

BOMBAY HIGH COURT

Annapurnabai Gopal

Vs

Government of Bombay

(Divatia and Sen, JJ.)

24.01.1945

JUDGMENT

Divatia, J.

1. This appeal arises in a suit filed by the plaintiff-appellant for a declaration that she as the widow of one of the inamdars of the village of Pimpalgaon Garudeshwar had got the right to have all the income, from whatever source, recovered by the Government, and by virtue of that right she sued to recover certain taxes levied by the Government from a company, called A.B. Godrej & Co., for six years from 1932 to 1938. The plaintiff had filed this suit in a representative capacity on behalf of herself as well as all the other inamdars of that village, claiming under a common grant of the Peshwas in 1754. Her case in substance was that this village was granted to the plaintiff's ancestor as a hereditary jahagir inam, that the British Government continued the same in 1883 under a sanad by which on the payment of a fixed sum of about Rs. 93 all the rights which the inamdars enjoyed in the village were continued, that the village was situated on the bank of the river Godavari and that the water of the river was also granted under the sanad. In 1926 the Godrej Company purchased some lands in the village and put up a pump for drawing the flowing water of the river for use in their factory. The Government levied certain water charges from the company under the provisions of the Bombay Irrigation Act. The plaintiff's case was that under the sanad the right to the water was granted to the inamdars with the result that all cesses levied in the village belong to the inamdars and that although the water tax under the Irrigation Act was payable by the company to the Government and not to the inamdars, the latter had the right to recover it from the Government on the ground that the waters of the river in the village belong to them. The present suit, it appears, is a sequel to a previous litigation consisting of two suits. One of them, No. 319 of 1930, was filed by the present plaintiff against the Godrej Company for claiming the amount of the water tax and for an injunction that the company should not pay the same to the Government. Thereafter, in 1931 the Godrej Company filed an interpleader suit against the plaintiff as well as the Government with a view to decide as to who

was entitled to the water tax. It was ultimately held by this Court that the water tax was properly payable by the Godrej Company to the Government, but it was not necessary to decide any question between the plaintiff and the Government inter se in that litigation because the Government was not a party to the suit filed by the plaintiff. That point, therefore, was left open. It was for that reason that the present suit was filed in 1938 after the termination of that litigation. It may be noted that the plaintiff accepts in this suit the right of the Government to impose water rate on any terms it likes. All that she contends is that whatever amount is levied by the Government by way of water rate from the riparian owner must be paid to the inamdars if it is levied for the use of the water on the lands belonging to them.

2. The defence of the Government was, among other things such as want of proper notice under Section 80 and the suit being time-barred, that the jahagirdars were not the owners of the flowing waters of the river Godavari, which passed by one of the sides of the village of Pimpalgaon, and even assuming that the water belonged to them, the plaintiff had no right to levy any cess from the riparian owners using the same or to recover it from the Government. It was further urged that the right of the jahagirdars over the river water, even if it be assumed to exist before, was extinguished by the Government Resolution, of February 17, 1913, by which Section 5 of the Bombay Irrigation Act was made applicable to that part of the river Godavari which passed by the side of this village, that as a result of the notification the water rate was leviable by the Government and the inamdars had no right whatever either to levy any rate for themselves or to demand that the amount levied by the Government should be paid over to them.

3. The only material point so far as this appeal is concerned is whether the jahagirdars were the owners of the river water and as such entitled to the relief sought.

4. The lower appellate Court decided that the plaintiff was not entitled to recover the water rate imposed by the Government under the Bombay Irrigation Act. It held that although the jahagirdars were the owners of the river water, they were not entitled to the declaration sought because Section 5 of the Irrigation Act was validly applied to the waters flowing in the river, and that thereafter the inamdars lost all the rights which they had in the water of the river.

5. The answer to the question raised in this appeal really depends on the construction of the sanad granted to the plaintiff's ancestor. Mr. Coyajee on behalf of the plaintiff-appellant has exhaustively argued this appeal on the various grounds raised by him, viz. that the sanad makes a grant of the village including the river bed and the waters flowing on it, that the same has been continued by the British Government with the rights to levy all future cesses connected with it, and that the water rate falls under the class of cesses stated in the sanad. He has further contended that even assuming that a notification under Section 5 of the Irrigation Act can be validly promulgated with regard to the portion of the river flowing by the side of this village, that does

not necessarily mean that the inamdars are deprived of the rights to the water which they had under the sanad. It is also urged that the provisions about compensation in Section 31 and the subsequent sections apply only to such riparian owners as are not the owners of the lands in the village, but that they cannot apply to the inamdars to whom the village itself had been granted by the sanad. On the other hand, the provision about the levy of the water rate, instead of causing any harm to the inamdars, is beneficial to them because those water rates which are levied by the Government are for the benefit of the inamdars to whom they are to be paid.

6. In order to appreciate this point it is necessary to deal with the terms of the sanad. Under the operative part of the sanad it makes a grant to the inamdars of "the village of Mouje Pimpalgaon Garudeshwar together with jahagir, mokasa, sardeshmukhi, babatis and together with all taxes and cesses, all rules and regulations, the present and future cesses, waters, trees, stones, mines and buried treasures, etc. (but exclusive of the hakdar's and inamdar's dues), in inam as Agrahar Dharmadaya." If this sanad be construed as a grant not only of the river bed adjoining the village but also of the full proprietary rights to the flowing water on that bed, the question as to whether those rights had been and could be curtailed by the notification under Section 5 would survive, but if the sanad be construed! as a grant of the village including the soil but not including the flowing waters on the bed of the river passing by it, no other question would remain, because in that case the Government as the owner of the running water of the river would be fully entitled not only to levy but to retain all the water rates imposed under the Irrigation Act.

