

(1936) 10 MAD CK 0023
In the Madras High Court

Secretary of State

APPELLANT

Vs

R.S.S. Narayana Ayyar and Another

RESPONDENT

Date of Decision : 30-10-1936

Acts Referred:

Citation : AIR 1937 Mad 523 : (1937) 46 LW 748

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—These cross-appeals arise out of the same suit and they may be dealt with together. The suit was instituted by the

Secretary of State against the Sri Vyasarayya Swami Mutt (defendant 2) which through its lessee, defendant 1, was in possession of the inam village

of Vagaikulam in the Tinnevely District. The lands in this village are irrigated by an artificial channel known as the ""North Kodaimelalagiankal

taking off from the Tambaraparni River. After flowing through a number of ayan villages and inam villages, this channel, at its tenth mile, enters the

Vagaikulam village and after flowing through that village for three-quarters of a mile it enters the Government village of Mannarkoil and finally

empties itself into certain ayan tanks. There have been prior litigations between the parties as to the extent of the rights possessed by the Mutt to

take water from this channel. But this litigation is of a somewhat different character. The plaintiff alleged that on 9th and 10th June 1926, defendant 1

deepened the bed of the channel to a depth of one foot three inches to a distance of about 680 feet between the points marked B and C in the

plan, Ex. A. It also alleged that he widened the channel by cutting and removing a number of stones which composed the rocky bed of the channel

and served to keep the water course within narrow limits. The plaintiff complained that as the result of these acts of defendant 1, the flow of water into channels taking off from this channel and irrigating ayan lands was greatly retarded and diminished and that a larger volume of water flowed into the branch channel irrigating the defendants' inam lands. The plaintiff accordingly prayed for a preventive injunction restraining the defendants from interfering with the N. K. Channel and for a mandatory injunction directing the defendants to restore the channel bed to the condition in which it was prior to June 1926 when the defendants made the alterations complained of. The right to relief was based on three grounds, namely, (1) injury to the irrigation of ayan lands; (2) ownership of the channel being in the Government; and (3) the paramount minority of the Government to control the channel from its commencement to its end.

2. The written statements denied the allegations of fact as well as the propositions of law put forward in the plaintiff. Six issues were framed in the case, of which it is sufficient to refer to issues 1, 2, 4 and 5. Issue 1 raised the question of the ownership of that portion of the N.K. Channel which lies within the inam limits. Issue 2 related to the plaintiff's claim of paramount right. Issues 4 and 5 related to the allegations of fact in the plaintiff as to the deepening and the widening of the channel by defendant 1 and the consequent interference with the flow of the water. Issue 6 was merely consequential, namely, whether the plaintiff was entitled to the injunctions claimed.

3. Issues 1 to 3 were by agreement of parties not dealt with in the Courts below, because it was expected that they might in substance be decided by this Court in Second Appeal No. 309 of 1928. I do not think it necessary for the purpose of this case to deal with issue 3 and I therefore make no further reference to it. On issues 4 and 5 the trial Court found against the plaintiff and consequently dismissed the suit. But, on appeal, the learned District Judge while affirming the finding of the trial Court on issue 5, came to a different conclusion on issue 4. He held that the interference by defendant 1 with the bed of the channel had not led to any material diminution in the supply of water to the ayan lands and that the interference was not to the extent alleged in the plaintiff; but he came to the conclusion that the defendants

caused the removal of many stones imbedded in the channel of fairly large dimensions and also. got one or two of the pivotal stones, ten feet below the point B in the plan out and removed.

4. On these findings he refused to grant the mandatory injunction asked for in the plaint, but granted a permanent injunction

restraining the defendants from interfering in any way with the N.K. Channel except for the purpose of clearing the silt and making such annual)

repairs thereto as are usual and necessary.

5. He added that even these repairs

should be carried out in case where the inamdar has got the right or is under an obligation to do such repairs, only after due and previous intimation

to the P.W. Department or officers.

