M.R.O. 1—20,002—12-8-65.

(1) Number of Pages 6

(2) Date of repair 18.5.68

(3) Initials of the Referencer

MADRAS RECORD OFFICE

GOVERNMENT OF MADRAS

Revenue DEPARTMENT

G.O. No. 296		~~Press~~
~~B.P. No.~~		Mis.
Dated 15.2.1875	196 .	

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296 — 15.2.75

182/75 - 4520/RH/75

Rec'd 28/2/75

Proceedings of the Madras Government, Public Works Department,
11th February 1875.

Read the following papers :—

No. 250. From H. G. PRICHARD, Esq., Government Solicitor, Madras, to Colonel G. W. WALKER, R.E., Secretary to Government, Public Works Department, dated Madras, 24th November 1874, No. 602.

I HAVE the honor to acknowledge the receipt of the Order of Government, dated 28th August 1874, No. 2,442, Public Works Department, requesting the Advocate-General's opinion as to whether the Government, as the Law stands at present, have a right to prevent any action on the part of individual proprietors of lands of navigable rivers for the purpose of forming accretions or rendering natural accretions permanent.

2. I submitted the matter for the consideration of the Advocate-General, and I now forward, herewith, a copy of his opinion.

OPINION.

There is no enactment in force in this Presidency corresponding to the Bengal Regulation XI. of 1825, which supplies the rule on which the decisions of the Bengal Courts and the Privy Council as to the rights of riverain proprietors in that Presidency have, in most instances, been founded. It is not safe, therefore, to accept the rulings of the Privy Council upon cases in Bengal (as is done in the Government Proceedings of 2nd March 1871) as indicating with precision the state of the Law in other parts of India : nor am I aware of any authoritative rulings of the Madras Courts which would support the inference that the same Law which has been legislatively enacted for Bengal exists by custom, though not by distinct enactment, in this Presidency.

2. The Bengal Regulation, however, proceeds to a large extent upon local usage, accepting that as the basis upon which the rights of the Government on the one hand, and owners on the other, are founded; nor would it supply, except inferentially, any rule for replying to the first question now referred, viz., whether, as the Law now stands, Government has the right of preventing individual proprietors from taking measures on the banks of rivers, which their properties adjoin, either to cause the formation of accretions or to secure the permanence of an accretion spontaneously formed, when such action tends to alter the natural course of the river, to injure the riparian proprietors generally, and to interfere with the necessary river conservancy.

3. Nor again is there any enactment, nor, so far as the reports show, any judicial decision as to the other question referred in the Government Order of 28th August 1874, viz., as to the extent of the rights of riverain proprietors to the portion of river beds which, in the dry season, is left uncovered by water and appears in the form of mud or sand banks.

4. Both questions must, therefore, be decided on the general principles of law applicable to such cases ; as, however, these principles are necessarily to a large extent borrowed from European systems of law, it is necessary, in applying them, to take into account the difference of the objects to which, and the conditions under which, they are to be applied, and the possibility of a resulting modification of the rule by which the matter must be governed. An instance of this was afforded in

the ruling in the Karvatinagger case recently decided in appeal by the Privy Council, in which the rule ordinarily applied by the English Courts in cases of damage resulting from accumulations of water was held inapplicable to India, owing to the different circumstances of the two countries.

5. With regard to the first question, it is clear that, in the absence of some special prescriptive right to do so, the proprietor of land on a river's side is not entitled to use the water in any way so as to interfere with the rights of others in connection with the river. He "may not dam up the water so as to flood or otherwise injuriously affect the lands of others, or by making embankments, or otherwise alter the ancient course of flood-water so as to throw it in greater quantity on the land of his neighbour," (Kerr on Injunctions; p. 391); and, though proprietors on the bank of a river are entitled to protect their property from an invasion of water by building a bulwark, they may not do so in such manner as to inflict injury on other proprietors. In Bickley *v.* Morris, L. R., 1, Scotch Appeals, 47, the matter was discussed by the House of Lords, and the principle affirmed was that a proprietor on a river's side has not, as such, any right to use the *alveus* of the stream in such a manner as to interfere with the natural flow of the water: and that though an erection, incidental to the natural use of the water (such, *e. g.*, as a boat-house), might be made on the *alveus*, so long as no infringement of the rights of others were involved, yet if this were its result it could not be permitted, still less could an erection invading the stream be allowed for the mere purpose of enlarging a proprietor's premises. Even a bulwark built *ripæ muniendæ causâ* must conform to the requirement of involving no injury to the property of other proprietors. Lord Cranworth further indicated that the person complaining of an invasion ought not to be put to any strict proof as to the likelihood of damage, or of its character and extent. The proprietors have a right, his Lordship observed to say, "We all have a common interest in the unrestricted flow of the water and we forbid any interference with it." In Williams *v.* Morland, 2, B. and C., 913, the right to flowing water was described as being originally *publici juris*: "so soon as it is appropriated by an individual his right is co-extensive with the beneficial use to which he appropriates it." So also in Bayley *v.* Shaw, 6, East, 208. See also Attorney-General *v.* Ferry, L. R., 9, C. A., 423, where the rights of riparian owners were discussed and doctrines similar to the above enforced.

6. The doctrines enunciated in these cases are of course fatal to any claim of a riverain proprietor either to enlarge his bounds by any diversion of the stream, or even to protect his property from inundation or erosion by any barrier which has the effect of diverting the current in a manner injurious to others.

7. It must be remembered, however, that this rule is liable to modification by any prescriptive rights which the proprietor may have acquired, and that these may, in many instances, have become absolute and indefeasible under the Limitation Act, a point which would have to be decided on the merits of each case.

