Secretary of State vs. P.S. Nageswara Iyer, 1936

Case Note: The issue is regarding claim of exclusive right to water in a channel on the basis of prescription and custom. The Court allowed the appeal and remanded the case to the lower court for further trial and determination in the light of the present judgment.

A. I. R. 1936 Madras 923

Decided on: 8.4.1936

Appeal No. 263 of 1930

Secy. of State

v.

P. S. Nageswara Iyer and others

Judges

Varadachariar and Mockett, JJ.

Yaradachariar, J.-This is an appeal by the Secretary of State (defendant 1 in the suit) against a decree declaring the exclusive right of the plaintiffs to all the water in an irrigation channel known as the Varahandi channel near Periyakulam in the Madura district, and restraining the Government by injunction from interfering in any manner with that channel between the points marked A-1 to A-7 in the plaintiffs' plan, whether by way of cutting open or digging a new channel or by way of diverting the water. The Varahandi channel takes off at the foot of the Palni hills from a river known as the Varahandi river at the point marked A-1 in the plaint plan. At this point, the main river turns northward and after some distance runs eastward, whereas the Varahandi channel runs almost directly eastward from the point A-1. At A-1 there is an east to west dam of boulders (called Thalavamadai dam) whose effects is to turn all the low water coming down the stream into the channel and it is only in seasons of flood that the water coming down from the hills can overflow this dam and find its way into the main river. On the hills, at a height of nearly 7,000 feet, there is an extensive swamp known as the Berijam swamp, which to some extent retains rain water and is also full of natural springs. It is the water from this swamp that flowing down the southern and eastern slope of the hills, finds its way to the point A-1. Somewhere to the east of this point, another hillstream known as the Moongil Pannayar joins the Varahandi channel and it is stated that this stream not only carries rain water but also affords a reliable supply of spring water. It is also stated that the bed of Varahandi river and the bed of the Varahanadi river and the bed of the Varahanadi channel between A-1 and A-3 are supplied with natural springs which always give a steady low water flow.

Between 1890 and 1905 Government had been investigating a project for construction of a reservoir alongside the Berjiam swamp with a view to conserve the water collecting there during the north-east monsoon rains (October and November).

The main wet crop in that part of the country known as the kalam crop is raised between August and January and during the rainy season there will not be much necessity to depend on water drawn from Berijam; but, for the second or kodai crop raised in the summer months, a dependable source of supply, specially towards the end of the season when the crops were maturing, was felt to be indispensable. With this object in view and also to improve the supply of drinking water to Periyakulam, the reservoir was constructed and it began to worm from about 1913. The plaintiffs filed this suit as representatives of the ryots owning lands in the villages of Thakarai (including Papayamatti) and Thamarakulam. The lands in these villages are irrigated by the Varabanadi channel either directly, by small channels taking off at various points from the main channel or from water stored in three main tanks fed by the Varahanadi channel. The waters of Varahanadi channel after filling Thamarakulam tank surplus at the point A-4 in the plaint plan, through a channel which ultimately joins the Varahanadi river. Defendants 2 to 25 represent the ryots of Kilamangalam and other villages, which are irrigated by channels taking off from the main river at a point below the junction of the Varahanadi surplus channel with the main river. In the revenue accounts, the Varahanadi channel is entered as the source of irrigation for the plaint villages while the Varahanadi river is entered as the source of irrigation for the villages represented by defendants 2 to 25.

