
(1956) 09 MAD CK 0021
In the Madras High Court

T.S. Srinivasa Rao, Attorney agent

APPELLANT

Vs

State of Madras and Another

RESPONDENT

Date of Decision : 04-09-1956

Acts Referred:

Madras Estates Land Act, 1908 — Section 12(a), 3(10)(a)

Citation : (1956) 2 MLJ 595

Hon'ble Judges : Rajagopalan, J

Bench : Division Bench

Judgement

Rajagopalan, J.—The petitioner was the holder of the zamindari estate, known as the Pudur Zamin in Tirunelveli District. Under the

provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) hereinafter referred to as the Act that estate

vested in the Government with effect from 3rd January, 1951, the notified date. Vagaikulam was one of the villages included in that estate. It was

common ground, that it was an uninhabited village, though for how long it had remained uninhabited there was no evidence to show. It was also

common ground that the entire extent of the village of about 71 acres 42 cents always belonged to the petitioner. No ryot held any land in that

village. Included in this extent of 71.42 acres was a tank (Kanmoi) which measured 32.33 acres. The ayacut of that tank measured 37.18 acres,

and the petitioner cultivated the whole of that ayacut as part of the private lands of the landholder in that estate.

2. After the estate had been abolished under the Act the petitioner applied to the Additional Assistant Settlement Officer for a ryotwari patta for

the entire extent of the lands in Vagaikulam including the areas occupied by the tank. The Additional Assistant Settlement Officer rejected the claim

for the tank as well as for some of the other plots of land. The petitioner appealed against that decision to the Estates Abolition Tribunal. In effect, the Tribunal allowed the claim of the petitioner for a ryotwari patta for all the lands in Vagaikulam other than the tank. The Tribunal rejected the claim of the petitioner for a ryotwari patta for the area occupied by the tank.

3. The petitioner applied under Article 226 of the Constitution for the issue of a writ of certiorari to set aside the order of the Tribunal.

4. The Tribunal held that the claim of the petitioner - we are now concerned only with the claim for a ryotwari patta for the area of the tank - fell

neither under Clause (a) or Clause (b) of Section 12 of the Act. The learned Counsel for the petitioner did not rest the claim on Section 12(b)

before us. But he challenged the validity and the correctness of the order of the Tribunal, that the petitioner's claim fell outside the scope of Section

12(a). The finding of the Tribunal on that point was:

The first question is if these lands are pannai or private lands u/s 3(10)(a) of Act I of 1908. There is no evidence that these lands were dealt with or

enjoyed or treated as pannai lands prior to 1908; nor is there any evidence of direct and personal cultivation of these lands for a continuous period

of 12 years immediately preceding the commencement of Act I of 1908; nor is there any evidence that the kanmoi was constructed by the

appellant or her ancestor. There is therefore no evidence that these lands are appellant's pannai lands as contemplated by Section 3(10)(c) and

she will not be entitled to a ryotwari patta for them u/s 12(a) of Act XXVI of 1948.

Section 12(a) of the Act runs:

In the case of a zamindari estate the landholder shall, with effect on and from the notified date,, be entitled to a ryotwari patta in respect of.

(a) all lands including lanka lands which immediately before the notified date - (i) belonged to him as private land within the meaning of Section 3,

Clause 10(a) of the Estates Land Act, or (ii) stood recorded as his private land in a record prepared under the provisions of Chapter XI or

Chapter XII of the said Act, not having been subsequently converted into ryoti land;

5. It was conceded that no record of rights was ever prepared for Vagaikulam or for the estate. So the question, did the tank belong to the

petitioner as a private land, had to be answered only with reference to the requirements of Section 3(10)(a) of the Estates Land Act.

Section 3(10)(a) of the Estates Land Act runs:

Private land-

in the case of an estate...means the domain or home-farm land of the landholder by whatever designation known such as kambattam, khas, sir, or

pannai, and includes all land which is proved to have been cultivated as private land by the landholder himself, by his own servants. or by hired

labour with his own or hire stock, for a continuous period of twelve years immediately before the commencement of this Act.

