it seems to me amply proved on the facts that the river channels customarily taking off from A and D are the recognised sources of irrigation for the wet lands in Malyam and Kanekal respectively, and in my view it makes no difference in the law applicable that the Government supply of water in the river-bed sinks at times below the surface. Government has by recognising these channels recognised that the sub-surface water is part of the recognised supply which it is their duty to have conveyed in sufficient quantity to the respective wet areas. So that even if it is "underground" water, it is underground water in which, by the law of this Presidency, there can be a legal right, and to which plaintiff has a legal right.

10. The position is much as if the river were a large well or a subterranean pond from which authorised channels took off at various recognised points for irrigating various wet areas. I am not pointed to any authority which has laid down that, if a ryot entitled to water in such an irrigation source abandons his customary channel and opens another in such a way as to cause loss or likelihood of loss of supply to another ryot in his customary channel, the latter has no action against the offending ryot. On the contrary, it has been held in several cases that he has such a right. In *Ramachandra v. Narayanaswami* ILR (1892) M. 333 : 2 M.L.J. 279 damages were awarded against a ryot who had induced Government to open for his benefit a new channel which materially diminished the customary water-supply of another's land. In *Rama Odayan v. Subramania Aiyar* ILR (1908) M. 171 : 18 M.L.J. 178 an injunction was awarded against some ryots who had wholly cut off another ryot's usual channel supply by blocking the entrance of the channel. The ruling in *Narasappayya v. Ganapathi Rao* ILR (1913) M. 280 is not in point, because there neither the plaintiff nor the defendant had any right to the water of the pond and had therefore no right to prevent the other taking, if he could, the whole of it, Isolated passages in *Mahankali Lakshmiah v. Karnam Narayanappa* (1918) M.W.N. 276 are strongly relied upon by the respondents, but the general ratio decidendi does not assist them, for there the point was

whether the plaintiffs could maintain an action on a mere threat of the defendants to interfere with a channel which was not the recognised channel of irrigation, though they had taken water from it without objection from Government for a long time, and it was held that the plaintiffs' claim of a possessory right in the water of this channel, which possessory right had been threatened, could not stand.

11. This was negatived because the plaintiffs did not prove any right to take water by that channel at all and had not made the Government a party to the suit to give Government an opportunity of saying whether they recognised the plaintiffs' right to the water of this channel or not. If any point be made that in this Madras Weekly Notes case Government had by acquiescence for some time authorised water being taken by the unauthorised channel, that is not the case here, as Government distinctly pleads that they did not authorise the defendants to come to the point K. I therefore find that the defendants' ground of contention No. 3 is not made out and is no bar to the maintainability of this action.

12. [Then dealing with the evidence regarding proof of actual damage caused to the village "M" and finding there was no such clear proof, His Lordship concluded that in similar circumstances it would be difficult for a party to prove actual diminution in supply of water or the extent of injury, and proceeded:]

13. However, it seems to me unnecessary to pursue this point further since I am of opinion that, on the facts of this case, the plaintiffs have a cause of action apart from proof of actual damage, and that they have a right to an injunction if they establish probable prospective damage. Even as early as *Kristna Ayyan v. Venkatachella Mudali* (1872) 7 M.H.C.R. 60 - Innes, J., held that; there was no cause of action for an injunction, because no case of prospective damage had been made out upon the facts," and Kernan, J., held that it must be proved that "damage has accrued or must necessarily accrue." In *Rama Odayan v. Subramania Aiyar* ILR (1908) M. 171 : 18 M.L.J. 178 damage was presumed because the entire supply was cut off. But the ruling is that a plaintiff is entitled to succeed "if the act is such as to be likely to cause damage to him". Decision on this point must be guided by the report and the evidence of the Expert Commissioner examined in the case rather than by the vague surmises of lay

witnesses. The P. W. D. Executive Engineer's opinion as set out in his evidence as P.W. 6 and his report, Ex. E, seem to me quite clear, namely,

that the supply of water in the Malyam channel is likely to suffer if the Kanekal channel is taken near the point K. He says in effect that in the case

of such channels tapping subsurface currents in the river-feed there is always a likelihood of the lower channel drawing off water from the higher so

long as the former takes off from any point above the level where the latter leaves the river-bed. It is true that he says-and it is obvious-that he

cannot predicate the exact extent of the diminution without actual experiment. The District Judge, I think, has been unduly impressed by that