The substantial point in dispute between the parties is whether for the purpose of irrigating the lands in the villages of defendants 2 to 25 water from the Varahandi channel can be made available only if and in so far as it surpluses through the weir of the Thamarakulam tank at A-4 or it can be made available in any other way, and if so, how and subject to what limitations. The suit became necessary in view of a proposal by the Government to dig a diversion channel flows into Thamarakulam tank. The diversion channel was designed to skirt the Thamarakulam tank and join the existing surplus channel at a point to the east of the surplus weir of the Thamarakulam tank. It is obvious that the purpose of the scheme was to take the water from the Varahanadi channel to the defendants' villages even when there may not be enough water in the channel to fill the Thamarakulam tank and surplus over the weir. The plaintiffs apprehend loss from the proposed diversion in view especially of their experience of what happened in the year 1922. In July of that year, the Tahsildar of Periakulam taluq (D. W. 1) arranged to supply water from the Varahanadi channel to the Kilamangalam ryots, taking it across the Thamarakulam tank through a channel specially dug for the purpose and joining the surplus channel towards the east. The plaintiffs complain that as a result of that attempt to supply water to the Kilamangalam ryots in a season of low water-supply, the crops then standing on a large extent of their lands seriously suffered, especially as all the channels leading to their lands from the main channel had to be closed for the purpose of leading the water from the Berijam reservoir on the surplus channel below the Thamarakulam tank. The plaintiffs apprehend that if the proposed version channel is dug, it is sure to deprive them of the necessary supply of low water to their lands and that they would suffer heavy damage. Hence the suit for an injunction restraining the defendants from digging the proposed diversion or in any manner diverting the water or the course of the Varahanadi channel, for the irrigation of Kilamangam lands.

We shall presently consider whether there is any and what justification for the apprehension felt by the plaintiffs. In claiming their plaint, the plaintiffs thought fit to set up an exclusive right to all the waters flowing in the Varahanadi channel. This

exclusive right they sought to found sometimes on a kind of proprietary basis, at other times on the basis of customary right and finally on the basis of prescription. At the trial however the proprietary basis was given up. The learned Subordinate Judge has recorded the end of para 19 of his judgment that the plaintiffs did not set up ownership of Berijam or to the Varahanadi channel or to the three tanks in their villages. The case therefore proceeded on the footing that these sources are Government property. Between the claim of customary right and the claim of prescriptive right, there are no doubt some common factors, but there is a fundamental difference which has been ignored both in the plaint and in the judgement of the lower Court. The customary right may give the plaintiffs all they really want but it may not give them an exclusive right to all the waters of the channel to the extent of preventing Government from using the water of the channel for other purposes even without prejudice to the plaintiff's accustomed user. Prescriptive right may in certain circumstances support a claim of exclusive right, though even the extent of a prescriptive right must generally be measured with reference to the user made by the claimant and not with reference to the mere flow in the channel. It is only in connexion with the determination of riparian right that the accustomed flow in the stream will be the standard.

In the present case, the claim based on prescription is precluded by the relationship between the plaintiffs and the defendant 1. The conflict is not directly between the plaintiffs and defendants 2 to 25, and there is accordingly no question of prescribing against these defendants who merely seek to move the defendant 1. It is unnecessary to consider the correctness of the theory which will make the ryotwari holder a kind of tenant under the Government, nor is it necessary to examine whether and in what circumstance a tenant can claim an easement as against his landlord. A right by prescription can be acquired as against the proprietary right of another but not as against the sovereign right, which under the Indian law the State possesses to regulate the supply of water in public streams so as to utilize it to the best advantage. The learned Subordinate Judge fell into an error in thinking that the decision in 50 Cal 356 (1) or the observations in 1927 Mad 382(2) are sufficient to support the claim of prescriptive right in the present case.

There can however be no doubt that the plaintiffs are entitled to certain rights in the waters of the Varahanadi channel for the irrigation of their lands. The position is correctly stated in the written statement of defendant 1 that the plaintiffs are only entitled to the accustomed supply of water for the irrigation of their lands and that they could not acquire any exclusive right to the detriment of the paramount right of the State to regulate and control all supply of water in public streams and channels. But the argument advanced before us by the learned Government Pleader shows that the expression "accustomed supply" is capable of being interpreted in a manner prejudicial to the plaintiffs and it has therefore become necessary for us to discuss the extent of the plaintiffs' right at some length.