6. In the rest of this judgment we shall confine the use of the expression ""private land"" to land that falls within the scope of Section 3(10)(a) of the Estates Land Act.

7. What were the tests to apply in deciding whether a given piece of land was private land within the scope of Section 3(10)(a) of the Estates Land

Act was discussed and settled by a Full Bench of this Court in *Periannan v. S.S. Amman Koil* (1952) 1 M.L.J. 71 : ILR (1952) Mad. 741 . In that

case, however, there was no occasion to consider whether a tank with its bed and bunds could under any circumstances be viewed as a private

land as denned by Section 3(10)(a) of the Estates Land Act. We shall consider later to what extent the principle laid in that case can be applied to

the facts of this case.

8. That a tank is ""land"" and that the expression ""land"" covers also the water that is stored over the land need admit of no doubt (see *Whatton's*

Law Lexicon pages 903 and 488). That the full proprietorship of the tank in *Vagaikulam*, which lay within the ambit of the zamindari always vested

in the petitioner and her pre-decessors-in-interest admitted of no doubt either. It was common ground that at no time did any one other than the

landholder claim or exercise any rights over the tank or the water drawn therefrom. The Tribunal pointed out that there was no evidence to show

that it was the landholder that had constructed the tank in question. But considering the facts set out above, it would appear only to be a

reasonable inference, that the tank in question, which was obviously intended to irrigate and actually irrigated exclusively the private lands of the

landholder was constructed by the landholder. The Tribunal also pointed out that

there was no evidence to show that the tank was constructed on what had been a private land. Nonetheless, the question remains to be answered, was the tank a part of the private lands the petitioner held in the village before the estate vested in the Government under the Act (XXVI of 1948). There can be no conclusive inference either way, that it was private land or that it was not private land from the factum of the petitioner's full proprietorship of the tank as a piece of land. Nor can the circumstance that at no time could the tank have been ryoti land, help to answer the question at issue. The definition of "ryoti land" in Section 3(16) of the Estates Land Act should itself suffice to reject any plea that the tank was ryoti land. Such a plea, it should be remembered never arose for consideration. Nonetheless, that it was not ryoti land is obviously not enough to establish that it was private land.

9. One marked feature of the definition of private land and ryoti land in Estates Land Act should however be noticed at this stage. Section 3(16)(a) specifically excludes beds and bunds of tank from the definition of ryoti land. There is no such express exclusion in Section 3(10)(a) of the Estates Land Act which defines "private land". No exclusion could be implied either and the exclusion enacted by Section 3(16)(a) cannot be imported into the definition in Section 3(10)(a) of the Estates Land Act. There is no scope either to bring the tank in question within the scope of Section 20 or Section 20-A of the Estates Land Act. It never served any communal purpose. It was exclusively owned and used by the landholder. No one else owned any of the lands in the village Vagaikulam, which itself was uninhabited.

10. We come back to the question, can a piece of land owned by the landholder and used exclusively as a tank to irrigate the private lands of a landholder be brought within the scope of the definition of private land in Section 3(10)(a) of the Estates Land Act. Unless that statutory test in satisfied, a claim to the statutory right conferred on the quondam landholder by Section 12(a) of Act XXVI of 1948 cannot be upheld.

11. The right conferred by Section 12(a) of the Act constitutes a statutory grant, a right to ryotwari patta for what had been the private lands of the landholder in an estate. The learned Counsel for the petitioner urged that whatever was appurtenant to that right also passed to the grantee under

that statutory grant. He contended that the right to own and use the tank was appurtenant to the right to own and use the cultivated private lands,

while both the tank and the cultivated lands lay in an estate as defined by the Estates Land Act and that therefore both the rights vested in the

grantee of the statutory grant u/s 12(a) of Act XXVI of 1948. The learned Counsel referred to the observations of their lordships of the Privy

Council in 36 CWN 359 (Privy Council) .

