

Samayan Servai and anr. Vs. P.K. Kadir Moideen Rowthen and ors.

Samayan Servai and anr. Vs. P.K. Kadir Moideen Rowthen and ors.

SooperKanoon Citation : sooperkanoon.com/800133

Court : Chennai

Decided On : Oct-17-1918

Reported in : 51Ind.Cas.899

Judge : Phillips and ;Napier, JJ.

Appellant : Samayan Servai and anr.

Respondent : P.K. Kadir Moideen Rowthen and ors.

Judgement :

1. So far as defendants Nos. 1 and 5 are concerned the appeal is dismissed with costs, as they are unnecessary parties or respondents.
2. This second appeal again came on for hearing on the 2nd October 1918.
3. Mr. K. Srinivasa Aiyangar, for the Appellants.--The land is Zemindari land and a Zemindari ryot is only entitled to water being made available for irrigating his fields. Beyond that, he is not entitled to insist upon a particular source of supply.
4. Then, the old source of supply, the Athan Odai, having become obliterated, the plaintiffs have no right to ask that water be stored in this tank for their use.
5. There is no damage caused to plaintiffs by the acts of the defendants in cutting up the channel. The plaintiffs have a copious supply of water for their fields from the new Periyar channel. The maintenance of this tank for storing water is no

longer necessary. The Zemindar's discretion should not be fettered where it does not collide with the interests of the public.

6. Mr. Narasimha Iyengar, for the Respondents.--The respondents, as owning lands under the Aiyacut of the tank, are entitled to see that their source of supply of water is not destroyed. Their usual source of supply was from the tank. They are entitled to insist that it should be preserved as a storage tank. It is the duty of the Zemindar to preserve all sources of water supply.

7. The fact that respondents have suffered no damage does not deprive them of their cause of action for the infringement of their rights. The supply from the Periyar channel may cease and there is no reason why respondents should give up their customary right. See *McCartney v. Londonderry and Lough Swilly Railway Company Limited* (1901) A.C. 301 ; 53 W.R. 385 also observations of the Privy Council in *Collector of Trichinopoly v. Lukkamni* 1 I.A. 26 ; 3 Sar. P.C.J. 318 that the preservation of tanks is essential for the welfare, and indeed for the existence, of a large portion of the population of India.

Napier, J.

8. In this suit the plaintiffs as representatives owning lands under the Sal-lived an tank claimed relief against the original owner of the tank-bed and certain assignees of land in the tank-bed, alleging various acts by the assignees in the tank bed which had deprived them of their water facilities. The defendants set up a number of pleas and among them alleged that the tank was not the source of irrigation for the plaint lands, that the tank-bed proper was only 3 acres in extent and that they had not encroached on it.

9. These specific pleas have all been found to be fake. Some of the acts alleged against them have not been held established but the findings of the lower Appellate Court are as follows:

10. The District Judge has found that the tank-bed has an area of 25 3/4 acres, that it is the source of irrigation of Survey No. 807 in respect of which this representative suit is brought, that up to 1902 the suit lands were regarded as

irrigable by the tank, that prior to 1903 the tank-bed was full of Babul trees, that there was then no cultivation and that after 1902 the 4th defendant began the cultivation in the tank-bed. He agrees with the other findings of the Subordinate Judge, which include the finding that the channel forming the main source of supply to the tank has since 1902 been obliterated and converted into nunja lands. Then as to the acts of the defendants he finds that defendants Nos. 2 and 3, the assignees of the tank-bed, have out the channel within the tank bed and put up a bund which prevents the water spreading all over the tank-bed and have otherwise prevented the tank being used for the storage of water. These findings are not contested before us and the sole question is whether on the above findings the plaintiffs are entitled to have the tank-bed restored to its original condition.