It is common ground that for more than 100 years the plaintiffs' villages alone have been taking water from the suit channel between the points A-1 and A-4 and the suit channel has been registered as the only source of irrigation for the plaint villages. It is also undisputed that in civil, revenue, and criminal proceedings in the course of the last century, the claims of the Mannavanur ryots to take water from the Berijam swamp through the slope on its western side have been negatived. But we cannot agree with the learned Judge that these circumstances confer on the plaint villages an

exclusive right to all the waters of the Varahanadi channel, for Government may not and is not likely to interfere with the water unless and until it is required elsewhere. It is unnecessary to refer at any length to the circumstances relating to the construction of the reservoir at the Berijam swamp. It is one thing to say that this construction could not have been intended to prejudice the rights of the plaint villages, but it is a different thing to say that the reservoir was intended solely for the benefit of the plaint villages. Even according to the plaintiff's defense, the waters flowing through the Varahanadi channel ultimately find their may through the channel A-4 to A-7 into the Varahanadi river and benefit other villages. But in low water seasons, there is very little likelihood of the water so flowing if the only flow permitted was through the surplus weir of the Thamaralam tank.

It is necessary to joint out that the learned Subordinate Judge has fallen into one or two material errors, in this connexion. He thought that after the construction of the Berijam reservoir, the sluice arrangement had been so carried out as to retain permanently in the reservoir 10 feet of water and permit only water above that level to flow into the channel. If this were the true position, it would not doubt greatly curtain the supply of water. But this view rests on the obvious misreading of QQ (see para. 26 of the judgment). A careful perusal of the whole file relating to the substitution of the steel pipe sluice in place of the oriental masonry sluice, shows that the steel pipe sluice was fixed at the same point in the reservoir as the original masonry sluice, but, to increase pressure, the other end of the sluice was fixed at a point 10 feet lower in level. Again, when dealing with the papers relating to the construction of the reservoir, the learned judge (in para. 23 of the judgment) expressed himself unable to understand the deference therein to 4488 acres because the ayacut of the plaint villages comprised only 1986 acres. This difficulty will disappear if it is remembered that the authors of the project had in mind not only the plaint villages but also the villages lower down including Kilamangalam and Kullapuram.

The statements and correspondence to which some of the ryots of the plaint villages were themselves parties clearly show that such was the scheme. Of course it was not then contemplated that the waters will be taken to the lower villages by any means other than the existing channel; but it must not be forgotten that the avowed object of the construction of the reservoir was to improve the supply available for the Kodal or the second crop, that is during the summer. There is no basis or justification for the assumption that the authors of the reservoir scheme intended it for the exclusive benefit of the plaint villages in the sense that even when no damage was likely to be caused to the lands in these villages, the Government could not lead the water from the reservoir to other villages. We must therefore dissent from the conclusion of the lower Court so far as it upholds the plaintiffs' claim of exclusive right.

The question remains, what then is he proper measure of the plaintiffs' rights. We are free to confess that it is by no means easy to fix them with anything like precision. As observed in 28 Mad 72(1), at p. 79, and in 34 Mad 82(1), at p. 86, the rights and obligation as between the State and the ryot in this country in the matter of irrigation rest largely on unrecorded custom and practice. It has generally been stated that the ryotwari holder is only entitled to claim that the supply of water required for the cultivation of his registered wet lands should not be materially diminished by any act of the Government. Subject to this condition, Government in this country has

claimed absolute right to change the source of irrigation or the method of irrigation by which the ryot has been supplied and to regulate the use of the waters of all public or natural streams in the best interests of the people. The result of the application of these principles was elaborated at some length in the judgment of Wallace, J. in 54 Mad 793(1), at pp. 797 to 799. Subject to a word of explanation to be presently added, we respectfully agree with these observations of the learned Judge. The reference to "registered wet lands" requires to be carefully examined in the light of the arguments advanced by the learned Government Pleader in the present case.

The difficulty in fixing the rights of the plaintiffs in this case arises from the fact that in the paint villages a very large extent of lands has long continued to be cultivated with second crop though only a small extent is registered as "double crop" land. It appears from the evidence that between 1868 and 1899 nearly the whole wet ayacut in the plaint villages, that is about 1986 acres, remained registered as double crop wet. But in 1895 however there appear to have been complaints of the precariousness of the available water supply with the result that in 1899 all the double crop lands in Thamarakulam village were permitted to be registered as single crop lands in the revenue records. Some years afterwards, most of the lands in Teenkari and Papayampatti also were registered as single crop land, a small extent however being entered as "compounded." In para.29 of the lower Court's judgment, figures are given from Ex. W showing the state of the registry as well as the state of the actual cultivation in 1915. It is there found that more than 1730 acres were registered as single crop lands in the plaint villages and less than 175 acres were registered as double crop lands. It however appears that in Fasli 1324 two crops were in fact being raised on more than 950 acres.

