Case Note: Case raising the issue whether the soil bed of a non-tidal but navigable river belongs to the Government. The decision on this issue hinged on whether the position adopted under English Common law on this very issue was applicable in case of the Godavari river. The Court ruled that in the English common law on this issue would not applicable as the nature of the Indian rivers was different and that the Government owned the sub-soil of all navigable rivers.

(1949)51BOMLR185

IN THE HIGH COURT OF BOMBAY

Decided On: 15.07.1948

The Maharaja of Pittapuram
Vs.
The Province of Madras

Hon'ble Judges:
Simonds, Normand, Oaksey, MacDermott and John Beaumont, JJ.

JUDGMENT

Normand, J.

1. These are consolidated appeals from three decrees of the High Court of Judicature at Madras affirming three decrees of the Court of the Subordinate Judge of Coconada in suits instituted by the appellant, the Maharaja of Pittapuram, against the respondent, the Province of Madras, in which he claimed the ownership of certain alluvial islands called "lankas" in the bed of the river Godavari.

2. The facts of the case may be conveniently stated at this stage in broad outline. On May 5, 1808, a sanad or deed of permanent property was granted by Lord Clive, then Governor-in-Couneil of Fort St. George, to the appellant's predecesor-in-title, settling in perpetuity the assessment of the zamindari of Pittapuram and authorising the appellant's predecessor-in-title to hold the zamindari in perpetuity to his heirs, successors and assigns on condition of his performing certain stipulations specified in the deed and the duties of his allegiance to the British Government. The sanad did not define or describe the lands of the Pittapuram zamindari, but it is not disputed that they included lands on the east side of the river Godavari and a number of lankas in the river bed. The village of Mulakallanka was part of the lands included in the zamindari at the date of the sanad, and it is near this lanka that the lankas which are the subject of the suit are situated. These lankas did not exist in 1861, for in that year the revenue department of the Government of India had the locality surveyed and the survey plans show no trace of their existence. They had appeared, however, by 1901, as is shown by the survey of the river undertaken

then by the River Conservancy authorities. The exact date of their appearance is unproved, but after their formation, the then zamindar of Pittapuram took possession of them and leased such portions as were suitable for cultivation to tenants. This continued until the year 1921 when the appellant was called upon to show cause why he should not be proceeded against under the Madras Land Encroachment Act of 1905 for unauthorised occupation of land belonging to the Government. After much correspondence a demand for the revenue assessed on the new lankas for the years 1917 to 1926, amounting to Rs. 1.16,229-2-8; was made upon the appellant who paid it under protest on June 1, 1927. On June 26, 1927, the appellant was called upon to vacate the new lankas and was informed that in default he would be summarily evicted. Thereupon he instituted the present proceedings by filing his plaint, in what came to be known later as the main suit, in the Court of the Subordinate Judge of Coconada on July 4, 1927. Plaints in connected and supplementary suits were filed in the same Court on June 8, 1929, and September 30, 1930, respectively. In the main suit he prayed for inter alia a declaration that he was the owner of the 18 lankas and for directions to the respondent to refund the sum of Rs. 1,16,229-2-8 which he had paid, under protest, as revenue due thereon.

3. The appellant originally based his claim chiefly on the proposition that the English common law rules governing riparian rights apply in Madras and that the bed of a navigable river, except where it is tidal, vests in the riparian proprietors and not in the Crown; but partly on the ground that the lankas claimed by him are comprehended within the area granted to his predecessor by the sanad, and partly also on the ground that the new lankas were accretions to or re-formations is situ of old lankas which were admittedly part of his property, and from which the new formations became separated in course of time through natural causes. He also claimed by adverse possession, but this ground was abandoned when the ease reached the High Court.

4. The Subordinate Judge awarded two lankas to the appellant on the ground that they had been accretions to or re-formation in situ of old lankas which were admittedly his property. In the proceedings before the High Court he gave up his claim to two lankas including one of those awarded to him by the Subordinate Judge, and the High Court found that he was entitled to three lankas in all on the same ground as that on which the Subordinate Judge had proceeded. The number of lankas still in dispute is, therefore, reduced to 18. Both the Subordinate Judge and the High Court rejected the contention that in Madras the English common law rules apply to riverain rights; they also rejected the appellant's construction of the sanad.