admission. For that in all probability the Kanekal channel will prejudicially affect the supply in the Malyam channel if it comes further up the river

than the point D, which is opposite the point B, where the Malyam channel leaves the river, there can on the Engineer's opinion be no doubt. Thus

we find-and it strengthens my acceptance of the Engineer's conclusion-that the actual customary practice has been in accordance with what the

expert thinks is necessary to preserve the customary supply in the Malyam channel. That is, if the location of the channels for Kanekal and Malyam

had been designed by an Engineer, he would have placed the heads of them in their present customary positions at A and D. In these

circumstances, it seems to me that the plaintiff is entitled to have these retained in their customary position, and to have an injunction restraining the

defendants from taking off their channel in the river-bed at any point higher up than the point D, so long as the plaintiff's village has the head of its

channel at A and so long as it is not supplied by Government with an equally efficient supply for its registered wet lands. I would, therefore, reverse

the decree of the Lower Court and grant the plaintiff an injunction in these terms and direct that each party bear his own costs here and below.

14. In the view I have taken that the sub-surface water of the river-bed is the Government source of supply, it is clear that Government cannot

shelve its duty of seeing to the equitable distribution of this supply, and that the Revenue Divisional Officer was not justified in his refusal to

interfere, when the ryots of Malyam approached him with complaints of shortage of water, on the ground set out in his order in Ex. IV that ""there is

no water flowing in Hagari and this is not a case of regulation of water."" It appears to me clearly the duty of Government, until and unless they

supply other equally efficient sources of irrigation, to see that the heads of the recognised channels at A and D are not carried further upstream but remain as they are, and that any attempt to alter the customary position should be penalised as an unauthorised interference with the rights of others equally entitled to the water of the river for their registered wet lands. I have noted above that I think Government ought to be struck out of the case as an unnecessary party and order accordingly. I would direct that Government bear its own costs in the case.

Krishnan Pandalai, J.

15. As the case involves some novel features and we are differing from the learned Judge below I shall state my reasons for our decision.

16. The case arose out of a dispute in 1924 between the ryots of two ryotwari villages Malyam and Kanekal lying on opposite banks of the Hagari

river about utilising the water of the river for second crop cultivation. The Hagari flows northward, Malyam on the right or east bank and Kanekal

on the left or west bank. The Hagari is a tributary of the Tungabhadra and rises in Mysore to the south of the Bellary District and traverses the

District from south to north for a distance of about 80 miles till it falls into the main river. In the Bellary District Manual it is described as a very

shallow river though impassable except by boats in the three months of the monsoon. On both sides of the river are broad belts of sand and there

is reason for supposing that it is gradually changing its bed. At Moka, 12 miles from Bellary, the bed is two miles broad. The part of the river

concerned in this case is near the Union of Kanekalla which is shown in the District map and is only three or four miles from the south-eastern

boundary of the Kayadrug Taluk where it enters the district.

17. This river in which there is no surface flow for nine months out of twelve (October to July) is the registered source of irrigation for the ryotwari

villages on either bank. The first wet crop is sown in July and cut in November. This crop is irrigated by channels which take off the flowing water

from the river. The second wet crop is cultivated between January and April when the river is dry. Water for the second crop is obtained by

digging spring channels in the dry bed of the river from points which are fixed by custom along courses which are also similarly fixed and taking the

water so obtained to a point in the river bank where the village channels begin.

The depth to which the spring channels have to be dug depends on the previous rainfall. If it has been deficient the channels have to be dug deeper and even then the supply may not be sufficient. The digging begins in this area in December and the channels have to be kept open by constant labour towards which the villagers contribute according to the area each has to irrigate. For obvious reasons the custom as to where these spring channels should start and the course they should take is jealously guarded by the villagers and disputes leading often to breaches of the peace result from any attempted variation.

18. Malyam is a comparatively small village with a wet ayacut in 1927 of about 150 acres. It has no other source of irrigation except the Hagari.