The accounts exhibited in the case show that there was a similar extent of double crop cultivation in many other faslis. It was argued before us on behalf of behalf of the Government that the plaintiffs' right to receive water in respect of wet lands registered as single crop lands was limited to the water required for the first crop and that they had no right to complain if they were deprived if the supply of water in connexion with the second crop. It was stated that the reference to the "accustomed supply" in para 3 of the written statement, as well as in the case law, must be read as limited by the nature of the registry in the revenue accounts. This seems to us to involve a serious restriction of the customary rights of the ryot and does not seem to follow from the nature or the purpose of the registry in the accounts.

In dealing with this question, it must be remembered that though the ryotwari holder is ordinarily spoken of as entitled t the customary supply of water, the corresponding obligation of the Government is negative rather than positive. Its obligation is not to find the required supply of water at any cost on pain of being held liable in damages for default but only not to interfere with the necessary supply if and so far water is available. Thus even in respect of the water required for the first crop on lands registered as single crop wet, the standing orders of the Board of Revenue provide that in seasons of short water-supply, Collectors have the right to restrict the area of cultivation on the lands registered as wet under any particular system or sources (B.S.O. 84, R.3). They can decided what proportion of the total area registered as wet in a village should be brought under cultivation and warn the ryots that if such proportion of the total area registered as wet in a village should be brought under cultivation and warn the ryots that if such proportion is exceeded and the crops wither in consequence, remission will not be granted. The significance of

the registry as single cop or double crop or as ‘compounded’ lies mainly in fixing the quantum of the liability of the ryot in the matter of land revenue; and when his liability has been thus fixed, he can only depend on the possibility of securing a remission if the revenue authorities are satisfied that there has been a failure or the water supply (See B.S.O. No. 1). It may be also follow that lands registered as ‘double crop’ lands are entitled to water for a second crop in preference to lands registered as ‘single’ crop under the same source, when a holder of the latter class of land proposes to raise a second crop on it. In making the registry, due regard is no doubt had to the nature of the available supply of water; but it is common knowledge that second crop is freely permitted to be raised on lands registered as single crop wet, subject of course to the ryot taking the risk of the failure of water supply and subject to the liability to pay assessment for the second crop.

Regard being had to the above considerations, it seems to us that the power of the state to interfere with the customary supply of water to ryotwari holders ought not to be determined with inference to the nature of the accustomed users To take an illustration merely for the purpose of testing the principle, suppose a ryot has at first been given the water required to enable him to raise a second crop on land registered as single drop wet, can it be contended that the state will be justified in refusing to him the supply of water required at the last stage to mature the second crop on his land? It is one thing to say that in a case like this, the ryot began the second crop cultivation with knowledge of the risk of a failure of water supply, but a different thing to say that even when water is available the offers of Government may at their will and pleasure deny the supply of water to his second crop merely on the ground that his land has registered only as a single crop wetland. It cannot be denied that the possibility or expectation of a fairly continuous, though not guaranteed, second crop cultivation, is a very important factor in estimating the value of lands in this country. It is very little consolation to the holders of such lands to be told that by reason of the failure of Government supply water a second crop is not raised, they will be under no obligation pay assessment in respect of that crop, for the mere non-levy or remission of the assessment cannot adequately compensate them for the loss thereby caused. On the other hand, we see no reason to think that it will be an undue interference with the power of the state to hold that its officer have no right arbitrarily to deny to a ryotwari holder water which for years he has been accustomed to receive a second crop cultivation on his lands. There may be difficulty in laying down what length of enjoyment would suffice give rise to a customary right to a supply of water in the sense above indicated, and the difficulty may be greater then, as is contemplated by the rules, holders of land in any village are permitted to arrange between themselves what lands shall be cultivated with a second crop, subject to the limitation fixed by the revenue authorities. Difficulties of this kind are inherent in the customary nature of the subject, but we do not think that the existence of such difficulty would justify us in upholding the extreme contention put forward by the learned Government Pleader or placing ryotwari holders at the mercy of Subordinate Revenue Officers. The statement of the law in 28 Mad 72 (3) at pp. 74 and 75 in favour of the right of a ryotwari landholder to whom water has been supplied by Government to continue to receive such supply as is sufficient for his accustomed requirements must, it seems to us, be given full effect.

