

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ahmad Yar Khan and Others v. the Secretary of State for India in Council and Another, from the Chief Court of the Punjaub ; delivered the 11th May 1901.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

[*Delivered by Lord Macnaghten.*]

The substantial question to be determined in this case is what are the respective rights of the Appellants (who were Plaintiffs in the suit) on the one hand and the Government on the other in the Hajiwah Canal—a work constructed many years ago under the sanction of the Government by the grandfather and the father of the Plaintiffs? Is the canal for the greater part of its course now vested absolutely in the Government to the exclusion of the representatives of the original undertakers (as both the Courts below have held) or have the Appellants as such representatives in common with their elder brother the Second Respondent a proprietary right in the whole of the canal subject only to a special privilege conferred upon or reserved to the Government by a Sanad dated the 20th of March 1886.

The Hajiwah Canal is an important irrigation work in the district of Multan. It is some 50 miles long about 40 feet wide and more than

10 feet in depth. It is supplied with water from the Sutlej and extends from its intake on that river to certain lands in Tabsil Mailsi which were formerly jungle or waste lands belonging to the Government and known as Bar-barini lands from the circumstances that their occasional cultivation depended upon rainfall.

It seems that in 1860 the revenue of these lands which were inhabited mainly by nomad tribes was in lease to one Ghulam Mustapha Khan for the period of the then current settlement. On the 5th of May in that year Mustapha Khan presented a petition to Government stating that "with a view to render the land culturable and facilitate the payment of the lease money and for the benefit of the public" he "at the expense of thousands of rupees from his own pocket" was "willing to dig two water cuts one for the irrigation of the land in Ludan which is occasionally watered from the Sutlej and the other for irrigating the land Khai a Government jungle from the same river." He therefore prayed that he might be granted permission to construct two nalas. The order on the petition was that the original should be sent to the Deputy Commissioner of Multan with a request that he would have a plan of the nalas in question prepared through the Khan. Under date the 30th of August 1861 there is a memorandum or report among the Government records to the following effect: "A detailed plan of both the nalas showing the name and mark of each nala &c. has been prepared. The persons whose lands are to be occupied by the nalas are all agreeable to the construction thereof. As regards the compensation (Hak-rasi) payable to the proprietors of the lands to be occupied by the nalas the Khan has with their consent which has been obtained in a lawful manner come to a settlement that

“ proposals will be made at the time of opening
“ of the nalas. Under these circumstances the
“ opening of both the nalas should be allowed
“ because a considerable area of land will thus
“ be rendered fit for cultivation and there is
“ every hope of increase in the Government
“ revenue.” Acting on this report the Com-
missioner sanctioned the project on the 4th of
September 1831. There seems to be no other
document or record in existence throwing light
on the circumstances under which the con-
struction of the Hajiwah Canal was authorised
or expressing the commands or intentions of
the Government with regard to it.

Having thus obtained the sanction of the
Government Ghulam Mustapha Khan com-
menced the construction of the canal. It was
completed after his death by his son Ghulam
Kadir Khan the father of the Plaintiffs and the
Second Respondent. The canal was constructed
partly on Government land and partly on the
land of private owners under arrangements
with them. The work is said to have cost in all
about nine lakhs of rupees. The annual cost of
maintenance and clearance appears to be over
Rs. 8,000.

The first question is what rights did Mus-
tapha Khan and Kadir Khan acquire from the
Government?

It seems to their Lordships that under the
circumstances the undertakers acquired a pro-
prietary interest in so much of the Government
lands taken for the purpose of the canal as was
required for its construction and maintenance
and also a right to have the waters of the Sutlej
admitted into the canal so long as the canal
was used for the purpose for which it was
originally designed.

The principles applicable to such a case are
nowhere stated more clearly than by Lord

Kingsdown in his judgment in the case of *Ramsden v. Dyson* 1 E. & I. Ap. 170, "If a man," says his Lordship "under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under an expectation created and encouraged by the landlord that he shall have a certain interest takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him lays out money upon the land a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* and as I conceive is open to no doubt."