Kanekal is a bigger village with a wet ayacut under the Hagari at the same settlement of about 500 acres. It has the advantage also of a tank which

in normal years supplies its surplus water to irrigate the area whose registered source is the Hagari. According to mamool, which is definitely

established to have existed at least from 1890 and which probably existed from 1836, the earliest year for which we have any written record of

these channels, the Malyam ryots began their channel (called Malyam channel or Malyam Nala) at a point A in the river opposite the village of

Rachmarri somewhat higher up in the river-bed than the Malyam village. This channel after traversing the river-bed in a northeasterly direction, left

the river at the point B (see the plan Ex. E-I) and entered the channel leading to Malyam. The Kanekal ryots, on the other hand, used to begin their

channel called the Devisetti channel or Devisetti Nala at a point D in the river-bed opposite the village of Gangalapuram and take the channel along

the dotted line to E where it left the river. The point D is about 500 yards north of A and is nearly opposite B which is almost due east of it on the

opposite bank. In short, the Devisetti Nala began near the western bank of the river nearly opposite the place on the eastern bank where the

Malyam channel left it.

19. In January, 1924, disputes between the two villages arose because the Kanekal ryots shifted the course of the Devisetti channel by digging it

nearer to the middle of the river-bed and therefore to the Malyam channel than the accustomed course and also by pushing up the head of the

channel first to a point II and then to a point K in the plan which was only two

chains from A. The Malyam ryots found that the result of this was to diminish the water in their own Malyam channel. They first tried to make up for the loss by pushing up the source of Malyam channel southward, i.e., up-stream and took it up to Srirangapuram. This had no great effect. They then complained to the Tahsildar but nothing came of it as he reported to the Divisional Officer on 14th February, 1924, that though the wet crops of Malyam appeared to be in need of more water and they are not faring as well as they ought, yet if the status quo ante is restored and the (Devisetti) channel forming the encroachment beyond the mamool point is closed there would be naturally diminution of supply to the vast ayacut (greater irrigated area in Kanekal). He added that the shortage was due to deficient rainfall and that though the question whether the Devisetti channel drew off the water of the Malyam channel is one for engineers on which he could give no definite opinion yet on the whole he was not convinced that it did so and therefore that the Malyam ryots were adopting a dog in the manger policy.

20. On the whole he entertained a rather unfavourable opinion of the complaint of the Malyam ryots which in his view evinced more jealousy than real self-interest and he described them as people who would not come to any amicable settlement and all his talk with them was of no avail. The Revenue Divisional Officer on 7th March, 1924, without going to the spot confirmed the opinion of the Tahsildar holding that the action of the Kanekal ryots in extending their channel higher up has not really caused any appreciable hardship to the Malyam ryots so as to justify any interference. The Collector (the late Mr. Duff) who came on Jamabundy to the spot on 22nd March, 1924, also noted that the complaint was not justified. The appeal to the Revenue authorities having thus failed the Malyam ryots filed this suit on 31st March, 1924, in the District Munsif's Court. The Secretary of State for India in Council was later made a party by order of the District Munsif. In July, 1926, as a result of re-valuation of the reliefs in the suit, the suit was found to be above the jurisdiction of the District Munsif and the plaint was returned to be presented to the District Court. The suit was heard by that Court and dismissed by the learned District Judge on 27th February, 1929. The Malyam ryots appeal.

21. At the outset it may be remarked that the Secretary of State for India in

Council did not contest the suit at any stage of it. In his written statement, he stated that he did not authorise the alleged acts of the Kanekal ryots in diminishing the supply of water to the Malyam ryots by varying the source and course of Devisetti Nala and submitted himself to the judgment of the Court as to the mutual rights of the parties and only prayed that the paramount right of Government to do everything necessary in the general interests of distribution of water may be recognised in the decree. In this Court also the learned Government Pleader adopted the same attitude. We have, therefore, thought it better to strike him out of the parties as no relief is claimed against him.

22. As between the two really contesting parties, i.e., the appellants, the ryots of Malyam, and the respondents, the ryots of Kanekal, who have sued and been sued through their respective representatives, the learned Judge found the most material facts in favour of the appellants. He found that the Malyam ryots have certainly a customary right to start their channel near Rachmarri village at about the point A in the suit plan. He also found that the Kanekal ryots should begin their channel according to custom at D and that in 1924 they had started it from K. But his reason for dismissing their suit was that "the Malyam ryots have not established their rights to keep the Kanekal ryots from starting their channel at any point in the river that suits them, in that they have not made out that they will suffer any detriment if the Kanekal ryots do not start their channel at or lower down than the point D".

23. In other words, it was not proved that taking the Devisetti Nala beyond D had caused or was likely to cause any damage by diminution of water in the Malyam Nala. Having come to this conclusion he went on to add in a rather inconsistent manner the following:

No doubt it would be better from many points of view and would prevent possible conflicts if the Revenue authorities insisted that the Kanekal channel in dry years should be started at the point D while the Malyam channel should be started at the point A; but this is merely a matter for the Revenue authorities in their capacity as distributors of water-supply and I cannot hold that the Malyam ryots have any right to insist that the distribution should be made in such a way.