6. The Secretary of State has preferred S.A. No. 1164 to obtain the mandatory injunction as well. The Mutt has preferred S.A. No. 1265,

complaining that. even the preventive injunction ought not to have been granted. I see no reason to interfere with the findings of fact of the lower

appellate Court that the bed of the channel has been interfered with in the manner and to the extent stated in the passage above extracted but that

there has been no material diminution in the supply of water to the ayan lands. The question for determination in the second appeals is, what relief,

if any, is the plaintiff entitled to on these findings? On behalf of the Mutt, Mr. Krishnaswami Ayyar has contended that as the rights of the Secretary

of State to the flow of water in the channel are only in the nature of easement rights, the suit should have been dismissed when once the Court

came to the conclusion that the alleged acts of interference by the defendant had not diminished the flow of water to the ayan lands. To clear the

ground, I may add that the case for the Government has not been based on any claim of riparian ownership; in that case, a question may arise

whether the mere interference with the bed of the channel by an upper riparian owner will not justify a claim by the lower owner to have that

interference removed, apart from proof of damage resulting therefrom. On behalf of the Government, it has been contended that the Government is

the owner of the bed of the channel even within the limits of the inam village and that therefore the acts of interference found by the lower appellate

Court constitute trespass, justifying the award both of the preventive injunction

and also of the mandatory injunction asked for in the plaint.

Alternatively, the claim based upon the paramount right of the Government to control the channel has also been pressed. In reply Mr.

Krishnaswami Ayyar has contended that the paramount right relates only to the regulation of the flow of water in the channel by acts done by the

Government on their own portion of the channel and would not entitle them to interfere with the bed of the channel within the inam limits or

complain of any interference with that portion of the bed by the inamdar. On the question of the ownership of the bed of the channel within the

inam limits, he contended that it is the inamdar and not the Government that should be held to be the owner.

7. I may at this stage mention that the questions which were raised by issues 1 and 2, and which the parties hoped would be decided by the

judgment of this Court in S A. No. 309 of 1928 have not been decided by that judgment, because the learned Judges found it possible to decide

that second appeal on their conclusion as to the extent of the easement right possessed by the Mutt. In the ordinary course, it might accordingly

have become necessary for me to ask the lower Court to try and decide these issues. But to save time, all the parties agreed before me that I might

myself decide these two issues on the evidence on record in this suit as well as in S.A. No. 309 of 1928. The questions raised by the two issues

have accordingly been argued before me at some length: but the argument has been more on points of law than on matters of evidence, because

barring the entries in the inam register, there is very little evidence bearing upon the question of the ownership of the channel within the inam limits.

The original Parvana, a copy of which seems to have been produced before the inam authorities, is not now forthcoming nor even that copy; it is

not therefore possible to gather the exact terms in which the grant was couched. Some reference was made to repairs made by the Government to

the N.K. Channel; but there is nothing to show that the Government made any repairs to that portion of the channel which lies within the inam

limits. I have therefore to decide the question of ownership of the bed of the channel practically as a question of law. I may add that in view of the

information gatherable from *Ambalavana Pandara Sannathi v. Secretary of State* (1905) 28 Mad 539, I am proceeding on the assumption that the

N.K. Channel was in existence even before the date of the inam grant to the Vyasaraya Mutt, because this grant appears to have been made only

in 1753 while it is stated in *Ambalavana Pandara Sannathi v. Secretary of State* (1905) 28 Mad 539 that the channel was found to have come into

existence even before a grant made in 1614. In cases where a channel like the present is shown to have come into existence after the inam grant,

the presumption of ownership even in respect of the bed of the channel will be stronger in favour of the inamdar; but the Court will have to draw

inferences as to the arrangement under which the channel serving not merely the inam village but other villages above and below is likely to have

been constructed.