Now taking all the circumstances into consideration having regard to the permanent character of the proposed work the indefinite amount of the probable expense of construction and the fact that the Government encouraged the undertakers to acquire the necessary land where the line of the canal passed through property in private ownership and also bearing in mind the view of the Government at the time as appears from Government records that the work might be constructed and maintained more economically by the Khans than by Government and that it would be better to leave the settlement of the country in the hands of native chiefs it seems to be pretty clear that the Government must have intended the Khans to understand and in fact must have led them to expect that all Government land required for the canal would be made over to them in proprietary right. If the Government had intended that at the termination of the period of the then current settlement the Government land required and used for the canal should revert to the Government

it is difficult to suppose that the Government would have omitted to say so in plain language or that they would have neglected to make provision for securing the transfer to them of the land acquired by the undertakers from private owners.

Upon the expiration of the period of the Settlement for which the lease of the Barbarini lands had been granted to Mustapha Khan the Government agreed to make a grant to Nadir Khan at a moderate assessment of a tract of land which was irrigated or capable of being irrigated by the canal and at the same time in the interest of the public they stipulated for the right to intervene when necessary in the management and control of the canal.

The Sanad or deed by which this arrangement was carried out was dated the 20th of March 1886. It contains a grant to Nadir Khan his heirs and assigns for ever in full proprietary right with retrospective effect from the 29th of December 1879 of a tract of 60,000 acres at a jama of Rs. 15,000 per annum for the period of the current settlement. It also contains a grant of an Inam of Rs. 5,000 a year for two lives out of the Government jama "in consideration of the general loyalty and good service to Government of the said grantee and more especially in recognition of his energy and enterprise in digging the Hajiwah Canal." And then there is a provision in the following words :—

8. "The canal dug by the grantee and known as the Hajiwah shall for the present remain under the management of the said grantee, provided always that in consideration of the premises the said grantor, his successors and assigns shall at all times hereafter, whenever he or they shall think necessary, be entitled, without the consent of, or permission from the said grantee, his heirs, legal representatives and assigns, to take into his or their own hands and control the management

“and distribution of the water of the said canal without payment of any compensation whatsoever, and further to clear the said canal and recover the cost of clearance and management by a canal rate to be levied on the area irrigated.”

Assuming that at the date of the Sanad Nadir Khan had a proprietary interest in the canal as their Lordships are prepared to hold the only remaining question is what is the effect of Clause 8?

It seems to their Lordships that this clause means exactly what it says. It does not give the Government a right to seize and confiscate the canal. It merely gives them the right from time to time whenever they think it “necessary” that is necessary in the interest of the public to take into their own hands the management and distribution of the waters of the canal and to clear the canal and recover the cost in the manner provided by the Sanad and that “without payment of any compensation whatsoever.” It is for the Government to determine when and under what circumstances it is necessary to take possession of the canal and how long it may be necessary to withhold the control and management of the canal from its owners. The canal does not become theirs nor do they acquire any proprietary rights in it by assuming its management and control. They are not however in the opinion of their Lordships in the position of receivers or managers or trustees for the owners or accountable to the owners for profits. If the owners are aggrieved by the action of the Government in taking or keeping possession of the canal it is a case for representation and remonstrance not for the intervention of the Court.

In the present case the Government it seems thought it necessary to assume possession and

control of the canal in consequence of dissensions which arose on the death of Nadir Khan between the members of his family and they are entitled to hold such possession and control so long as they think it necessary.

The result therefore is that in the opinion of their Lordships the Appellants are entitled to a declaration that subject and without prejudice to the privilege conferred upon the Government by Clause 8 of the Sanad of the 20th of March 1886 they are entitled to a proprietary right in three fourth shares of the Hajiwah Canal. In other respects the suit fails. Their Lordships are of opinion that there ought to be no costs of the first hearing but that the First Respondent ought to pay the costs of the Appeal to the Chief Court of the Punjab.

Their Lordships will humbly advise His Majesty accordingly.

The First Respondent will pay the costs of this Appeal.