11. The Commissioner's plan and the survey plan make it clear what was the position prior to 1896 and what is the present position. The tank lies just below two other tanks named Reddiar tank and Vadukar tank. Prior to 1896 the western tank of the two other tanks, that is, the Reddiar tank, was fed by a stream called Virasamarthu Odai flowing from the north, and the eastern tank by a channel which conveyed water from an Odai called Athan Odai taking its source in the Sirumalai hills. This Odai ran from north to south east of the two upper tanks and east of the plaint tank, but the water was taken off by the channel at a point north east of the upper tanks. The plan also shows that the Athan Odai channel, besides feeding the eastern tank, ran down between the two tanks and discharged the surplus water into the plaint tank. It appears that some surplus water from the Vadukar tank passed into the plaint tank and a certain amount of rain water, which is practically negligible, flowed off the land south of the upper tank down to the bund of the plaint tank. These were the nominal sources of supply for the plaint tank.

12. In about the year 1895 the Periyar channel was cut across from east to west north of the upper tanks, and the course of supply of all the three tanks was immediately altered. For the Reddiar tank the water was brought from the Periyar channel down the old Virasamarathu Odai direct to the tank, and for the Vadukar tank a new channel was also led from the Periyar channel. This latter channel joined the course of the old Athan Odai channel where it ran between the two

tanks towards the plaint tank, and defendants Nos. 2 and 3, the assignees of land in the bed of the tank, have continued this channel down to the tank bund, enclosed it by a bund and created an outfall from it for the supply of the ryots. The result is that at present the ryots receive water direct from the Periyar channel together with possibly a little surplus from the Periyar water in the two upper tanks. The old channel, the Athan Odai, has, as previously stated, been obliterated and cultivated since 1902 at least. The lower Appellate Court has found that plaintiffs have not suffered any damage by the present condition of the Sallivedan tank, and indeed it appears that having this abundant Periyar supply they are now cultivating a second crop. These facts are to be found in the judgments of the Courts and are not disputed here.

13. The Subordinate Judge states the proposition arising from these findings in paragraph 9 of his judgment as follows:--'The case for the defendants is that since the plaintiffs and other ryots are getting a never failing and sufficient supply of Periyar water, they cannot insist on getting the tank restored to its original state, especially as the channel from the Athan Odai which is its main source of supply is no longer available owing to disuse and consequent cultivation in the channel bed.' He continues: There is some force in this contention but the Periyar supply is only a supplementary source of irrigation. The ryots have no control over it. Sullivedan tank is the ancient and customary source of irrigation. Why should they sacrifice the natural source of water to which they are entitled as a matter of right, even though they do not now suffer for want of water from the tank? Those two sources are still available and nobody has a right to alter the customary source of irrigation. I must hold that the plaintiffs have a right to have the tank so kept as to allow the accustomed quantity of water to flow through the lands.' The District Judge states the proposition more tersely. He says: The acts of the defendants restrict the plaintiff's accustomed user of the water of the tank for irrigation and he is entitled to an injunction.'

14. He says also that the capacity of the tank as tank has, of course, been materially altered for the worse and the plaintiffs are entitled to have the whole tank-bed area of 25 3/4 acres available as a tank It seems to me that the question which arises for determination by us is as follows:

(1) Whether the ryots have a right that the old customary source of irrigation by a storage tank should be maintained; (2) whether the defendants Nos. 2 and 3 have done anything which infringes that right; and (3) whether, no damage having accrued to the plaintiffs, they have any cause of action against defendants Nos. 2 and 3. Mr. Narasimha Ayyangar has argued that the plaintiffs are entitled to have the storage tank and that defendants Nos, 2 and 3 by cultivation of the lands and by the building of the banks in the tank bed have infringed that right. He contends that the fact that they have suffered no damage at present does not deprive them of their cause of action.

