Privy Council Appeal No. 34 *of* 1931.

The Secretary of State for India in Council, represented by the Collector of East Godavari District - - - - - *Appellant*

v.

Sannidhiraju Subbarayudu and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH NOVEMBER, 1931.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
SIR JOHN WALLIS.

Delivered by VISCOUNT DUNEDIN.]

The original plaintiff in this suit is dead and the suit is continued by his legal representatives. The plaintiff owned land abutting on a branch of the Godavari called the Chilapa Kalva. From that in exercise of what he considered his riparian rights, he took water. The Government, through the Collector of Godavari, charged a water-cess of Rs. 8–5–8 for his use of the water. He paid under protest and then raised the present suit against the Government to recover the money so paid.

The sole question, therefore, is whether the water-cess was legally levied. The cess bore to be levied in virtue of the provisions of the Madras Irrigation Cess Act, No. 7 of 1865. The preamble of the Act is in these terms:—

> "Whereas, in several districts of the Madras Presidency, large expenditure out of Government funds has been, and is still being, incurred in the construction and improvement of works of irrigation and drainage, to the great advantage of the country and of proprietors and tenants of and: and whereas it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works:"

Then follow the words of the Act which, so far as material to the present case, are to be found in the first section :—

"1.—(*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, or work belonging to, or constructed by, Government.

* * * * * *

it shall be lawful for the Government before the end of the Revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water-cess as aforesaid shall be levied : and alter or amend the same from time to time :

"Provided that where a *zamindar* or *inamdar* or any other description of land-holder not holding under *ryotwari* settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more : "

Now the facts which have not been a matter of dispute may be thus stated :—

1. The plaintiff's land is bounded by the river.

2. At the place where he has taken the water there are Government lands on the opposite side of the stream.

3. He only uses the water he takes for the purpose of the irrigation of his own property.

4. The river at this place is tidal.

There are also two disputed facts :—

First, the plaintiff originally averred that he had taken the water at this place from time immemorial. The Government said he had only taken the water recently. The latter was found to be the case both by the Judges of the inferior Court and the Court of Appeal, and consequently it cannot be and has not been argued to the contrary by the respondents in this appeal. Secondly, the Government aver that the river at the place where the water is taken being tidal is also navigable. The District *Munsif* before whom the case depended found that the river was navigable by big boats for six or seven months and by fishing boats for the remainder of the year. He therefore found that it was navigable as well as tidal. Upon that ground and the ground that the Government owned land on the other side of the river, he held that the river belonged to the Government. Riparian rights to be good against the Government, he decided, must be customary immemorial rights, and as he had found the fact of long user against the plaintiff, he decided that the cess was duly levied and dismissed the suit. On appeal to the Sub-ordinate Judge he confirmed the judgment of the Munsif on substantially the same grounds. Appeal being taken to the High Court in Madras, they reversed the judgment and decreed the suit.

As to the river being navigable, they were not satisfied that the evidence tendered was sufficient. They considered that navigability must extend during all the year and, as the character of the fishing boats had been left dubious, they would have been

prepared to remit the case for further evidence on the point had it been necessary for them to do so, but, in their opinion, the case could be disposed of upon the assumption that the river did in terms of the section " belong " to the Government, and they accordingly proceeded on that assumption. The judgment of the Court was decided by Ramesam J., and the deciding passage may be found expressed as follows :—

> " 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. Whatever the enjoyment at the date of the grant may be, the measure of the right that passes is determined only by the configuration and the width of the river and stream. I therefore think in this case the plaintiff is entitled to draw water from the Addarapu *kalva* in exercise of his rights as a riparian owner and so long as he does not exceed those rights he is not liable to water-cess. That in India rights of the riparian owner include also the right to take reasonable quantity of water for purposes of irrigation scarcely admits of any doubt."

There have been in the Madras Courts a considerable number of cases dealing with the Act of 1865. The judgments pronounced in them, and still more the dicta contained in the judgments, are exceedingly contradictory. In their Lordships' view, it would serve no good purpose to go through the cases and pick out the different dicta with which they do or do not agree. They prefer, therefore, to lay down quite shortly the various propositions in law which suffice for the determination of the present case.

The first question that presents itself is obviously whether the river in the phraseology of the Act " belongs " to the Government. Now the word " belongs," easily applicable to works, etc., is obviously ill-suited to be applied to a river. Running water at common law, though many people may have the right to take and use it, belongs in a river to no one. It passes on and successive people have rights in regard to it. So that literally no " river " could belong to the Government unless it was a river which from the source to the sea was within Government lands, or tidal and navigable so that it was always Government property. But clearly the word " belongs " cannot be so restricted. The idea, therefore, must be that the river belongs to such person or persons as have the ownership of the water for the time being at the place at which it is taken. Belonging points to exclusive belonging. It therefore seems to follow that within the expanded meaning a river only belongs to the Government when the solum of the stream belongs to the Government. This will happen either when the Government is proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable. So much for the expression as it was used in 1865. But then there is the Act of 1905. That Act with its general and sweeping enactments has certainly the effect that in future when there is a contest as to the right of *water*, the opponent of the Government will be put to prove his title. He will not be able, as he otherwise would have been when attacked by the Govern-

ment, to put them to prove their title. But counsel for the Government did not argue that the Act of 1905 made the *river* belong to the Government, and as the natural rights of persons are expressly excepted it can have no effect on the riparian rights of the parties in the present case.