24. The finding that the defendants' acts have not adversely affected plaintiffs'

channel is certainly weakened by the opinion that from many points of view and to prevent conflicts it is better to insist that the defendants' channel should start at D. What these points of view are, unless one of them is that the plaintiffs have a legitimate grievance that defendants are abstracting their customary supply of water, the learned Judge has not indicated. Nor is it clear how or why the Revenue authorities as distributors of water can or ought to insist that the defendants' channel should begin at D or lower down, unless they were by shifting their channel interfering with plaintiffs' rights. The fair inference from his conclusion is that the learned Judge while satisfied that the defendants' channel ought according to mamool to start at D or lower down and that a continuance of that mamool was from many points of view and to avoid conflicts desirable yet felt that no legal right to such a decree was established as according to him it was not proved that defendants had by their act diminished the water in plaintiff's channel.

25. I think that this last conclusion cannot be supported on the evidence. That the water in Malyanl channel did diminish and that their crops suffered in 1924 was never disputed and is amply proved. The attempt of the Kanekal ryots in 1924 was to explain it away by suggesting that the diminution of water was due to deficiency of rainfall and to Malyam ryots not working hard enough at their channel and that the damage to Malyam crops was caused by salinity of soil and by pests. At the trial the defendants adopted a different attitude.

26. Their witnesses 2, 3 and 4 went to the length of denying that they had pushed the source of their channel from D to K. This is significant. The learned Judge did not believe them on this point. D.W. 1, the Tahsildar, who reported in 1924 that the Malyam lands were suffering for want of water and were not faring as well as they ought, swore in 1928 that the crops on the Malyam lands were doing well. The witness must have been making a mistake. It is probably true that rainfall had been deficient. But that would not justify the Kanekal ryots from abstracting, if their act was capable of that result, even the small supply which Malyam was in the circumstances likely to get from their mamool channel. Absolutely no evidence was given at the trial that the Malyam ryots did not spend the necessary labour on their channel. On the contrary the evidence was that

when faced with shortage of water they did what the defendants did, i.e., pushed up their own channel to the village of Srirangapuram further up

the river which must have cost extra labour. As to salinity of soil, this, if true, is as pointed out by the appellants' advocate a permanent factor

which had no special effect in 1924. As to pests it is well known that pests will more easily attack badly irrigated crops which are thereby in poor

condition. It is difficult to see why the Kanekal ryots took the trouble to dig a new channel and bring it to K unless they, who know something of

the river, thought they could get more water. Of the plaintiff's witnesses 1 to 5, 7 and 8, all but the plaintiff (P. W. 1) are residents of the

neighbouring villages Kalekurti, Rachmarri and Srirangapuram and presumably disinterested persons. They all swear that as a result of the

defendants' shifting their channel and pushing it up from D to K, the water in the Malyam channel first diminished and then ceased to flow and that

the Malyam crops failed in consequence.

27. The most important evidence in the case as to the consequence of the defendants act is the report and evidence of Mr. Ireland (P.W. 1), the

Executive Engineer in charge of the Tungabhadra project, who was deputed by the Court to inspect the spot and make a report on the question

whether the Malyam channel is liable to diminution if the Kanekal channel is dug near the village of Rachmarri. He reported (Ex. E) that in his

opinion such diminution is likely to result. He gave his reasons for that opinion which was founded on experience of behaviour of similar channels in

dry river-beds. On the question what distance should be maintained between the plaintiffs' and defendants' channel in order that the latter may not

interfere with the former he said that the exact distance can be found out only by making an experiment of digging one channel first, gauging its flow

and then digging the other and observing the effect on the first. This could only be done in the dry weather. As Mr. Ireland was appointed

Commissioner in September, 1928, just before plaintiff's evidence began and his report had to be submitted before the evidence closed and was

in fact made in October, 1928, the experiment was not carried out probably owing to water in the river. But Mr. Ireland from his experience and

knowledge and having inspected the spot reported that the only safe way to prevent interference is to fix the spring head of the lower (Kanekal)

channel at a point D not above the spot where the higher (Malyam) channel enters the river margin, B-the practice which had been found by actual

experience to be the safe rule-that the distance between D and B should not be nearer than about 15 chains or 1,000 feet and that the course of

the Kanekal channel below D in the river-bed D G E should not approach the Malyam bank nearer than the centre line of the river.