5. In the present appeal the appellant did not claim any of the lankas which are still in dispute on the ground that they were accretions to or re-formations of lankas which were admittedly his, and if the appeal is to succeed to any extent, it must be either on the legal ground that the common law of England on riverain rights applies, without modification, to the Godavari and that as a riparian proprietor he owns the bed of the river and insulae natae in alveo opposite his lands usuque ad medium filum aquae, or on the ground that the sanad of 1803, properly construed, granted to his predecessor an area which included the bed of the river in which the disputed lankas are situated.

6. The first question therefore is whether the English common law is, without modification, applicable to the river Godavari. The additional facts relevant to this question must be stated. The High Court has adopted from an official document dated 1907 the following description of the river :

Among the great rivers of India the Godavari takes rank next after the Ganges and Indus. It runs nearly across the peninsula, its course is 900 miles long, and it receives the drainage from 1,15,000 square miles, an area greater than England and Scotland combined. Its maximum discharge is calculated to be one and a half million cubic feet per second, more than two hundred times that of the Thames at Stailes and about three times that of the Nile at Cairo.

At the part of the river with which the dispute is concerned it is non-tidal, but it has been found to be navigable by the Subordinate Judge. It flows between embankments and the navigable channel lies up and down river and considerably nearer to the west than to the east bank. In the High Court the argument proceeded, as the judgment records, on the footing that the Godavari is a public navigable river, but counsel for the appellant submitted to their Lordships that because the river was not navigable at all seasons in all parts of the eastern side at the locus it must be treated as non-navigable on the eastern side. Their Lordships have no hesitation in rejecting this novel contention or in holding that an embanked river which includes a navigable channel is to be treated as without qualification a navigable river between its embankments.

7. Under the common law of England the bed of a river does not vest in the Crown unless it is tidal; the contention of the respondent is that in India the bed of a navigable river, whether tidal or not, vests in the Government. It is not disputed, and the Courts in India in this case have recognised, that the common law of England is applicable in India so far as is consistent with justice, reason, equity and good sense; but there is obvious good sense in the High Court's comment that it is impossible to compare a river like the Godavari with any river in England and that that is sufficient in itself to make one hesitate to apply to it common law rules of riverain rights. The propriety of applying these rules to great rivers has been considered judicially both in India and in the United States of America. In one of the Indian cases, Srinath Roy v. Dinabandhu Sen (1914) L.R. 41 I.A. 221, s.c. 16 Bom. L.R. 901 Lord Stunner, delivering the judgment of this Board, said (p. 241):—

The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or repassing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil quasi-servitudes of towing, anchoring, or landing in favour of the common people. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire, and Vermont, where

the rivers approximated in size and type to the rivers of this country, the English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one side and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illinois, and Indiana, followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee, and Albania, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of western Europe. (See Kent's Commentaries, iii, 525). The reasoning has been put pointedly in Pennsylvania. Tilghman C.J. says in 1810, in Carson v. Blqer (1810) 2 Binney 473, 477 'the common law principle concerning rivers' (viz., that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), 'even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it.' (See, too, Shrunk v. Srhuylkill Navigation Co. (1826) 2 Sergeant & Rawle, 71, 78) Thirty years later, in Zimmerman v. Union Canal Co. (1841) 1 Watts & Sergeant, 346, 851 President Porter observes, 'the rules of the common law of England in regard to the rivers and the rights of riparian owners do not extend to this commonwealth, for the plain reason that rules applicable to such streams as they have in England above the flow of the tide, scarcely one of which approximates to the sinc of the Swatara, would be inapplicable to such streams as the Susquehanna, the Allegheny, the Monongahela,' and sundry other 'rivers of Damascus.' A similar deviation, equally grounded in good sense, from the strict pattern of the English law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification. In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day regard must be had to the physical, social, and historical conditions to -which that rule is to be adapted.... Above all the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of lower Bengal change is almost normal in the river systems, and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness.

