
(1935) 10 MAD CK 0068
In the Madras High Court

Secy. of State

APPELLANT

Vs

A.V. Narayanaswami Pillai

RESPONDENT

Date of Decision : 25-10-1935

Acts Referred:

Tamil Nadu Irrigation Cess Act, 1865 — Section 1(b)

Citation : AIR 1936 Mad 692

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—The appellant is the Secretary of State against whom was passed a decree declaring the right of the plaintiff to irrigate his wet lands from the water of a poromboke channel, known as Kandian Madai and for a refund of penal water rate levied by Government. The channel in question takes off from the south bank of the Manniar river which flows roughly from west to east. Higher up the river there is a big channel known as the Debir channel which also takes off from the south bank and flows eastwards. The Kandian Madai channel runs north to south leading from the river to this Debir channel, but in the middle of its course there is a branch which flows eastwards and irrigates a block of lands belonging to the plaintiff. It is the Government's case that this irrigation by a direct take-off from the Kandian Madai channel is unauthorised and liable to penalty and that the authorised source for this block of the plaintiff's lands situated to the north of Debir channel is the Debir channel itself. The lower appellate Court has found that the recognised source for the plaintiff's lands, according to the revenue registers, is not the Kandian Madai but the Debir channel. It is also found that the Kandian Madai channel was dug at some time after the year 1878 and that the plaintiff has not proved that it was dug by his ancestors. It is also found that the channel is a poromboke channel, the bed of which is not the property of the plaintiff, and that there is no evidence of an adverse user, such as would justify the claim based on prescription. Thus, it is clear that the main case pleaded in the plaint based on (1) ownership of the channel and (2) prescription has not been made out.

2. It is, however, found by both the lower Courts that the plaintiff has been using the water of this channel for very many years and has been permitted by the Public Works Department to execute repairs to the channel, and it is indisputable that in the Public Works Department's accounts and plans the plaintiff's lands are shown as a separate ayacut under the Kandian Madai channel. From these facts the lower appellate Court infers that the user of the water of the channel by the plaintiff must have a legal origin, and he calls in aid the fiction of a lost grant to give a decree for the plaintiff. "Whether this lost grant was a grant of ownership in the channel or a grant of a right in the nature of a right of easement to take the water from the channel belonging to the Government or whether it was a mere grant of an authority (which would be, subject to certain restrictions revocable by the Government as in the case of an ordinary permission to irrigate) the learned appellate Judge does not seem to have asked himself. He also finds that the Kandian Madai channel does not appear to be a different source from the Debir channel and that therefore irrigation of the plaintiff's land from the Kandian Madai channel is covered by the authorisation contained in the settlement registers which permits the plaintiff's lands to be irrigated from the Debir channel. On the strength of the findings, he gives a declaration which recognises in favour of the plaintiff an absolute right, unqualified by any power of revocation or control, to use the water of this Kandian Madai channel for his lands.

3. It seems to me quite clear that whatever be the correctness of the lower Court's findings, no such absolute right in the water of a channel belonging to Government can be acquired by a ryot holding land directly under Government, except under the most unequivocal and unconditional form, of grant such as in practice is almost unknown. It is well established that the right of the holder of wet lands in ryotwari areas under Government whether it be based on contract or whether it be proprietary in its nature, is a right to the accustomed quantity of water (so far as water is available) and it is subject to the right of the Government to control the supply and even to change the source provided that there is no diminution of facilities. So much is settled by the ruling in *Basavanna Gowd v. Narayana Reddi* 1931 54 Mad 793, which follows a long line of cases of this Court. A ryot holding lands under Government might conceivably prescribe for a right to a certain quantity of water, but it is difficult to see how he can prescribe for a right to take water from a particular source without regard to Government's control which is both in law and in practice a condition precedent to the use of water coming from sources belonging to the Government. If this reasoning is correct, it seems to follow that no declaration should be given of an absolute right in water belonging to Government in ryotwari areas unless there are circumstances which warrant the assumption that the Government have expressly divested themselves of that control of sources of supply which is a normal feature of the revenue administration.