It has been finally argued that the plaintiffs are not entitled to any relief in the absence of proof of the certainty of damage to them if Government should carry out

the proposed diversion. This point was raised by issue 7 in the case. The learned Subordinate Judge has found in plaintiffs' favour on that issue, but that finding is so largely based on his view that the plaintiffs had the exclusive right to all the waters in the suit channel, that we are not able to accept it as sufficient finding to entitle the plaintiffs to a decree even on the footing that they can claim no exclusive right but only the accustomed supply. The plaintiffs withnesses have maintained in the course of the evidence that the available water in the channel in seasons of low supply which synchronies with the later stage of Kodai crop would barely suffice for the requirements of the plaint villages and that therefore the proposed diversion must inevitably cause them damage. In the argument before us the learned counsel for the respondents reiterated this contention, and also laid great stress on the fact that though in form the proposal was one to carry Berijam water to the defendants' villages, the proposed course involved the closing up of all the channels which branched from the suit channel between A-1 and A-4 with the result that during all the time that Berijam water was supposed to be taken to the defendants' villages, the plaint villages were totally deprived of water including even the spring water and the moongil Pannayar water flowing in the suit channel. It was pointed out in this connexion that Berijam water takes about three days to reach Kilamangalam and it must inevitably cause damage to the crops in the plaint villages if for these three days and for the remaining days of supply to the defendants' villages, the lands in the plaint villages should be denied all supply of water.

With a view to help the Court to determine this question of the probability of damage, both parties have led evidence as the result of the attempt to supply water to Kilamangalam from the suit channel in July 1922. The plaintiffs' witnesses have deposed that at that time there were sugarcane, paddy crops and betel leaf cultivation on a large extent of lands in the suit villages and that they suffered from the deprivation of water. On behalf of the Government, it was suggested that this is an exaggerated story and reliance was placed upon the evidence of D. W. 1, the then Tahsildar, his statement in Ex. 8, whereby he obtained permission from the Collector to supply water to Kilamgalam and the statement of the Thamarakulam ryots in Ex. 22 dated 4th July 1922 that there was paddy crop on 12 acres of land and betel leaf cultivation on 10 acres and for their benefit a supply of Berijam water was required for four days. We regret to the obliged to say that the evidence given by D. W. 1 is by no means satisfactory or convincing and some of his statements in Ex. 8 are scarcely reconcilable with his own report Ex. OO and with the entries in registers like Exs. DD and KK which D. W. 1 was obliged to admit were reliable as showing the then state of cultivation in the suit villages. It seems to us that the learned Judge was right in his conclusion that the attempt to supply water to Kilamangalam in July 1922 did cause damage to the ryots in the plaint villages. It would not however necessarily follow that it might not be possible to devise arrangements whereby water from the suit channel might be supplied to the defendants' villages without prejudice to the plaint villages, but the case has not been considered by the lower Court from that point of view, because attention was chiefly directed before it to the plaintiffs' claim of exclusive right.

It seems to us necessary in the interests of justice to send the case back to the lower Court for a proper trial of issue 7 in the light of the foregoing paragraphs. Both parties will be at liberty to adduce evidence bearing on that issue. It will then be for the lower Court to decide what decree, if any, the plaintiffs are entitled to any

whether their rights cannot be sufficiently safeguarded by a mere declaration without necessity of following it up by injunction. The declaration and injunction in the form now granted by the lower Court are obviously unsustainable and must be set aside. The appeal is allowed, the decree of the lower Court is set aside and the case remanded to the lower Court for further trial and determination in the light of this judgment. In view of the form of the lower Court's decree, Government had no alternative but to bring up the matter before this Court by appeal. But as we are not satisfied that the plaintiffs had no grievance, and as the Government has failed in some of its contentions, we think it proper to direct that Government shall recover from the plaintiffs-respondents only one-half of the costs of this appeal. The costs in the lower Court will be provided for in its revised decree.

C.R.K./B.D. *Case remanded.*