28. The learned Judge has discarded the Engineer's opinion confirmed by his sworn evidence on the ground that the above experiment, which, as

pointed above, was impossible at the time, was not carried out and preferred the opinion of the Tahsildar (D.W. 1) first expressed by him in his

report of 1924 (Ex: IV) and repeated by him in Court that the defendants' acts did not interfere with the Malyam channel. Seeing that the Tahsildar

himself in Ex. IV said that he was unable for want of professional knowledge to give any definite opinion as the question was one on which only

Engineers could give a competent opinion, I think the learned Judge, erred. in preferring his opinion to that of Mr. Ireland which was entitled to

much greater weight. I think the only safe conclusion possible on the whole evidence is that to which Mr. Ireland came and it follows that the

ground on which the plaintiffs were non suited is not sustainable.

29. But the respondents contend that even if the plaintiffs have proved that they suffered diminution of water in their channel by reason of the

defendants shifting their channel, they are not entitled to any relief. The grounds of this contention are: (1) Plaintiffs must prove not merely

diminution of water in their channel but diminution of the quantity of water which plaintiffs as ryotwari tenants are entitled to, i.e., the quantity which

is necessary for cultivation of their registered wet lands and there is no proof of that character in the case; (2) the plaintiff's case was based on a

prescriptive right, which can only be proved by sixty years' enjoyment against Government and there is no such proof even if ryotwari tenants can

prescribe against Government for necessary water for their holdings; (3) the plaintiffs' rights to water are only against Government and even if

defendants interfere with that supply plaintiffs have no cause of action against them but must only apply to Government for water; (4) according to

law the plaintiffs can have no claim in law to percolating water flowing in undefined channels which the defendants drew off by deviation of their

own channel and therefore plaintiffs can have no right to a declaration or injunction in respect thereof.

30. The first point raised for the respondents raises questions of fact-what is the registered wet area for which the plaintiffs are entitled to water

from Government and whether the plaintiffs were taking by their Malyam channel more than they were entitled to when the defendants by their act

diminished that supply-which were never raised by them in the Lower Court and on which therefore no issues were raised and no evidence taken.

It is therefore sufficient to say that the respondents cannot now be allowed to raise new defences of fact on which there has been no trial; but all

the indications ,are that as regards the second crop cultivation of 1924 which is in question, the plaintiffs were at no time in a position to draw off

more water than was necessary for that crop for their registered wet lands. No one not even the Revenue Officer suggested that such was the

case. On the contrary it seems to have been understood and conceded by all that there would not have been enough water, in any case. The

Masolwari accounts of that crop both in the defendants" and in plaintiffs" village (Exs. V and VIII) show that the crops yielded ranged from 1 to 8

annas which is practically conclusive that there was a general shortage of water. This objection therefore fails.

31. Points 2 and 3 relate to the nature of the plaintiffs" right and may be dealt with together. The right of ryotwari landholders as against

Government to water necessary and sufficient for cultivation of their registered wet lands and their right to take it from the accustomed or

recognised source of supply till other reasonable and sufficient sources are provided have been settled by a series of decisions of this Court.

Kristna Ayyan v. Venkatachella Mudali (1872) 7 M.H.C.R. 60, Ramachandra v. Narayanaswami ILR (1892) M. 333 : 2 M.L.J. 279 and

Sankaravadivelu Pillai v. The Secretary of State for India in Council ILR (1904) M. 72 : 15 M.L.J. 32. There has been controversy as to whether

the right is a contractual right as held in Fakir Muhammad v. Tirumala Chariar ILR (1876) M. 205 or whether it is a proprietary right as observed

in Sankaravadivelu Pillai v. The Secretary of State for India in Council ILR (1904) M. 72 : 15 M.L.J. 32. Whatever the legal character of the right,

it is now settled that Government themselves cannot interfere with the accustomed mode of supply unless and until they substitute another and

equally efficient mode and if they do, will be legally liable to the injured ryots [Rama Odayan v. Subramania Aiyar ILR (1908) M. 171 : 18 M.L.J.

178] and that third parties like other ryots similarly interfering will be likewise liable [Ramachandra v. Narayanaswami ILR (1892) M. 333 : 2

M.L.J. 279 and Rama Odayan v. Subramania Aiyar ILR (1908) M. 171 : 18 M.L.J. 178].