8. Dealing with the relief to which the plaintiff was entitled, the learned District Judge observed that even on the footing that the inamdar was the

owner of the N.K. Channel within his limits, the interference with the bed was wholly unwarranted and illegal, independently of any question of its

effect in diminishing the supply of water to other tanks or lands and independently of the motives operating on the mind of the defendants. I am not

able to concur in this unqualified statement of the law. Bather inconsistently the learned District Judge adds, at the end of the paragraph, that the

defendants had no right to interfere with the channel by deepening or widening it or by rendering it narrower or more shallow so as to increase or

lessen the quantity of water flowing through it and thus affect other lands and landowners. I propose to deal with the case only on the footing that it

has been found that the defendants' acts of interference have not materially or appreciably diminished the supply of water to the lands or tanks of

other owners.

9. I do not see how the paramount right of the Government to regulate the distribution of water for purposes of irrigation will give them a right to

complain or ask for relief on the above findings, if it be assumed that the bed within the Inam limits belongs to the inamdar. In *Fischer v. Secretary*

of State (1909) 32 Mad 141, it was recognized that even for the purpose of exercising this right of control, Government cannot commit an act of

trespass. It is one thing to say (as observed in the same case on p. 160) that the grant to the proprietor was subject to the paramount rights of

Government to control" the waters of the stream or channel for purposes of

irrigation, but another thing to say that Government can exercise the same rights on the bed of the stream or channel within proprietary limits as on the portion of the bed outside those limits. In *The Secretary of State for India in Council Vs. Palaniyappa Pillai and Another*, *Rahim and Srinivasa Ayyangar, JJ.* emphasized the limits of the paramount power claimed for the Government, though in the interests of other lands dependent on the particular system of irrigation, they took care to direct the *mittadar* to keep the channel and the works connected therewith in proper repair and efficient condition. In *Chirmappan Chetty v. Secretary of State* AIR 1919 Mad 412, *Rahim, J.* observed that this paramount authority cannot supersede the rights of the riparian proprietors.

10. If however the Government can maintain that the bed of the channel even within the inam limits is vested in the Government, any act of interference with it by the inamdar will amount in law to trespass, unless justified by custom or by some implication of a limited grant. This question of ownership of the bed of the channel within the inam limits is not by any means free from difficulty. In the former litigation which culminated in *S.A. No. 309 of 1929*, the lower Courts assumed that the decisions in *Ambalavana Pandara Sannathi v. Secretary of State* (1905) 28 Mad 539 and *Papala Narayanasawmy Naidu and Others Vs. The Secretary of State for India in Council and Others*, had in effect been overruled by the Privy Council in *Bala Surya Prasada Row v. Secretary of State* AIR 1917 PC 42. I do not think this is a correct reading of the decision in the *Bala Surya Prasada Row v. Secretary of State* AIR 1917 PC 42. In all the water cess cases that went up to the Privy Council, their Lordships found it possible to uphold the claim of the proprietor by a decision in his favour as to the extent of water right that he was entitled to, independently of any question as to the ownership of the bed of the stream. The decision in AIR 1932 46 (Privy Council) illustrates this. By a liberal interpretation of the reference to "engagement" in the Irrigation Cess Act, their Lordships were prepared to hold that the immunity from cess extended to the full right of water supply which the proprietor can claim either by grant or by prescription or as a riparian right. In AIR 1932 46 (Privy Council) they explain the decision in the *Bala Surya Prasada Row v. Secretary of State* AIR 1917 PC 42 as one relating to "easement right" determined no doubt with

reference to the terms of the Sanad. In *Secretary of State v. Maharaja of Bobbili* AIR 1919 PC 52 they preferred to have their decision on an

implication of an engagement arising out of a prescriptive easement, though at the end of the judgment they added that they did not intend to differ

from the conclusion arrived at by the High Court: see *Secretary of State v. Maharaja of Bobbili* AIR 1916 Mad 946 on the question of the

ownership of the bed of the river. The observations in AIR 1932 46 (Privy Council) establish that the ownership of the stream referred to in the

Irrigation Cess Act is the ownership of the bed and not of the volume of the water as an independent entity.

