

(1936) 01 MAD CK 0028
In the Madras High Court

Secy. of State

APPELLANT

Vs

Duvvuri Somayya and Others

RESPONDENT

Date of Decision : 07-01-1936

Acts Referred:

Citation : AIR 1936 Mad 550 : 163 Ind. Cas. 87 : (1936) 43 LW 761

Hon'ble Judges : Pandrang Row, J

Bench : Division Bench

Judgement

Pandrang Row, J.—This is an appeal from the decree of the Additional Sub-Judge, Amalapuram, dated 24th February 1931 allowing an appeal from the decree of the District Munsif of Amalapuram dated 16th April 1928 in O.S. No. 91 of 1925, a suit against the Secretary of State for India in Council for refund of Rs. 20-9-0 alleged to have been illegally levied as irrigation cess in respect of the land described in the plaint schedule for Fasli 1333. It is common ground that the land was irrigated by water from a madugu or lake which adjoins the land; the plaintiff's case was that the madugu and the water therein belong to the Zamindars of Mukkamala, and that the plaint land is mamool wet land. The defendant however denied these allegations and claimed that the madugu is communal property over which the Public Works Department has been exercising control and rights of ownership for a long time. Both the Courts below proceeding on the basis that the plaint land belongs to the plaintiff, found that the madugu was a natural lake and constituted communal property; but they differed as regards the plaintiff's right to irrigate free of charge the plaint land with water from the lake. The trial Court was of opinion that no riparian rights could exist in respect of the water of the madugu as it is not a natural stream; the lower appellate Court, however, was of opinion, that

even if for the sake of argument we assume that the madugu is a natural stream belonging to the Government the appellant as a riparian owner of land abutting the stream has got a natural right to use its water for irrigation purposes, and consequently the Government has no right to charge water cess in such a case.

2. The decree of the trial Court dismissing the suit was thereupon set aside by the lower appellate Court and a decree was passed in favour of the plaintiff. The Secretary of State for India in Council appeals from that decree. As the lower appellate Court did not actually decide whether the madugu or lake belongs to the Government but decided the controversy on the assumption that it belongs to the Government, the present second appeal has been argued on the same assumption and the only point argued is whether there can be any riparian right to use the water of the lake for irrigation, free of charge, on the assumption that the lake belongs to the Government, or in other words on the assumption that the Government could legally levy irrigation cess in respect of the water taken to lands not adjoining the lake. It is therefore unnecessary to decide whether the rule laid down in *Johnston v. O'Neill* (1911) AC 552, that the Crown is not as of common right entitled to the soil or waters of an inland non-tidal lake, does not apply to India. "Except in respect of accretion the law relating to non-tidal waters applies equally to pools and non-tidal lakes"- *Coulson and Forbes on Waters and Land Drainage*, Edn. 5, p. 108. Riparian rights are not therefore absent in the Case of natural lakes, and the existence of such rights including the right to use the waters of lakes for irrigation is recognised in I11. (j) to Sub-section (b) of Section 7, Easements Act. The illustrations to this sub-section are of rights which owners of Immovable property have, subject to any law for the time being in force, of enjoying without disturbance by another the natural advantages arising from its situation, and I11. (j) is as follows:

The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

3. Riparian rights exist in respect of natural lakes no less than in respect of natural streams, and the same limits apply in both cases. The madugu or natural lake with which we are concerned in the present case is one bounded on all sides by Zamindari villages, and when these villages were included in the Zamindaris at the time of the permanent settlement the riparian rights in respect of the lands abutting on the lake must be deemed to have passed along with the lands. As observed by Ramesam, J. in *Subbarayadu v. Secy. of State* 1927 50 Mad 961 at pp. 976 and 977:

No distinction can be made between the effect of a grant on the measure of irrigation rights granted, whether the enjoyment at the time of the grant was by an easement or as a riparian owner with natural or prescriptive rights... A riparian right is a natural right and is not acquired by immemorial user. It exists by law, It may be lost by the adverse enjoyment of another, but it has not got to be enjoyed to be kept up.... That in India rights of a riparian owner include also the right to take reasonable quantity of water for purposes of irrigation scarcely

admits of any doubt.

4. This decision was followed by a Bench in a subsequent case, *Secy. of State v. Surayya* 1929 29 MLW 744. It is well settled that the Government cannot impose cess for the use of water the right to use which was appurtenant to the lands in respect of which a permanent jumma or assessment has been fixed. The levy of irrigation cess in the present case is therefore unauthorised by law, and the decree appealed from is right. The second appeal therefore fails and is dismissed with costs. Leave to appeal is asked for; in the circumstances such leave can be granted only subject to terms as regards costs. Leave to appeal is given subject to the condition that in any event the costs of the plaintiff should be paid by the Secretary of State for India in Council and that the latter bear his own costs.