8. The second question, viz., what is to be considered the 'bed of the river' in cases when the river differs in width at various seasons of the year, does not admit of any absolutely definite and invariable answer. It must be decided in each instance by the facts of the case. There is, I believe, generally a clearly defined

hich water flows for a suffi ent space of time to leave clear evidence this channel may be overf wn at certain seasons and be left nearly but there would, as a rule, be little difficulty in demarcating it, and uld, I imagine, consider thi to be "the river" in case of any dispute

he English Courts a distinction is made between navigable and rivers, the *alveus* of the former being considered to belong to the latter to be joint property of the riparian proprietors. Lord Advon, 1, Macg., 46, quoted at p. 46 of L. R., 1, Ex. Ap., 49. This distinto have been kept in view by the framers of the Bengal Regulation: know that there is any sound reason for applying it in the case of

The current opinion is, I believe, that all rivers are the property of t the matter appears never to have received judicial exposition, and e of this and of any legislative enactment there might, I apprehend, be lty in the case of a permanent formation in the midst of a stream being e opposite proprietors on the one hand and the Government on the uestion is perhaps of less importance since it is quite clear that nothing which in any way interferes with the natural flow of the river or the s of other proprietors.

e above remarks will have indicated that, in my opinion, the subject is nsiderable difficulty and uncertainty, and that with a view to a speedy nt action in matters of conservancy and the avoidance of possible litigaedient to have recourse to legislation.

(Signed) H. S. CUNNINGHAM,
Advocate-General.

er 1874.

No. 49.

MEMORANDUM.

be useful, as a basis for discussion, to note some of the principal hich, it is thought, should be included in the bill for conservancy of h it is supposed will be brought forward, with reference to the neral's opinion that legislation will be desirable. An Act to enable nent to deal effectively with this subject, should, the Chief Engineer thinks, confer on the Government

, full and definite powers of control over the beds of all deltaic ivers, and this definition should include those lower parts of all rivers he waters of which when in flood are liable to seek other outlets than the proper channel of the river, and which therefore require to be more or less embanked;

, the property in all marginal or mid-stream accretions from the date on which the Act may become law;

, the power of acquiring all land formations within the bed proper of a river, the removal of which formations may be necessary to its proper conservancy—

1*st.* on payment of compensation, if such formation be included in any puttah or other title deed granted by competent authority, or if it be shown by any Revenue Survey map or by Pymash or other similar accounts to be in proprietary or private occupation;

2*nd.* without compensation otherwise

(*d*), the property in all land reclaimed by river conservancy operations carried out at the public expense;

II. the power to require that all protective works, which individual landholders on the banks of a river may desire to carry out, shall receive the sanction of officers appointed by Government to exercise this control, prior to the execution of such works.

2. The Act should prohibit all plantations or other works by private individuals, or by any one except the conservancy officers, or under their orders, within the river bed and banks.

3. The Act should determine the bed of a river to be the defined channel within which its waters ordinarily flow, and which would be laid down on a chart or survey as the bed of a river. Generally the edge of the bank is clearly defined, and in the few places in which such definition may be imperfect the proper line is always ascertainable from defined banks above and below.

4. The Act should render penal any cutting or injury, by private individuals, of river flood embankments, whether such interference may or may not have occasioned damage.

5. The Act should provide the necessary penalties for infringement of its provisions, together with the procedure for the enforcement of the regulations contained therein.

CAMP, TRIPATOOR,
11*th January* 1875.

(Signed) JOHN MULLINS, Lieut.-Colonel, R.E.,
Chief Engineer for Irrigation.

No. 252. ORDER THEREON, 11th February 1875, No. 380.

IRRIGATION, No. 13.

THE opinion expressed by the Advocate-General upon the subject referred to in Proceedings Madras Government, No. 2,442 of the 28th August 1874, indicates that the action which the Government desire to take in connection with the conservancy of the important deltaic rivers of this Presidency is not at variance with the general principles of law, but it is also shown that legislation must be resorted to in order to avoid difficulties.

2. His Excellency the Governor in Council is pleased therefore to direct the preparation of a Bill, for the conservancy of rivers, by the Advocate-General in communication with the Chief Engineer for Irrigation and the Board of Revenue.

3. It will be desirable that the opinions of the local Revenue and Public Works Officers also should be taken into consideration, so that no really important details may be overlooked, and this Order together with that of the 28th August last, will be communicated to the Superintending Engineers, Kistna and Tanjore,

and to the District Engineers, Godaver Nellore, North Arcot, Chingleput, South Arcot, and Tinnevelly, for the submissi y them of any observations regarding the rivers of their districts which they n leem to need consideration.

(Tru xtract.)

Colonel, R.E.,
Secretary to Government.

To the Chief Engineer for Irrigation.
" Superintending Engineer, Kistna.
" Do. Tanjore.
" District Engineer, Godavery.
" Do. Nellore.
" Do. North Arcot.
" Do. Chingleput.
" Do. South Arcot.
" Do. Tinnevelly.
" Advocate-General.
" Revenue Department.
" Judicial Department.

No 526.
Revenue Department

Govt. of {1875} Madras.

PUBLIC WORKS.

To

THE CHIEF ENGINEER FOR IRRIGATION,

&c., &c., &c.

Dated February 11th.

Read. —"—13. Encl.

G. O., 11th February 1875, No. 380.

FEBRUARY.

Nos. 250-252

Conservancy of the Deltaic Rivers of the Madras Presidency.—Directing the preparation of a Bill for the conservancy of rivers by the Advocate-General in communication with the Chief Engineer for Irrigation, and communicating this Order together with that of the 28th August last to certain District Engineers for the submission by them of any observations regarding the rivers of their districts which they may deem to need consideration.

No 296
Commc. to the
Bd of Rev for their information & guidance
15.2.75

VCP 3339/75
" 435/76
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14 Deltaic Rivers Conservancy Bill