32. The contention of the respondents that only Government is liable in such cases was sought to be supported by the decision in Mahankali

Lakshmiah v. Karnam Narayanappa (1918) M.W.N. 276, which is no authority for that proposition. "To understand the meaning of that decision

it is necessary to know what the facts and the points for decision were" 28 CWN 953 (Privy Council) . In that case the defendants had been the

lessees of plaintiff's land for about 30 years and during that time had used for the cultivation of the plaintiff's land water from a channel which was

not the registered source for those lands but was the registered source for the defendant's own lands. This was apparently a matter of

convenience. After the termination of the lease the defendants refused to allow the continuance of the same arrangement for irrigating plaintiff's land

and plaintiff sued for an injunction restraining defendant from interference with what was claimed as an easement or growing easement. The

Government was not made a party. In these circumstances it was held that the registered source of supply to plaintiff's lands being different and no

arrangement or sanction from Government for what was done during the tenancy being proved, no allegation of easement or growing easement

was of any avail as a cause of action and the suit must fail. That decision has no application to this case in which the facts are different and

therefore the questions for decision are different.

33. The respondents' argument is however right to the extent, that the plaintiffs erroneously founded in the plaint on a right of easement. The

ordinary right of ryotwari landholders against Government to water sufficient to irrigate their fields is not an easement within the meaning of Section

4 of the Easements Act, as it is not a right to do or continue to do something or to prevent and continue to prevent something being done in or

upon or in respect of certain other land not his own. Section 2 of the Act expressly saves the rights of Government in the water of natural rivers

and streams from the operation of the Act. The right of ryotwari landholders to water for their holdings is an incident of ryotwari tenure whether it be regarded as having a contractual or proprietary origin. Whether ryots may by prescription or otherwise acquire a right against Government to more water or to take it in a particular way does not arise in this case. Therefore there is no question in this case of dominant and servient heritage essential to easements. Nor is the right of ryots to enjoyment of their rights of water undisturbed by other ryots an easement as against the holdings of those ryots. But it is the ordinary right of all who have rights to the undisturbed enjoyment of those rights undisturbed by acts which the doers have no right to do. The plaintiff therefore was subjecting himself to an erroneous and gratuitous limitation when he founded his claim on prescription as apparently his advisers did in the Lower Court, as the language of the first issue shows. But this error does not furnish an answer to the suit based as it ought to be on a better and more complete right which the facts establish. The arguments submitted by the respondents furnish no answer to the plaintiff's claim when the legal relations following from the established facts are properly conceived.

34. The most plausible of the respondents' objections is the one based on the well-known rule of law that as between owners of land, no one has a right of property in water flowing underground in undefined and unknown channels by percolation; as a consequence of which one owner has no right of action against another who by sinking wells or by other works on his own land draws off and appropriates the underground percolating water which would otherwise have flowed into his well or stream and makes it unavailable to him. And this is so, even when it is done from an improper motive or maliciously: *Chasemore v. Richards* (1859) 7 H.L. Cas 349, *Acton v. Blundell* (1843) 152 E.R. 1223 and *Mayor of Bradford v. Pickles* (1895) A.C. 587. But as stated by Lindley, J., in *Ballard v. Tomlinson* (1885) 29 Ch.D. 115:

The reasons for the distinction between water in defined and visible channels and water percolating through the soil and not yet in any defined visible channel must be borne in mind, or the decisions establishing it may be misunderstood, and be made the basis of reasoning, leading to results which are as startling as they were unforeseen.

35. The argument of the respondents is that, even according to our finding, what they have done is only to prevent the water borne in the sandy

bed of the Hagari which might otherwise have percolated through unknown and undefined interspaces of the sand into the Malyam channel from

reaching it and it is urged that on the authorities above referred to they cannot be legally prevented from doing so. There are several answers to this

contention.

36. In the first place the right of taking underground water and, in exercise of that right, of abstracting all the water that may percolate into your

land in undefined channels from the surrounding lands belongs to the owner of the soil and can only be exercised by works done on your own

property. You cannot go on your neighbour's land, dig there and take the underground water found there and justify your action because the water

was running underground in undefined channels. That would be trespass as against the owner and would be also actionable at the instance of those

who have rights against the owner to the water you abstract. The respondents are not owners of the bed of the Hagari which belongs to

Government and they cannot invoke the doctrine of percolating water in their aid. The plea of the Government is that they have not authorised the

acts of the respondents and are therefore not responsible for them.