12. After explaining the principle laid down in the Urlam Case (1917) 33 M.L.J. 144 : 1917 44 L.R. IndAp 166 : ILR 40 Mad. 886 (P.C.),

Viscount Dunedin, observed:

Of course, the permanent settlement was dealing with the Government's right to a payment, which represented and replaced the melvaram of more

ancient times, but the test is the same as the test which would be applied to a conveyance. In a conveyance you ask what passed. In the case of the

permanent settlement you ask what was the extent of the property that was settled. In the Urlam Case (1917) 33 M.L.J. 144 : 1917 44 L.R.

IndAp 166 : ILR 40 Mad. 886 (P.C.), the water rights in question passed because they were existing water rights enjoyed by way of easement at

the time of the settlement. Here what passed was the property and the property, being riparian, had inherent in it without special mention, the

riparian rights.

The same principle was applied in (1943) L.R. 70 I.A. 112 (Privy Council) . (See the observations at pages 238-240.) The learned Counsel for

the petitioner urged that the test should be the same whether it was a Crown grant, like that embodied in a sanad issued after the permanent

settlement, or a statutory grant. That the test should be the same in deciding what was it that was conveyed under a grant appears to us to be a will

founded argument.

13. Was the tank truly appurtenant to the cultivated private lands of the petitioner in Vagaikulam is the next question.

14. The Oxford English Dictionary explained ""appurtenance"" as follows:

(1) (Law and general) - A thing that belongs to another, a belonging; a minor property right, or privilege, belonging to another more important, and

passing in possession with it; an appendage.

(2) A tiling which naturally and fitly forms a subordinate part of, or belongs to a whole system; a contributory adjunct, an accessory.

15. The entire ayacut of the tank consisted of the cultivated private lands of the petitioner. Those lands could not be irrigated without the water of

the tank. It could certainly be claimed that the ayacut and the tank together constituted a single unit for agricultural purposes and each formed a

subordinate part of and belonged to the whole system. The tank was certainly accessory or adjunct to the ayacut. Unity of ownership of both parts

was there and so was the unity of enjoyment of both the tank and the ayacut. If the expression ""appurtenance"" is given its normal meaning as

disclosed by the dictionary, the tank in question was an appurtenance of the ayacut. That the entire ayacut formed the private lands of the

petitioner, as defined by Section 3(10)(a) of the Estates Land Act, was never in dispute. The tank was an appurtenance of those private lands.

16. The expressions, "appurtenant" and "appurtenance" have also been interpreted by Courts both in England and in India. A fairly full discussion

of the case-law on the subject can be found in the decision of a Full Bench of the Allahabad High Court in Babu Lal Vs. Ram Prasad and Others, .

Bannef, Ag. C.J., referred to the passage in Stroud's Judicial Dictionary, Edn. 2, 1903, page 109:

But the word "appurtenant" may be used in a secondary sense as equivalent to such a phrase as "usually enjoyed with

and observed:

On this passage a view has been taken that this secondary sense is not a right of easement and that the phrase ""appurtenant to a holding implies a

part of the holding "or" part and parcel o the holding " or forming part of the holding.

17. The learned Acting Chief Justice then proceeded to examine the scope of Roe v. Siddons (1888) L.R. 22 Q.B.D. 224, on which Wharton in

his Law Lexicon based the secondary meaning ""usually enjoyed with"". Iqbal Ahmad, J., with whom Harries, J., agreed observed at page 43;

I am clear that the word appurtenant in the phrase "appurtenant to a holding" has been used in this country in the secondary sense noted above and

not in the sense of a right of easement.

Again he observed:

It follows from what has been observed above that the phrase "appurtenant" to an "agricultural holding" means something which is adjunct to or an integral part of the holding.

18. We shall confine ourselves to the question whether a tank which irrigates an ayacut under it is an appurtenance of that parcel of lands which constitutes the ayacut when both are owned by and are in the possession of the same landholder of an estate.