7. The river Godavari is not passing through this village but it is running by the side of it. There is no mention whatever of the river and any rights appertaining thereto in the sanad. All that is stated is that the village is granted together with waters, trees, etc. The word for water is jala and in my opinion it is impossible to construe this expression as including the flowing waters of the river passing by the side of this village. It only applies to Wells, ponds and pools in the village. Even the bed of the river, over which the water is passing, is not mentioned in the sanad. It is only under the common law right that a person would get the ownership of the river bed, either half or whole according as the lands are situated on one or both banks of the river. In this case the inamdars' lands are situated only on one side of the river. Even so it cannot be said that under the common law the plaintiff inamdar was made the absolute proprietor of the flowing waters on the river-bed. The law as summarized in Coulson and Forbes on Waters, 5th Edition, pages 115-116, is as follows: The right to have a stream flow in its' natural state, without diminution or alteration, is an incident of property in the land through which it passes; but flowing water is publici juris, not in the sense that it is bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession,

and that during the time of his possession only. But each proprietor has the right to the usufruct of the stream which flows through his land.

8. This statement of law is enunciated in *Embrey v. Owen*¹

9. Their Lordships of the Privy Council have also discussed the law about riparian ownership in *Secretary of State for India v. Subbarayudu*² and have observed at p. 275 as follows: 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.

10. The law as summarized in Halsbury's Laws of England, Hailsham Edition, Vol. II, at p. 351, is as follows: The grant of a watercourse does not mean the grant of the water itself. It may mean any one of three things, namely, a grant of the easement or the right to the running of water, or a grant of the channel-pipe or drain which contains the water, or a grant of the land over which the water flows. The meaning in the case of each particular grant is to be drawn from the context, and if there is no context from which the meaning can be gathered the word 'watercourse' prima facie means an easement.

11. It was held in *Vaman Janardan Joshi v. The Collector of Thana and the Conservator of Forests*³ that in construing grants by former Governments, the rule of English law as to the construction of grants to a subject by the Crown is the correct rule to be applied by the Courts in India.

12. That being so, the question is whether it can be said that the plaintiff's ancestor had been expressly granted absolute proprietary rights in the flowing waters of the river passing by the side of the village. In my opinion, there is no doubt that under no construction, either express or implied, of the terms of the sanad can it be said that any such right has been granted to the inamdar.

13. Mr. Coyajee relied on Section 37 of the Land Revenue Code and contended that standing and flowing water is also included among the properties which may be vested in an individual or aggregate of individuals. That no doubt is so. Even rivers, streams, nallas, lakes, tanks, etc. can conceivably be of the private ownership of individuals, but it is expressly stated in that section that it is for the individual to prove that it has so become his property. So long as it is not proved that the running water of the river by the side of this village had become of the ownership of the inamdar, it must be taken that it continues to be the property of the Government. I have no doubt that the Peshwa Government did not intend to confer absolute proprietary rights in the flowing

waters of the river on the inamdars, because the water of the river was to be used not simply by the inamdars of this village but by all persons in the villages which are situated either on or near the banks of the river. It is for that reason that this right is regarded in the nature of an easement unless there is an express proprietary grant of the same. All that can be said, therefore, is that by virtue of the sanad the plaintiff's ancestor became the grantee of the village, and incidentally under the law of half of the river bed adjoining the village, and in that capacity entitled to the reasonable use of the flowing water in the river. The inamdar cannot claim that the water rate levied by the Government belongs to him and not the Government. It is not the plaintiff's case that as the whole of the village including the river-bed and the running water has been granted to her, she alone is entitled to levy any water rate which she likes from the persons occupying her land. That would have been a logical argument on her contention that the proprietary right to the river-bed and the water running on it had vested in her. She concedes, and has got to concede on account of the result of the previous litigation, that the Government has the right to impose any rate which it thinks proper for the use of the water including water running on her own river bed. That concession itself demolishes her case of ownership of water. In my opinion the inamdar's right cannot be higher than the right of a riparian owner to the reasonable use of water. That being so, no other question survives, and it must be held that the water rate levied by the Government belongs absolutely to the Government and not to the plaintiff.

14. It is not necessary to refer to the decisions of the Madras High Court relied on by the appellant in connection with the rights of zamindars because it appears that in the Madras Irrigation Cess Act of 1865 there is a special proviso to Section 1 under which there may be an engagement between the zamindar or inamdar on the one hand and the Government on the other with regard to the levy of irrigation fees. The question arising there was whether the inamdar was bound to pay the water rate with regard to the use of water in his own land. The question in the present case is entirely different. It is not the alleged right of the inamdar not to pay any water rate to the Government but the alleged right to recover the water rate levied by the Government from persons using the water. Section 5 of the Bombay Irrigation Act clearly empowers the Government to declare any river as a canal, and that being so, all the provisions with regard to compensation under Section 31 and others would apply to all riparian owners, and therefore, to the plaintiff also.

15. In the result the decree of the lower Court is confirmed and the appeal is dismissed with costs.

Cases Referred.

1(1851) 6 Ex. 353

2(1931) I.L.R. 55 Mad. 268 P.C

3(1869) 6 B.H.C.R.(A.C.J.)