37. Secondly, the Government themselves who are owners of the bed of the Hagari would not be justified in diminishing the supply of the Malyam

channel on the plea that they were entitled as owners to draw off the underground percolating water seeing that they were bound to maintain the

supply of that channel in fulfilment of their obligation to their ryots (the appellants) till they furnished another equally efficacious substitute. And this

on the broad ground that no one may derogate from his own grant or take advantage of his own wrong. The Government being bound by law to

furnish water to the appellants for their cultivation and to substitute another sufficient source of supply before interfering with the registered source

customarily in use, which ex hypothesi is the water percolating into the Malyam channel, would be presumed to have bound themselves not to do

anything to interfere with the existing source of supply till they had found the substitute. And though according to the theory of the decisions about

percolating water, no one, not even the owner of the soil under which it flows,

has any property in such water till it actually reaches a defined channel and therefore there is no infringement of any right of property by appropriating what belongs to no one in particular, yet it is possible for an owner to be guilty of breach of contract if, by appropriating underground percolating water from his land he causes diminution of a supply which he is obliged by law to maintain. The decision of the House of Lords in *M'Nab v. Robertson* (1897) A.C. 129 shows that this is possible though the actual decision of the Court was that even if such contract were implied, as to which some of their Lordships expressed doubt, there was no proof of damage. The question on which their Lordships differed was whether water oozing (seeping) through a marshy area from a spring to a pond was included within the term "streams" used in a demise. This was negated by the majority. But the lessee also urged alternatively that the lessor must be deemed to have contracted not to diminish the supply of water actually available to the land demised at the date of the demise. On this point

Lord Watson said:

I see no reason to doubt that such a contract right as the appellant alternatively claims, Seeing it may be the subject of express stipulation, may also be derived by reasonable implication from the terms of the lease-page 136.

38. Lord Shand said that he was disposed to hold that there is such an obligation implied, and that although the water in question was not directly conveyed, there was an obligation on the part of the landlords not to diminish the water supply (pages 138-9).

39. Lord Davey, like Lord Watson, felt the difficulty of implying the obligation not to diminish the supply of water in the case of a demise which expressly mentioned certain sources but otherwise did not disagree with the opinion that such an implication was possible (page 142).

40. We are not hampered by the express language of any deed from giving effect to the relation between ryotwari tenants and the Government

according to the meaning and intent of the parties and the justice of the case and I feel no doubt that having regard to the obligation of Government

not to interfere with existing sources of water till a sufficient substitute was found by them, they would be bound not to do anything to diminish that

supply while it lasted. It follows that Government itself would not find justification in the doctrine of percolating water for diminishing the supply of

water in Malyam channel and that the defendants can find no justification in it for producing that result.

41. Finally, I share with my learned brother doubts about applying the doctrine of percolating water flowing underground in undefined channels as

settled by English decisions to the water carried in the sandy bed of an Indian river in the dry months between monsoon to monsoon. This feature

of our rivers is due to the physical features of the country and other natural causes. The monsoons produce floods and torrents of a rapidity not

known in Western Europe. The tropical heat produces rapid evaporation. But after the floods have subsided and the sands dried up in the

scorching sun, the cunning river still saves up in her sandy mantle an ample store of life-giving water which only requires the thin covering to be

pushed aside to come to the relief of the thirsty villager and his crop. Some of these rivers have no flow at all in the dry weather. More frequently

there is a straggling thin stream winding along the bed. Shall we say that all water under the river sand is percolating water flowing in undefined

channels? Or shall we say that the river remains an underground "stream" covered with a coating of sand, the flow being still continuous though

slow and invisible, a body of water still flowing within the defined channel of the river-bed?

42. The distinction between the two cases is not whether the water is found above or below the ground or whether the movement of water

particles is or is not scientifically to be ascribed to percolation; but the distinction is whether the water can as a whole be reasonably spoken of as

moving in one direction within a definite and known channel. Having regard to the descriptions of a stream given by Lord Watson and Lord