19. In *Nidhi Krishna Bose v. Rama Doss Sen* (1873) 20 W.R. 341, Couch, C.J., observed:

Where land is let for cultivation, and there is a tank upon it, the tank would go with the land; and if there was a right of occupancy in the land, there would be a right of occupancy in the tank as appurtenant to the land.

On the facts of that case, however, the learned Chief Justice found that the tank was the principal subject of the lease and that therefore the lessee

did not acquire a right of occupancy. The same learned Judge, Couch, C.J. and Glover, J., held in *Siboo Jelya v. Gopal Chunder Chowdhry* (1873) 19 W.R. 200.

This tank appears to be used only for the preservation and rearing offish. It does not appear to have formed part of any grant of land, or that it can

in any way be considered as appurtenant to any land held by the defendant. The only thing occupied appears to be the tank itself.

The claim for occupancy right was negatived.

20. Both these decisions were considered by a Division Bench in *Surendra Kumar Sen Chaudhury and Others Vs. Chandratara Nath and Others*, and Mitter, J., observed:

...the true test as to whether the lease is for agricultural purposes or not is to see whether the primary object was the lease of the tank or lease of

the land surrounding it for purposes of agriculture with the tank within it.

Graham, J., recorded:

...if a portion of the demised area is used for agricultural purposes that will determine the character of the lease as a whole.

The principles laid down in *Nidhi Krishna Bose v. Ram Doss Sen* (1873) 20 W.R. 341, and *Surendra Kumar Sen Chaudhury and Others Vs.*

Chandratara Nath and Others, , were considered again by Mitter, J., in *Bir Bikram*

Kishore v. Amanaddin 40 C.W.N. 156. On a construction of the lease in question in that case the learned Judge came to the conclusion, that the primary object of the letting was a non - agricultural purpose.

21. Applying the principle laid down by Couch, C.J., in Nidhi Krishna Bose v. Ram Doss Sen (1873) 20 W.R. 341, with which we respectfully

agree and adapting the language of the learned Chief Justice to the facts of this case, we would say : where the parcel of lands was held by the

petitioner for cultivation and there was a tank upon it, the tank would go with the land and if there was a right to a patta for the land there would be

a right to a patta for the tank as appurtenant to the land. Or if we can put it in the language of Graham, J., in Surendra Kumar Sen Chaudhury and

Others Vs. Chandratara Nath and Others, , if a portion of the demised area (the grant in this case being u/s 12(a) of Act XXVI of 1948) is used

for agricultural purposes, that will determine the character of the grant as a whole.

22. What Section 12(a) of the Act granted was a right to a ryotwari patta for private lands, as that expression has been defined by Section 3(10)

(a) of the Estates Land Act. If the tank had been constructed on what was proved to have been private land before that construction, the

landholder would be entitled to a patta for the tank also. Even if there was no proof of the nature of the land before the tank was constructed, if the

tank was always held and enjoyed by the owner of a parcel of private lands as appurtenant to those lands, Section 12(a) of the Act, in our opinion

would confer a statutory right to a ryotwari patta for the tank also. As we have already stated the tank and its ayacut together constituted one unit,

owned and enjoyed by the same person, the landholder, for agricultural purposes. The rights in what was appurtenant to the private lands passed

with the right in the private lands granted by the statute u/s 12(a) of the Act.

23. The matter may be looked at from another angle. The petitioner could claim that, even without full recourse to the principle of appurtenance

which we have discussed above, the tank in question was part of his private lands, as that expression has been defined by Section 3(10)(a) of the

Estates Land Act. We have already pointed out that appurtenance by itself connotes that what is claimed as appurtenant is part of a whole. The

appurtenant tank was part of the parcel of lands, all of which together

constituted the private lands of the petitioner. That the tank was not cultivated while the rest of the lands was cultivated by the petitioner may not affect the determination of the question at issue, could the tank by itself be viewed in the circumstances of this case as a piece of private land within the meaning of Section 3(10)(a) of the Estates Land Act.

