

(1926) 03 MAD CK 0058
In the Madras High Court

Raghavalu Nayudu and Others

APPELLANT

Vs

Secretary of State

RESPONDENT

Date of Decision : 19-03-1926

Acts Referred:

Citation : AIR 1927 Mad 144

Hon'ble Judges : Odgers, J

Bench : Division Bench

Judgement

Odgers, J.—This appeal involves a question of water rights. The plaintiffs are certain inhabitants of Sumangalai village, Cheyyar taluq, and

they brought this suit against the Secretary of State in Council for a declaration that they and the other ryots of Sumangalai and Kunnathur villages

are entitled to the customary right of erecting a turf bund across the masonry work of the Sumangalai and Kunnathur Hissa tank every year and

that the defendant, i.e., the Secretary of State be restrained from interfering with that right.

2. The plaintiffs allege in their plaint that by the water-mamoolnama of 1815 they had by that date established the right of damming the water in the

Hissa tank. According to the plaint they used to dam up the interspaces between the dam stones of the kalingula which was then out of repair. As I

read paragraph 4 of the plaint, the device of damming up the interspaces was to prevent practically the entire water of the tank from running waste.

In 1875 the Government replaced the old kalingula by masonry work which is said to have reduced the height of the water by about 2 1/2 feet.

As the supply of water to the tank became lessened by such an arrangement the ryots constructed turf bunds over the masonry work to the height

of about 2 1/2 feet thus preserving the old order of things and ensuring a full supply to their lands according to mamool.

3. They allege that for over 40 years they were constructing these turf bunds on the new kalingula in order to get six months supply from the tank

and they claim that the villages of Sumangalai and Kunnathur have acquired a prescriptive and customary right over the kalingula of the tank in

order to get their full supply of water. The cause of action arose on the 15th November 1915, The Secretary of State's written statement puts the

plaintiffs to proof of their allegations and states that if the plaintiffs can establish the alleged custom of placing temporary turf bunds over the weir of

the plaint tank, the Secretary of State will withdraw the order in question. This also points out that the ryots of Perungattur, foreshore owners of the

plaint tank are necessary parties and should have been impleaded to enable a final adjudication to be come to on all matters in dispute. Defendants

2 to 11 were then joined. They are certain ryotwari owners having lands in the foreshore of the tank. The plaint remained unamended.

4. Defendants 2 to 11 pleaded that the turf bunds were first put up in 1911. They objected to the same as in consequence of the erection of these

turf bunds lands on the foreshore of the tank belonging to these defendants and others became submerged and their, crops damaged. The

Government did not contest the suit nor appeared in the lower appellate Court.

5. As I desired to be clear as to what the position of the plaintiffs was with regard to the Hissa tank which is admittedly the property of the

Government in the course of the hearing. I adjourned the case in order to see if Government could see their way to instruct the learned

Government Pleader to appear in the matter. Mr. Anantha Krishna Iyer applied to Government, but informed me that he was not instructed as

Government had directed the parties to fight out the dispute between themselves. Consequently I am left to do the best I can and I assume that the

following is the contention of the respondents: that by the year 1815 they had acquired a customary right to erect a two foot or two and a half foot

turf bund every year on the kalingula of the Government Hissa tank whereby not only their own lands received an adequate supply of water but the

lands of the defendants were submerged. The question is whether the plaintiffs-respondents have acquired a right not only to erect the bund as

aforesaid but also to submerge the lands of Defendants 2 to 11.

6. Much discussion took place both before me and apparently before the District Munsiff as to exactly how many acres this Hissa tank was

expected to irrigate, and the District Munsif came to the conclusion that a certain quantity of water would be required for the acreage under the

tank and that in order to obtain that water it was necessary for the ryots of those places Sumangalai and Kunnathur villages to bund the kalingula.

As I pointed out in *K. Muhammad Usan Rowther Vs. The Secretary of State for India in Council and Others*, the engagement of the ryot with

Government is that he shall get by any means Government chooses to bring the water on to his land, sufficient water for his cultivation: see also

Mahanakali Lakshmiah v. Karnam Narayanappa [1918] M.W.N. 276 .