15. The first difficulty in his way, however, is this, that the old source of supply was the Athan Odai which has disappeared, This disappearance occurred before the defendants did any of the acts complained of and it necessarily follows that the acts of the defendants have not caused the failure of water from the Athan Odai. Mr. Narasimha Ayyangar has been compelled to concede this. But his argument is that if at any time the Periyar water supply ceased, the plaintiffs might be able to get the old Athan Odai channel restored and take the water from their old source of supply. Judging by the plan and from some evidence given in the case, I believe this to be a physical impossibility for it seems to me that the Periyar channel crosses the source of the Athan Odai. But assuming that this contingency might occur, the question is whether the plaintiffs have now a right of suit against the defendants. Mr. K. Srinivasa Ayyangar argued that as there was no damage, the plaintiffs were not entitled to any relief. Mr. Narasimha relies on the doctrine laid down in *McCartney v. Londonderry and Lough Swilly Railway Co. Ltd.* (1901) A.C. 301 that the owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement and that it was not necessary for a person having rights in the water of the natural stream to prove damage. This proposition is in certain circumstances unassailable, but it starts with the proposition that the plaintiffs have a right which may be affected, whereas the important question in this case is what are the rights of the plaintiffs.

16. Section 54 of the Specific Relief Act provides that a perpetual injunction may be granted to prevent a breach of an obligation existing in favour of the applicant, who there expressly or by implication, when the defendant invade or threatens to

invade the plaintiff's right to or enjoyment of the property and, among others, where the invasion is such that pecuniary compensation would not afford adequate relief. The question, therefore, to be determined is whether the plaintiffs have a right to, or to the enjoyment of, the property, namely, the tank-bed and secondly, whether the defendants' action invades or threatens to invade that right, Mr. Srinivasa Ayyangar at the beginning of his argument wished to contend before us that the sole right of a Zemindari ryot was to have his accustomed supply of water made available for his fields and that he was not entitled to look to the tank at all. I am not certain that it is open to us at this stage of the case to consider a proposition which has not been put forward at any earlier stage. 'We have not before us any of the Pattas held by the plaintiffs, and the sole finding bearing on the question is the finding that the tank was the old source of supply. This important question may arise for decision and I would reserve my opinion on it till then. But assuming the right of the ryots to be to have their water from the tank, the question still remains whether they have such a right in the whole of the tank-bed as to entitle them to insist on its total area being preserved and the tank bund being kept up in such a manner as to form a storage tank. In the well-known instructions issued to Collectors under the Presidency of Fort St. George, dated October 1799, on the introduction of the Permanent Settlement of Zamindari Land, the Government distinctly stated their wish to leave the construction and care of the tanks and water-courses entirely to the proprietors (vide page 332 of Volume II of the Fifth Report), and this was held by the Privy Council to be the common law of this Presidency in the leading case of the Madras Railway Company v. Zemindar of Carvetinagaram 14 B.L.R. 209 ; 1 I.A. 364. The passage is as follows:

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindu and Muhammadan Law, by regulations of the East India Company, and by experience older than history, as essential to the welfare and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on Zamindars of whom the defendant is one. The Zemindars have no power to do away with the tanks, in the maintenance of which large numbers of people are interested but are charged

under Indian law, by reason of the tenure, with the duty of preserving and repairing them.