8. It will be observed that the judgment refers to a current of authority in India agreeing with the law of those American States which have deviated from the pattern of common law. In fact most of these authorities, including the case cited, deal with the rivers in Bengal, but there is nothing either in, the reasoning of the judgment or in its language to indicate an intention to differentiate one part of India from another. It is, however, the fact that in Bengal a Regulation (No. XI of 1825) was made for the purpose of making known the rules established by the law and custom of the country for regulating disputes occasioned by the frequent changes which might take place in the channels of the principal rivers of Bengal. The regulations were promulgated after consulting the law officers on the Mohammedan and Hindu Law, and they were without doubt intended to be declaratory of the pre-existing law. They have been extended to other parts of India but not to Madras. One of the regulations provides that

when a chur or island may be thrown up in a large and navigable river (the bed of which is not the property of an individual) or in the sea, and the channel of the river or sea between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of the Government.

Counsel for the appellant did not dispute that, according to the law of Bengal, the bed of a navigable river belongs to the Government but he denied that this was the law of Madras. It has not indeed been shown that the riverain law of Madras was the same as that of Bengal before 1825, and perhaps it is not possible to attain certain knowledge about the law of Madras at that time; but at least it can be said that no reason has been advanced for supposing that there was any difference between the riverain law of Madras and that of Bengal at the beginning of last century, and it can also be said that the rules which are suitable and convenient for regulating rights in navigable rivers in Bengal may be suitable and convenient for regulating rights in navigable rivers in Madras. In Bengal the common law of England did not oust the pre-existing law now embodied in the Regulation of 1825, and the respondent argues that, since the common law in its native purity was as inapplicable to navigable rivers in Madras as to navigable rivers in Bengal, it is to be inferred that the pre-existing law was allowed to continue in Madras also and that it was the same as the law of Bengal; or that the common law was modified in its application to Madras, as it was in certain states in America, in order to fit the geographical conditions. On either alternative the result is the same and it accords with the overriding principle that the common law should not be applied except so far as is consistent with justice, reason, equity and good sense.

9. The respondent's argument commends itself to their Lordships and it is fortified by the authorities that were cited. It is needless to refer in detail to all the Bengal decisions for they have been adequately discussed in the judgments of the Subordinate Judge and of the High Court. There is in all of them a notable absence of any suggestion that the law laid down was peculiar to Bengal or to those provinces to which the Bengal Regulation has been extended. They do not in general make specific reference to the Regulation of 1825 and they proceed rather upon the character of Indian navigable rivers as determining the type of law to be applied to them. Thus in Haradas v. The Secretary of State for India in Council (1917) 26 C.L.J. 590, s.c. 20 Bom. L.R. 49, p.c Lord Buckmaster, delivering the judgment of this Board in a case in which the Ganges was concerned, said (p. 594):

The river Ganges in its course through the district of Dacca rests so uneasily in its bed, that its boundaries can never at any moment be defined with the certainty that their limitation will be long observed. Frequently the river leaves its course, flows over large tracts of land, leaving other areas bare, and then again its waters recede, giving back the lands submerged in whole or in part to use and cultivation. It is obvious that difficulties as to ownership must arise in these circumstances, and of the extent and complication of these difficulties the present case affords an excellent illustration. The general law that is applicable is free from doubt. The bed of a public navigable river is the property of the Government, though the banks may be the subject of private ownership.

10. In Tarakdas Acharjee Choudhury v. Secretary of State for India (1935) 69 M.L.J. 171, s.c. 37 Bom. L.R. 638, p.c where the Ganges was again under judicial consideration, Sir Shadi Lal, in delivering the judgment of the Board, referred like Lord Buckmaster in the last cited case to the character of the river and stated that it was beyond question that the bed of a public navigable river was presumed to be the property of the Government and not that of a private person. Neither of these judgments hinted at any difference between the law of Bengal and other parts of India. The Madras cases are fewer and in none of them is there a decision on the point, but in two cases there are dicta which add weight to the respondent's argument in Sri Balsu Ramalaksmamma v. Collector of Godaveri District (1899) L.R. 26 I.A. 107, s.c. 1 Bom. L.R. 696 a claim was made to a lanka formed by alluvio in the river where it was navigable but not tidal. Their Lordships expressed grave doubts whether the presumption applicable to little English rivers applied to great Indian rivers such as the Godaveri, but they did not decide the question. In that case the plaintiffs' claim rested on the rules of the English common law. In Venkatanara -simha v. Secretary of State for India (1920) 11 L.W. 256 it was held that the alveus did not belong to the Government because the river was not navigable. The case, therefore, did not decide the point at issue in the present appeal, but the learned Judges treated tidality as immaterial and pointed out that conditions in Madras are so unlike those in this country that the English common law might well be thought inapplicable without some modification as a test of the public or private ownership of the beds of those rivers which are non-tidal but navigable. Two further cases must be mentioned. Dawood Hashim Esoof v. Tuck Sein (1931) L.R. 58 I.A. 80, s.c. 33 Bom. L.R. 897 was concerned with rights of a river in Rangoon at a part which was tidal but not navigable. In delivering the judgment of the Board Sir George Lowndes said (pp. 86-87) :