11. The decisions in *The Secretary of State for India in Council Vs. Palaniyappa Pillai and Another*, and *Secretary of State v. Maharaja of Bobbili*

AIR 1916 Mad 946 and of the Full Bench in *Chirmappan Chetty v. Secretary of State* AIR 1919 Mad 412 are no doubt authorities for the

proposition that in the case of zamindaris, the bed even of natural streams, so far as they lie within zamindari limits, would prima facie belong to the

proprietor. This view may also be said to be supported by the observations of the Judicial Committee in *Bala Surya Prasada Row v. Secretary of*

State AIR 1917 PC 42. The question is, whether the same conclusion holds good in the case of inams. Government have been contending that

even in respect of water rights, the *Urlam* decision should not be applied to inamdars; but even if this contention should be held to be untenable, it

would not necessarily follow that the question of ownership of the bed should be decided alike in both cases, for the decision in AIR 1932 46

(Privy Council) shows that the question of water rights may be dissociated from that relating to the ownership of the bed.

12. In *Ambalavana Pandara Sannathi v. Secretary of State* (1905) 28 Mad 539 and *Papala Narayanasawmy Naidu and Others Vs. The*

Secretary of State for India in Council and Others, weighty reasons have been suggested in favour of the view that where a main channel is the

source of irrigation not merely for an inam village but for other Ayan villages also, it must be presumed that the channel was not intended to be

comprised in the gift to the inamdar. *Ambalavana Pandara Sannathi v. Secretary of State* (1905) 28 Mad 539 related to the very channel now in

question. In *Venkatarama Sivan v. Secretary of State* AIR 1919 Mad 765, *Sadasiva Ayyar, J.* expressed the opinion that the decision in the *Bala*

Surya Prasada Row v. Secretary of State AIR 1917 PC 42 overruled the view expressed in these cases in river porambokes and channel

porambokes in whole inam villages. I am, with all respect, unable to concur in that opinion. That considerations of the kind referred to in these

decisions are not irrelevant to the question is shown by the observations of the Judicial Committee in Bala Surya Prasada Row v. Secretary of

State AIR 1917 PC 42. In Secretary of State v. Venkataratnammah AIR 1914 Mad 482 Benson and Sundara Ayyar, JJ. treated the question of

the inamdar's ownership of the bed of the channel as one depending on the circumstances of each case and laid stress on the fact that the stream

concerned in the case before them was not part of any larger irrigation system maintained by the Government. In Papala Narayanasawmy Naidu

and Others Vs. The Secretary of State for India in Council and Others, Sankaran Nair, J: reserved his opinion on this point and in Secretary of

State v. Ambalavana Pandarasannadhi AIR 1914 Mad 552, he expressed his conclusion as a finding on the facts of that case and not as one

based on any general principle. In Venkata Lakshmi Narasamma v. Secretary of State AIR 1919 Mad 965 reference was made to a Full Bench,

in connexion with an inam grant, of the question whether the English rule of construction that a grant carries the bed of an adjoining river ad medium

filum is applicable in India; the Full Bench gave a guarded answer to the effect that the presumption applied, but it may be strong or weak

according to the circumstances. It was however added that the onus of showing that the grant did not convey the bed was on the grantor. Whether

the considerations adverted to in Ambalavana Pandara Sannathi v. Secretary of State (1905) 28 Mad 539 and Papala Narayanasawmy Naidu

and Others Vs. The Secretary of State for India in Council and Others, would suffice to rebut the presumption remains an open question.