24. We have already pointed out that the definition in Section 3(10)(a) of the Estates Land Act does not expressly or even impliedly exclude the

land which is in use as a tank, used exclusively to irrigate the cultivated private lands of the landholder. The learned Government Pleader urged that

actual cultivation should be the test in deciding whether a piece of land satisfied the statutory requirements of Section 3(10)(a) of the Estates Land

Act. We are unable to accept this contention. The definition in Section 3(10)(a) of the Estates Land Act is an inclusive definition and the second

limb of that definition which includes all land proved to have been cultivated as private land, does not abrogate the first limb of Section 3(10)(a),

Private land in the case of an estate means the domain or homefarm land of the landholder by whatever designation known.

Absence of actual cultivation may not be sufficient to negative the claim, that a piece of uncultivated land is nonetheless private land. There is little

substance in the plea of the learned Government Pleader, that the bed of a tank as such is uncultivable, in the sense that it is impossible to cultivate

it. Neither nature nor the statute made it impossible for the petitioner to cultivate the bed of the tank in Vagaikulam, if she had chosen to do so at

any time. That actual cultivation, continuous or intermittent, was not the only test to apply in deciding whether a given piece of land was within the

scope of Section 3(10)(a) of the Estates Land Act was made clear in *Periannan v. Amman Kovil* (1952) 1 M.L.J. 71 : ILR (1952) Mad. 741 . Of

the tests formulated by the learned Judges in that case, items 3 and 6 run:

(3) If there is no proof of cultivation for a continuous period of 12 years before the commencement of the Act, the land may be proved to be

private land by other methods, provided the land was not shown to be once ryoti.

* * * * *

(6) The essence of private land is continuous course of conduct on the part of the landholder asserting and acting on the footing that he is the

absolute owner thereof and recognition and acceptance by the tenants that the

landholder has absolute right in the land.

25. The land in question, that is, the tank was never ryoti land. It is true it was not proved to have been cultivated at any time even intermittently.

Nonetheless, the continuous course of conduct of the landholder was to treat the tank as a piece of land in which the landholder had absolute rights

and to use the land (tank) only for his agricultural purposes. Agriculture has obviously a larger connotation than cultivation. Whether or not it

exhausts the conception of domain or private lands, that the lands were held as of right by the landholder for his exclusive agricultural purposes

should in our opinion, suffice to bring those lands within the scope of Section 3(10)(a) of the Estates Land Act.

26. A strict application of the test of cultivation would exclude, for example the area occupied by an irrigation well in the midst of undisputed

private lands ; so would a small pond or an uncultivated mound of earth stand excluded. Yet no basis could be found in the statutory language of

Section 3(10)(a) of the Estates Land Act for such exclusion. The area of the water-spread could be of no consequence, when either proof of

actual cultivation or evidence of availability for cultivation is the only means of establishing that the piece of land falls within the scope of Sections

3(10)(a) of the Estates Land Act.

27. The distinction between the land in use as a tank held as appurtenant to cultivated private land and that land (tank) held for the exclusive

agricultural purposes of the landholder may be fine drawn, but nonetheless it is perceptible. In either case, it would, in our opinion, satisfy the

statutory definition of private land in Section 3(10)(a) of the Estates Land Act. Despite its continuous use as tank, if the land came within the scope

of the definition of private land in Section 3(10)(a) of the Estates Land Act, the landholder would be entitled to a ryotwari patta for that land (tank)

also u/s 12(a) of Act XXVI of 1948.

28. The Tribunal, in our opinion, misconceived the scope of Section 3(10)(a) of the Estates Land Act and Section 12(a) of Act XXVI of 1948

when it in effect applied the test of cultivation in the past as the only and conclusive test. It really amounts to a failure to exercise jurisdiction to

decide the issue before it after taking into account all the relevant factors. The order of the Tribunal has, therefore, to be set aside by the issue of a

writ of certiorari. That, in effect, means that the Tribunal will have to dispose of the appeal afresh in accordance with law and in the light of the observations in this judgment.

29. The rule is made absolute and the petition is allowed. There will be no order as to costs.