In India it has long been recognised that the beds of channels of tidal navigable rivers arc-the property of the Government in right of the Crown.

And in Secretary of State for India v. Subbarayudu (1931) L.R. 59 I.A. 56 Lord Dunedin delivering the judgment of the Board made use of similar language in discussing rights in the Godavari at a point where it is both tidal and navigable. In neither case was the Board concerned with the rights of the Government in the bed of a river which was navigable but not tidal. No inference adverse to the respondent's case can therefore be drawn from the judgments themselves or from the use of the expression "tidal and navigable" in relation to the Crown's proprietary rights in the alveus. Finally it may be noted that in Doss's Tagore Lectures on the Law of Riparian Rights the law of Bengal on the point at issue is treated as typical of India as a whole.

11. Their Lordships consider that the appellant's contention, that the English common law rule that the bed of non-tidal rivers belongs to the riparian proprietors should apply to Madras, not only runs counter to the trend of judicial dicta but conflicts with good sense, and that the rule to be applied is that the bed of a navigable river in any part of India, whether tidal or not, is vested in the Government unless it has been granted to private individuals.

12. The remaining ground of appeal must therefore be considered. The sanad of 1803 makes no mention of the bed of the river, it does not define the zamindari by boundaries

and it says nothing of the extent of the area comprehended in it. On the face of it, it does no more than confirm the right of the zamindar and his heirs, successors and assigns in what he owned at the date of the grant. It is known that at that date the zamindari, including lankas, amounted to 1,360 acres. That fact is established by a contemporary official document and by admissions made in the case. Now the appellant claims that his rights as owner extend over 6,400 acres, including the bed of the river, bounded by certain boundaries which are set forth in his pleadings. These boundaries were, he asserts, established in litigations which took place between his predecessors and other private owners, and in one instance between his predecessor and the Government. But within these alleged boundaries, unfortunately for his case, there are to be found lankas which admittedly belong to the Government and lankas which admittedly belong to other zaraindars. The boundaries contended for by him would imply also that he owned land on the west bank of the river but this is contrary to an express admission made by him in the High Court after judgment was delivered. Moreover, an examination of such evidence as the appellant has produced shows that the alleged boundaries are merely straight lines drawn between fixed points for the restricted purpose of defining the two limited areas in dispute in each of the litigations. Those lines were not in the proper sense a boundary enclosing the zamindari.

13. The appellant next sought to interpret the sanad by a reference to accounts in which the area comprised in the zamindari is stated as 800 putties, the equivalent of the 6400 acres claimed. These accounts belong to a period about half a century after the date of the sanad; they were kept by persons appointed by the appellant's predecessors-in-title and they were kept for the purpose of enabling the zamindar to claim an apportionment of the revenue assessment in the event of an alienation of a part of the zamindari. It is not competent to interpret the sanad by evidence of this sort. Even if, contrary to their Lordships' opinion, the sanad could be regarded as an ancient document, the evidence offered is not evidence of content-poranea expositio, and the appellant is in truth attempting not to construe the sanad but to add to the area confirmed by it to his predecessor-in-title. But accounts such as he has produced, though accepted by the revenue authorities, could not have effect as an additional grant for it is not even alleged that these officials had power to alienate Government lands. Equally irrelevant is some other evidence tending to show that Government officials were cognisant that the appellant's predecessors were exercising the rights of ownership over the disputed lankas. This evidence is indeed open to the additional criticism that evidence of possession not sufficient to establish a claim by adverse possession is of no value for the purpose of interpreting or adding to the grant made by the sanad.

14. The judgments of the Courts in India have dealt exhaustively and satisfactorily with the contentions of the appellant and they contain a valuable exposition of the law of riverain rights in India. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. The appellant will bear the costs of the appeal.