17. The proprietary right of Zemindars in their lands was established by the decision of the Board in the case reported as Collector of Trichinopoly v. Lukkamani 1 I.A. 268 ; 3 Sar. P.C.J. 318 and this right of ownership has always been applied to waste lands and tank Porambokes. And I know of no case in which it has been held that the rights of a tenant in a Zemindari tank-bed and bunds are anything higher than the rights of grazing, cutting fuel and fishing arising either by grant or custom. It cannot, therefore, I think, be seriously argued that the plaintiffs, ryots, have any proprietary right to the bed of the tank or its bunds, and the sole question really is whether their right to be provided with water from the tank is such a right to the enjoyment of property as cannot be varied. If it was to be contended that the water was. property, the plaintiffs would be met with the difficulty that the water which now comes to the tank is not water from the old source of supply and that that old source of supply has been out off, not by the action of defendants Nos. 2 to 4, but by persons over whom they have no control. Their rights in the tank-bed and bunds must be correlative to the duty of Zemindars and the language of the Privy Council stating the duty of the Zemindars is prima facie in their favour. I asked Mr. Narasimha Ayyangar for further authority on this proposition, but he was unable to give me any, and indeed for the purpose of his argument assumed the position which is now in dispute. The matter is, therefore, one of first impression and I find considerable difficulty in disposing of it. The Privy Council in the passage above quoted have stated that the preservation of the tanks is essential to the welfare and indeed to the existence of a large portion of the population of India. That is the foundation of the duty, and it goes without saying that where a storage tank is essential for the welfare of the ryots under the Aiyacut, that tank must be maintained. But here we have the finding that a storage tank is not essential. The finding is that since 1902 at least, if not a few years previous, the whole of the water given to the ryots out of their tank has come from the Periyar channel. It may be and probably is the fact that for the first few years the water from the channel was allowed to accumulate in the tank bed, but it is obvious that that accumulation conferred no benefit on the ryots of which they have now been deprived. At the present moment they are in fact cultivating a

second crop with the Periyar water, a condition of affairs which was unknown under the old source of supply. The result of the action of the defendants has been to do away with this unnecessary storage and lead the water direct to the sluice from which it is supplied to the ryots, and the construction of the bunds for that purpose has resulted in the reclaiming of a major portion of the tank-bed for purposes of cultivation. To restore the tank-bed would, therefore, confer no benefit on the ryots and could remove land from valuable cultivation. It seems to me that it is impossible to ignore the modern conditions of irrigation and to insist on the strict application of the language of the Board used with reference to conditions 40 years ago. In the course of argument my learned brother put this proposition to Mr. Narasimha Ayyangar: 'If it had been found possible in modern days to bring water down the old Athan Odai channel through the tank-bed direct to the sluice without filling the tank, could it be suggested that that is an infringement of the plaintiffs' right?' Mr. Narasimha Ayyangar contended that it would be, and this in fact is the fundamental position that he takes up. It is perfectly conceivable that at some time in the future storage tanks with their waste of large areas by submersion may be found to be unnecessary and that by a perfect system of distribution of river water with the aid of pumping schemes, lands may be irrigated by direct flow. I cannot think that the Privy Council intended by the judgment to require adherence by Zemindars to a system that may eventually be found wasteful and unnecessary. I am, therefore, of opinion that the enjoyment of the tank-bed, to the extent of the utilization of water stored in it, is a right which only exists as long as it is the duty of the Zemindar to preserve such a tank, and that where he is in a position to give all proper water facilities from the tank without such storage, he is under no obligation to maintain the old system.

18. With reference to Mr. Narasimha Ayyangar's further argument that the supply from the Periyar may some day be discontinued, it seems to me sufficient to hold that the right of the plaintiffs against defendants Nos. 2 and 3 will arise when water is brought from the old source to the tank and the condition of the defendants' land is then found to make the storage impossible. I would, therefore, dismiss this suit, but in view of the fact that the defendants set up false defences in both the lower Courts, I would dismiss it without costs in those Courts, only allowing the costs of this appeal against respondents Nos. 21 to 24.

Phillips, J.

19. It seemed to me that if the plaint tank were Government tank, in exercise of its powers of distributing water it would be entitled to follow the course adopted by defendants Nos. 2 and 3 and there seems to be no reason why a Zemindar, who owns a tank, should not have similar powers, At any rate we have not been referred to any authority to show that his powers are restricted unless, of course, there is an express contract to that effect, and to hold in favour of such restriction would result in harm to the general public, because improved methods of irrigation rendered possible by the discoveries of modern science would thereby become nugatory. It must, of course, be understood that the exercise of his rights by the Zemindar must not in any way be detrimental to the ryots concerned and as in this case it has been found that the plaintiffs have suffered no damage, I agree in the order proposed by my learned brother.