7. I am not clear that this discussion about the acreage to be irrigated is strictly relevant to the present consideration. How the plaintiffs acquired

any right against the Government, the owners of the tank, to erect these bunds is not clear, especially in the absence of any argument on behalf of

the Government. But what I am chiefly concerned with is how the plaintiffs have acquired a consequential right to submerge the fields of

Defendants 2 to 11. The District Munsif found that the plaintiffs had not acquired a prescriptive right to bund the water to a height of two feet over

the present kalingula, but that they had acquired a mamool right to do so. The finding as to a prescriptive right is based on Ex. 1 and the

depositions of P. W's. 5 and 6 by which the learned District Munsif thought it proved. The District Munsif also points out that the plaintiffs not

having obtained an order under Order 1, Rule 8, Civil P.C., can only be held to have established their individual rights.

8. On appeal to the learned District Judge he affirmed the District Munsif's judgment, but finds that the present F. T. L. without the bund is

insufficient for the irrigation of the 525 acres under the tank. As I have said I am not clear that this question is strictly relevant, nor am I clear that

525 acres is the correct acreage of the irrigated land under the tank.

9. Reliance is placed on Exhibit H which is an extract from the proceedings of the Revenue Divisional Officer in June 1920 (some years after the

institution of the present suit) where he says that the water mamoolnama shows that the Alingiler Tangal ayacut is entitled to the Hissa tank water

under certain conditions. Very little attention, if any, seems to have been paid in the lower Courts to the consequences of their findings to the lands

on the foreshore of the tank. It seems a strange doctrine that if ryots find that Government is not carrying out its contract to supply them with the

amount of water to which they are entitled they can erect temporary bunds on the kalingula of the Government tank and thereby secure as much

water as they think they ought to have. That Government has objected to this procedure time after time and year after year is perfectly clear by the

record in this case. No prescriptive right has been acquired. There has been no finding that an easement right has been acquired. But it is said that

a mamool or customary right has been acquired.

10. In order to find a customary right enjoyment for a period at least as long as would a prescriptive or easementary right require is necessary.

There is admittedly no evidence here of this custom of erecting turf bunds having been in operation between the years 1815 and 1875. As stated

above the plaintiff's case is that the right had already been established by the year 1815 and for that they point to the mamoolnama Exhibit A,

dated 4-9-1815. That document recites that

according to mamool water used to be stored up so as to rise one cubit above the kuttakala (perpendicular stones) planted on the northern side of

the kalingula lying on the southern side, the Kannathur side. If it be stored up, water would spread over the nanja field tract of Perangathur

aforesaid to the height of one span above the parangal (boulder) therein etc. Since the veera madai sluice on the side of Sumangalai became

breached during the cyclone in Rakshasa year (1795-96) and has not been repaired, since the kalingula has not been repaired and since the sluice

repaired are in a very dangerous condition, we now store up water to the level of the perpendicular stone.

11. We are left with this document which I take it is not a document of title but a statement as to the manner in which irrigation was obtained in and

perhaps before 1815. It does not evidence a contract: see Holloway, J., in *J.D. Robinson v. Ayya Krishnamachariar* [1870] 7 M. H. C. R. 37.

12. Whether on the extracts from Exhibit A set out above it could be established, as the District Judge thought, that there was a custom to store

water in the tank to a height of two feet above the present F.T.L. is to my mind a

question of doubt. No evidence has been brought to my notice, and it is perhaps natural that none should now exist as to the position of this perpendicular stone mentioned in Exhibit A. It is at least arguable that storing water up to the level of the perpendicular stone might mean up to the height of the present masonry kalingula though we know that the plaintiffs did object that in 1875 the Government had placed the kalingula too low.