The result is that in this case the river only belongs to the Government if the river is both tidal and navigable. Their Lordships, without deciding, will assume, as the High Court did, it is so ; for if it is not, the right to levy cess is gone. They will therefore assume that it is. Now come the following considerations :—

1. A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. In ordinary cases the fact that his land abuts on the stream makes him the proprietor of the bed of the stream *usque ad medium filum*. But he may not be. He may be ousted by an actual grant to the person on the other side, or he may be and often is ousted by the Crown when the stream is tidal and navigable, because where the stream is tidal and navigable the solum of the bed belongs to the Crown. Yet in neither of these cases are his rights as a riparian owner to take water affected. He would have no right in the two cases put to erect an *opus manufactum* in the bed of the stream even if from the point of view of navigation or diversion of the direction of the flow it was unobjectionable, for the land is not his, but his right to take water remains. In *Lyon* v. *The Fishmongers' Company* (1 A.C. 662), in the judgments of Lord Chancellor Cairns, Lord Chelmsford and Lord Selborne will be found clearly laid down these two propositions :—

(*a*) A riparian owner has the same rights in a tidal and navigable river as he has in a river which is not tidal and navigable.

(*b*) The right of a riparian owner to the use of the stream does not depend upon the ownership of the soil of the stream.

2. The right of a riparian owner to take water is, first of all, for domestic use, and then for other uses connected with the land, of which irrigation of the lands which form the property is one.

But there is a difference in degree between these primary and secondary rights. The whole matter was carefully explained by Lord Cairns in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*, L.R. 7 E. & I. 697. At p. 704 Lord Cairns says :—

> " Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for whch he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted, and may cease to come down by reason of that use. But, further, there are uses, no doubt, to which the water may be put by the upper owner,

namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before."

The same views were expressed by Lord Macnaghten in the more recent case of *McCartney* v. *Londonderry and Lough Swilly Railway Company* [1904] A.C. 301. At p. 317 he says :—

" In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary, but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

Now, in speaking of the returning of the water it must be remembered that both Lord Cairns and Lord Macnaghten were speaking of a diversion of the whole stream. When only a part of the stream is taken, and that for purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished.

3. Further, the right is a natural right and not in the strict sense of the word an easement, though in many cases it has been called an easement. In particular, it is not capable of being lost *non utendo* and the maxim *tantum prescriptum quantum possessum* has no application. It is not the only right of this class—analogous to an easement and yet not strictly an easement. The right of support, that is to say the natural right of support as distinguished from the easement of enhanced support, is another example. It is probably a confusion as to this that led the lower Courts in this case astray.

Applying these principles, it follows that the plaintiff had absolute right to take the water and use it for irrigation of his property, for there is no complaint at the instance of a lower proprietor that too much has been taken, and he uses it for his own property alone. But then comes the Act, and although the plaintiff is within his rights in taking, yet on the hypothesis that the water comes from a river belonging to the Government, he is liable in cess unless he can have resort to the proviso. In *Kandukuri Balasurya Row* v. *Secretary of State for India in Council* (the *Urlam* case), (44 I.A., p. 166), which has been so often cited and so often commented on, Lord Parker puts the point quite clearly at p. 172 :—

" If, for example, a riparian owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or

> stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving the source of supply. If in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner."

The case that Lord Parker is here putting is where there is no more than the naked fact that the taker of the water takes it in respect of either a natural or of an easement right. Lord Parker did not go on to decide in terms the question he had raised. He did not do so because there was something more to be considered in the case before him, viz., the effect of the *sanad* arranged at the time of the permanent settlement. Nor does the *Urlam* case actually decide the present case, because the rights of the *zemindar* in question were easement rights. The actual decision necessarily shows this, because the enjoyment was limited by the size of the channels and cuts which brought the water.

Nevertheless in the present case their Lordships think that what was clearly laid down in that case decided the point. It was obviously possible to argue that by engagement was meant an engagement which specially dealt with the supply claimed, but this argument was rejected. On p. 173 Lord Parker says :—

> " Their Lordships cannot accept the contention that the proviso applies only where there is an express contract that the supply to which the person claiming the protection of the proviso is entitled shall be free from anything in the nature of a future tax."

And then the judgment goes on, after a review of history as to the permanent settlement and an argument which need not be quoted, to find in terms that the Government *sanad* permanently fixing the *jumma* for the property (which, it may be added, was accompanied by the Zemindar's *kabuliyat* or counterpart engaging with Government for the payment of the permanently settled *jumma*) may be such an engagement, though it makes no mention of water rights. In other words, if the water rights claimed are within the property which was, so to speak, enfranchised by the *jumma* fixed at the permanent settlement, then the *sanad* which fixed the *jumma* is an engagement within the meaning of the Act. Of course, the permanent settlement was dealing with the Government 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 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. While it must be understood that their

Lordships must not be held to concur in each and all of the expressions used in the judgment of the High Court, they are of opinion that the result arrived at by them was right.

An observation is not out of place that, although it is well settled that an enactment cannot be cut down in its meaning by the preamble, yet it is at least satisfactory to feel that the present judgment is in accordance with the express intention of the preamble when a judgment to the opposite effect would have been a flagrant overstepping of it.

Their Lordships will humbly advise His Majesty to dismiss the appeal, with costs as between solicitor and client, in accordance with the terms upon which the Government obtained special leave to appeal in this case.

In the Privy Council.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF EAST GODIVARI DISTRICT

v.

SANNIDHIRAJU SUBBARAYUDU AND OTHERS.

DELIVERED BY VISCOUNT DUNEDIN.

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