13. The decision in Secretary of State v. Srinivasachariar AIR 1921 PC 1 has introduced a further difficulty. The presumption of ad medium filum

ownership of the bed has to be based on the ownership of the banks and the adjoining lands; but in Secretary of State v. Srinivasachariar AIR

1921 PC 1, the Judicial Committee has recognized only a qualified kind of ownership in the inamdar, even in respect of the lands comprised in the

inam, except when the terms of the grant expressly create a larger right. Assuming it is a grant of the land and not merely of the revenue, they say it

was not a complete transfer of all that was in the grantor but merely something carved out of his larger interest". In their view, the only benefit;

contemplated or intended for the grantee would ordinarily be the "use of the land for the purposes of cultivation". In (Sree Rajah Kakarlapudi)

Venkata Krishnamaraju Bahadur Garu Vs. (Sree Rajah Chintalapudi) Suryanarayana Raju Bahadur and Others, , the learned Judges were pre-

pared to treat even this kind of interest as "ownership" for certain purposes. It may be open to question whether the presumption of ad medium

filum ownership of the bed of a river or channel skirting or flowing through an inam village could be based on this kind of ownership of the

adjoining lands. In Ambalavana Pandara Sannathi v. Secretary of State (1905) 28 Mad 539, the terms of the Sanad relating to the grant of a

neighbouring village irrigated by the same channel are set out and they are such as may amount to a grant of full ownership even according to the

test indicated in Secretary of State v. Srinivasachariar AIR 1921 PC 1. As already stated, the original Parvana or even a copy of it is not available

in the present case.

14. In the above state of the authorities, I should have preferred to place the case before a Bench (or even a Full Bench) if " I thought that for the

disposal of these Second Appeals, it was necessary to come to a positive conclusion as to the nature and extent of the inamdar's interest in the

bed of the channel. But it seems to me that this case can be disposed of on narrower grounds. Even on the principle stated in Ambalavana Pandara

Sannathi v. Secretary of State (1905) 28 Mad 539 and the qualified (ownership recognized in Secretary of State v. Srinivasachariar AIR 1921 PC

1, the inamdar must, it seems to me, be held to have some interest in the bed of the channel, to the extent required to enable him to maintain it in an

efficient condition as a source of irrigation for his lands. Further, even if his right to take water for irrigating the inam lands be put no higher than an

easement, he would be entitled u/s 24, Easements Act, to do on the servient tenement (i. e., the bed) all acts necessary to secure the full enjoyment

of the easement, subject of course to the limitations indicated in that section. In like manner, the Government, by reason of its interest in villages

lower down, may be entitled to do certain acts on the bed of the channel within the inam limits, even if this portion of the bed should be held to be

the property of the inamdar. Such acts, whether done by the inamdar or by the Government, cannot be said to amount to a trespass. On the

findings, I cannot hold that what the inamdar has done in the present case was done for any other purpose than to make that portion of the channel

efficient as a source of irrigation. It is in this view that I am unable to concur in the opinion of the learned District Judge that the motive or purpose

of the inamdar in doing these acts is immaterial. The removal of the stones cannot by itself be said to "damage" the servient heritage. The gravamen

of the plaintiff's complaint was that the defendant's acts interfered with the supply of water to the ayan villages or at least increased the supply to

the inam lands. But this allegation has been found against by both the Courts. It seems to me unjustifiable to impose on the inamdar the duty of

giving notice to the plaintiff's officers before the inamdar could do what he is legally entitled to do, viz., to clear silt or effect repairs to the channel

within his limits. The result is that S.A. No. 1164 is dismissed, S.A. No. 1265 is allowed and the suit dismissed with costs throughout, of defendant

2. Time for payment of costs, 3 months.

15. Before taking leave of the case, I must express my dissent from the way the learned District Judge has criticized the District Munsif's treatment

of the part played by P.W. 6 in this litigation. I quite agree that in the decision of the merits of the case, such considerations have no place; but they

are relevant to the question of the award of costs. More than that, I would emphasize that in the matter of starting a litigation of this kind the

Government should, in my opinion not regard itself as standing in the same position as a private litigant. In the public interests, it should insist that its

officers should take upon themselves a due share of responsibility in satisfying themselves that the allegations on which the suit is sought to be

founded are reasonably true and not be led away by emphatic assertions made by private parties or even by . their offer of indemnity as to costs.

Leave granted.