Halsbury in *M'Nab v. Robertson* (1897) A.C. 129, I respectfully submit that the question is not capable of a general answer applicable to all

conditions to be found" on the globe and that the doctrine of percolating water being *publici juris* must be applied to Indian rivers with due regard

to the reasons of the rule, which is ultimately one of convenience. As explained in the English cases if a man who sank a well was to be held liable

for the diminution of water in the wells of surrounding properties, to what distance is this liability to extend? The water in the next garden may not

be affected but owing to some underground fissure of which no one knows anything, the water in some distant properties may be affected. There

could be no reasonable method of fixing liability of such results. The doctrine, useful because convenient in such cases, becomes unmeaning where the result of drawing water from one place in a water-bearing river-bed, at another not distant place can be easily foretold from experience. The water of such rivers drawn off by channels like the Malyam and Kanekal channels is recognised by the law of the land as the registered source of irrigation for hundreds of villages all over the Presidency. The ryots are expected and required to resort to such sources and only to such sources for water, and if they transgress, as unfortunately they too often do, when water is scanty, they are penalised in all the ways permitted by law. The duty of Government with respect to water derived from such sources stands in the same footing as that concerning other public sources of irrigation. The land revenue derived from the properties irrigated from such sources must be considerable. The result of holding that the water of such rivers is subject to the rules of underground water percolating in undefined channels would be to create such confusion in the civil and revenue law of this Presidency that in the absence of any authority binding on me I should be most reluctant to do so. For this reluctance I derive much support from the way modifications of English doctrines relating to water have been recognised by the highest authority to suit Indian conditions. In 18 CWN 1217 (Privy Council) the Privy Council held that the English rule which connects the subject's rights to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership are not applicable to Bengal. In AIR 1922 105 (Privy Council) their Lordships in applying to the river Godavari the English rule as to accretions observed that the actual rate of progress necessary to satisfy the rule is not necessarily the same as in the case of English rivers. Having regard to the difference in climatic conditions between England and this Presidency and to its necessary results, it seems not so unreasonable, to assimilate the legal incident of streams flowing in known channels whether over or under ground, to rivers like the Hagari, as well during the dry months as in the monsoon months. Perhaps, we may adapt the observation of Lord Sumner in a sense somewhat different from that in which it occurs in the context: Sometimes there is no water in these watercourses, and sometimes what there is does not course, nor are they ever fed by springs; but these

circumstances are not critical. A river may be fed by the rains directly, without any intermediate collection of the water in the bowels of the earth,

and still be a river, and a river which naturally runs during a good part of the year does not cease to be a river merely because at times it is

accustomed to become dry"" Stollmeyer v. Trinidad Lake Petroleum Company (1918) A.C 485.

43. His Lordship was there referring to the riparian rights in the water of a river in Trinidad during the months when it was running, and no question

arose about any water retained in the sandy bed after the surface flow had ceased. Though this observation was not intended to apply to the

present question, it shows that necessary modifications must be applied to the English law of flowing water to make it applicable to tropical

countries. The respondents' advocate has not drawn my attention to any Indian decision on this point nor have I found any, bearing any similarity

to this case.

44. In the Lower Court it seems to have been too easily taken for granted by every one that water which is not visible on the surface must be

percolating water flowing in undefined channels and the plaintiff's advocate thereupon conceded that he could not prescribe for an easement in

such water. It has been pointed out that there is no question of easement in the case. Probably due to this misapprehension the evidence does not

disclose that any particular attention was paid to the aspect of the case now under discussion. The learned Judge refers to a statement of the

plaintiff that there are no fixed head springs, that ""the course of the channels are not marked and that the depth of them varies with the rainfall"". But

in Ex. B, which contains the information collected in 1890 for the last settlement, the source of irrigation of the Malyam village is described in

column 7 under the heading ""Talaparisha, where does it originate, and how is the canal formed"" and the information recorded is that it originates

from the river Hagari close to the village of Marri (Rachmarri), (whence) the canal was dug; and from there it runs for a mile in the river and

extends as far as the wet land. Percolation water flows through the canal. Similarly, the corresponding entry in Ex. C for Kane-kal village is that

there is a fountain head formed in the river Hagari near Gangalapuram hamlet of the village and a canal was dug along the very edge wherefrom

are formed small canals feeding the wet land. The expression ""Talaparisha"" means head springs in the bed of a river from which such channels begin and it is significant that it is the description used for the source of both channels. As to the use made by the learned Judge of the statement that the course of the channels is not marked, and that their depth may vary this is to a certain extent unavoidable as the river-bed is sandy but that the source and course of the channels is sufficiently identifiable is seen from his own finding under the second issue that the places (where the channels are annually dug) are generally in much the same neighbourhood. That the ryots have no difficulty in this matter is clear from the statement of Mr. Irel