13. It seems to me to be unsafe and unreasonable to construe Exhibit A as evidence that what is being done now is exactly what was being done in 1815 and prior thereto. The District Judge holds in respondents' favour largely on what he calls the admissions of these defendants in Exhibits G

and H series which are statements before the Tahsildar that their lands are submerged. I cannot glean from these statements that there is any admission or acquiescence in the plaintiffs' right to submerge these fields. The District Judge holds that this sort of customary right, whether based

on prescription or presumption from a lost grant, is one recognized in law. He is the first to raise any question of lost grant and it is not clear by

whom the grant can possibly have been made whether by the Government or by the predecessors in title of the Defendants 2 to 11. He relies on

Narayana Reddi v. Venkatachariar [1901] 24 Mad. 202 There the Judges accepted the finding that the respondent had for a period of 20 years

kept the kalingula at the height at which it was then. The effect was at times to submerge the appellant's land. The learned Judges continue

distinguishing Robinson v. Ayya Krishnamachariar [1870] 7 M. H. C. R. 37:

Here the respondent merely claims to be allowed to maintain his bund at its usual height so as to give him the full advantage of his tank. There is no

question as to what the appellants may be entitled to do in order to get rid of water which is thrown back on to their land, and while deciding that

the respondent has not exceeded the right which he has proved, we do not decide that it is beyond the power of the appellants to take measures to

save their land from being submerged.

14. There is some doubt as to whether that was a private tank. Government was not a party and all that was held was that the defendants had

acquired a certain right which they have not exceeded. Here the question goes back much further as to whether the plaintiffs have in fact acquired

any right at all. The difficulty in this case is caused partly by the position of the plaintiffs. If they have acquired no right as against Government, and I

think they have not, can they stand in the position of Government with regard to this tank and say that because this bund has been erected for a

number of years they or the Government have acquired a right to submerge the defendant's lands? I am not prepared to say that any customary

right had been acquired by the plaintiffs at the time of Ex. A nor thereafter. The practice has constantly been interrupted and even a continual user

from 1875 on wards would not be sufficient to prescribe any right against the Government being of only 40 years duration. If the plaintiffs have

thus failed, as they had, in my opinion, to establish any customary or prescriptive right to erect this turf bund, it follows that they could have

acquired no right to submerge the lands of the defendants. In Robinson v. Ayya Krishnamachariar [1870] 7 M. H. C. R. 37 the plaintiffs claimed a

prescriptive right to throw the water back from the tank on to the defendants' lands and to keep there till it was gradually drawn off into the area of

the tank. That is, as I understand it, exactly what the right claimed here is. Holloway, J., held that the right there claimed could not in any system of

law be acquired by prescription, there, of course, being no question as to prescribing in water flowing in a definite stream. Innes, J., found

it is no evidence of a valid contract (i.e. the water mamoolnama) and cannot in any way bind the defendants to continue to submit to the periodical

submergence of their lands for the advantage of the plaintiffs. A prescriptive right to throw back water and keep it standing on the land of another

exists only in the case of water flowing in a definite stream and cannot apply to surface water not flowing in such a stream, though it might ultimately

if not arrested flow in a tank:

15. see also Perumal v. Ramasami [1888] 11 Mad. 16 where it is held that according to both decision and legislation it is clear that surface water

not flowing in a pool, tank or otherwise is not a subject of easement by prescription. It seems to me therefore that the practice of putting up these

bunds must be assumed to have been at least within living memory permissive and that therefore the ryots have acquired no rights as against

Government. Much less have they acquired any rights as against Defendants 2 to 11 which rights are in fact as I have endeavoured to show from

the decisions of this Court incapable of acquisition.

16. This is quite apart from the question as to whether there can be any customary right to enough water to enable the plaintiffs to raise a double crop, their wet lands being admittedly compound double. If the ryots of Sumangilai and Kunnathur cannot obtain sufficient water they are entitled to, without resorting to the erection of these bunds, it is of course a question between themselves and Government as ryotwari tenants. But I am at present only concerned with any rights acquired by the plaintiffs as against the holders in Perungathur, and I am of opinion that a right to submerge the Perungathur lands has not been acquired either by mamool or by prescription or otherwise. The plaintiffs are, in my opinion, in fact trying to establish a right unknown to law, e. g, prescription or mamool as acquirable by lapse of time. In my opinion, therefore, both the judgments of the lower Courts are based on a misconception of the law and cannot be allowed to stand. The appeal must therefore be allowed with costs of the 2nd to 11th defendants throughout. Appeal allowed.