

(1926) 09 MAD CK 0026
In the Madras High Court

Secretary of State

APPELLANT

Vs

K. Subba Rao

RESPONDENT

Date of Decision : 30-09-1926

Acts Referred:

Citation : AIR 1927 Mad 382 : (1927) 26 LW 10

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—The only point in this case is whether the Government is entitled to levy water rate on the extent of wet cultivation on the

lands in plaintiff's occupation. The source of supply is a spring in Government poramboke land and the water is taken by means of a channel to the

plaintiff's land. The plaintiff's case is that he and his ancestors have been using the water of the spring taken through the channel for over 80 years.

The finding is that the enjoyment has been for over 60 years. Both the lower Courts have given a decree to the plaintiff and the Secretary of State

has preferred this second appeal.

2. The contention of the learned Government Pleader is that the Government is entitled to levy watercess under Act 7 of 1865, whatever may be

the source of irrigation. Here the channel marked A B C in the plan not printed here along which the water flows is said to have been dug by the

plaintiff's ancestors and it is also alleged that the source of the spring is in a well or ditch sunk by the plaintiff's family. The water wells up from the

ground and flows through the channel to the plaintiff's land. It is admitted that there is no source of water--any work or any construction--near the

spring. The water seems to well up from underground and flow through the

channel. The contention of the appellant is that the water wells up in Government poramboke land and is taken along a channel which is also in poramboke land and, therefore, the Government is entitled to levy water cess. The plaintiff's contention is that the channel was constructed by his ancestors, and he has been taking water from the spring for the last 80 years. The question is whether the source of the water could be brought within Section 1 of Act 7 of 1865. Section 1 (a) is in these terms:

Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to. . . .

and Section 1 (b) as follows:

Whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through

adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating, etc.

3. It is admitted that the water does not come from any river, stream, channel, tank or work belonging to or constructed by Government and also

that the water of the spring is not by percolation, direct or indirect by flow or drainage from any river, stream, channel or tank or work from or

through adjoining land. Seeing that there is no river or stream or channel belonging to Government or any work constructed by Government which

can be taken as the source of supply to the spring, Section 1 cannot apply. Where water springs up from underground and that is used by a ryot

for over 60 years, the question is whether he acquires a right of easement to the free flow of water without being subject to the provisions of the

Irrigation Cess Act. It is contended for the appellant that there could be no right of easement in the case of a ryotwari tenant against Government. I

am unable to uphold this contention. Every ryot can acquire by prescription title against Government and if he could acquire prescriptive title

against the Government he could also acquire a right of easement against Government provided the user fulfils the conditions which are necessary

for the purposes of making out an easement by prescription.

4. In this case the finding is that the water of the spring has been used for over 60 years to irrigate the plaintiff's lands. That being so, the

Government is not entitled now to levy water cess on the portion cultivated with the help of the water of the spring. The bed of the channel having

been enjoyed by the plaintiff for carrying the water for over 60 years, is subject to the easement right of the plaintiff. The only question, therefore, is

whether the water which springs up from below can be brought within Section 1. I have no hesitation in holding that water which naturally springs

up from underground without its source being in any way traceable to any of the sources of water mentioned in S.1 cannot be the subject of

assessment under the Irrigation Cess Act.

5. It is unnecessary in this view to consider the case relied upon by both sides Chinnappa Mudaliar v. Sikka Naikan [1901] 24 Mad. 36 and

Kesari Venkata Subbiah v. Secretary of State [1913] 14. M. L. T. 131 In the result the second appeal fails and is dismissed with costs.