4. Now, it seems to me that the theory of a lost grant is inapplicable to the facts of a case like the present. Quite apart from the difficulty of inferring a lost grant

when the period of the user is admittedly less than the period necessary to establish a right of easement as against the Government under the Easements Act, the facts of this case indicate that there cannot have been a grant, made so far back as not to have been within living memory. And the records of the settlement indicate that there certainly was not any grant of ownership in the channel. The general rule which has been recognised with reference to the fiction of a lost grant is that it may be presumed, in a suitable case, from a period of user, which is not less than that laid down by statute for the acquisition of rights by prescription, vide Godard on Easements, p. 171. When a person prays the Court to presume a lost grant as against Government, it is reasonable to infer that such a grant cannot be presumed unless there is evidence of a user which would be sufficient to establish a right by prescription as against Government, that is to say, unless there is evidence of sixty years' user. So much was recognised by Odgers, J. in the case of Mahomed Hussain Rowther v. Secy. of State 1926 Mad 788 . Even if this decision be considered to go too far it seems to me impossible to infer a lost grant on the basis of immemorial user when the evidence shows positively, as the lower appellate Court has held, that no such grant has been made in the year 1878, that is to say, less than fifty years before the suit. It is one thing to infer a lost grant from evidence of forty years' user when there is nothing in the previous history of the land which is repugnant to the theory of a grant, but it is quite another thing to infer a lost grant from forty years' user when there is a positive indication that, fifty years ago, no such grant had been made. It seems to me manifest that in the present case, had there been a grant, evidence would have been available of that grant, and that in such circumstances when there is clearly no possibility of prescribing for the right claimed, it is quite incongruous to set up a fiction of a grant which is improbable on the facts, in order to abbreviate the period of sixty years laid down under the Easements Act for the acquisition of a right by prescription as against Government.

5. It seems to me therefore impossible to found the right of the plaintiff of the water of this channel on ownership, whether that ownership be based on title in the bed of the channel or an absolute right to water acquired by prescription or by grant from Government. It is however possible that there may have been either an assignment by the revenue authorities of the Kandian Madai as the source for the irrigation of the plaintiff's land or some due authorisation to the plaintiff to take this water from a source which is not that assigned. Proviso 2 to Section 1(b), Madras Irrigation Cess Act, reads as follows:

Provided also that no cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated by using without due authority water from any source herein before mentioned and such course is different from or in addition to that which has been assigned by the revenue authorities or adjudged by a competent civil Court as the source of irrigation of such land.

6. Now it seems to me clear that the words "adjudged by a competent civil Court" refer to an adjudication prior to the user of the water, and that it is not open to a civil Court to say that, though there has been an unauthorised user of water, the revenue authorities ought to have authorised this user and therefore a decree will be passed against the Government. It is however to be noted that the water used must be taken not only from an unauthorised source, but also without due authority. It cannot, I think, be contended that evidence of an authorisation in years gone by would suffice to rebut evidence of lack of authorisation or prohibition at the time when the water is actually taken. Once it is conceded that the Government have the power to alter the source of irrigation, provided that there is no diminution of the accustomed supply, it seems to me to follow necessarily that the Government have power to cancel an authorisation which has been given. If so much is granted, it will follow that even if the lower appellate Court's theory of the assumption of a legal origin for the taking of water by the plaintiff be recast as an assumption of a due authorisation for the taking of water such past authorisation would not avail the plaintiff, if there is evidence that at the time when the water is taken the source of irrigation assigned by the revenue department was different from that from which the right to take water is claimed. Now it is established that at the time of the re-settlement operations shortly before the suit the plaintiff approached the Settlement Officer and asked for the alteration of his rough patta and the recognition of the Kandian Madai channel as the source of irrigation for his lands in lieu of Debir channel. An enquiry was held and the prayer of the plaintiff was finally refused. It cannot therefore be contended that at the time when this penalty was levied the Kandian Madai channel was in fact the authorised source for the irrigation of the plaintiff's land, though it might be contended that in past years there had been authority for its use. If in fact there has been a change prescribed by the Government in the manner of the irrigation of the plaintiff's lands, and if this change has effected a diminution in the accustomed supply the remedy of the plaintiff is not, in my opinion, to take water in defiance of the order of the Government but by a proper proceeding to seek redress for the damage, if any, done by the change in the prescribed manner of irrigation. In this view I must allow the appeal and dismiss the plaintiff's suit with costs throughout. (Leave to appeal granted.)