

Revenue (1897) Department.

MISCELLANEOUS SERIES.

G.O., No. 2997

DATED 14th June

[Despatch Abstract.]

Communicating to the Bd of Rev. Letter from the
Govt. solicitor forwarding opinion re: the
right of Govt. to regulate surface drainage
with an expression of concurrence expressed
therein by the Hon. Mr Advocate General.

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

Revenue (1897) Department.

CURRENT No. 4427

The Hon. Mr. Esnoze. C. S. &
I think we had expected
a statement with the ad.
Govt. but there is no case
now to be commenced

From
5/6/97

The Govt. Solicitor
Madras.

Order Mis

Prop^d 20/11/97

Communicated to the Board
of Revenue.

No. 319

Dated 22nd May 1897

Received 26.5.97

Registered 27.5.97

Enclosures 10.

that the Govt. the instructions Spare copies
to be furnished the case and
the Board of Revenue (A.P.)
with enclosures.

(A.P.)

1 June 97

with draw from the litigation.

The Govt. has to maintain the
proposition that he may flood
one Govt. village and obstruct
their crops in order to save
the crops of another and he

SUBJECT.

Forwarding opinion re:
the right of Govt. to regulate
surface drainage

24/6/97
29/6/97

has to establish this proposition in the face of decision of the Civil Courts of 1877. That even then the Sengalipuram village had not the right to claim for them. When finally the same case as that now before was declared not to be justifiable. These decisions only came to light just before judgment was delivered. The whole litigation is understood to have been some 5000 Rs which it was not to put the drainage of both these villages on a satisfactory basis. I am acquainted with the case as it was in the last stages of litigation when I was in Tanjore.

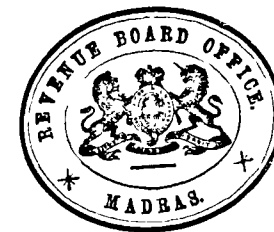
4/6/97

BACK PAPERS.

G.O.	No.	Department.	Date.
	2736	—	3-5-97

FURTHER PAPERS

G.O.	No.	Department.	Date.



Proceedings of the Board of Revenue
(Land Revenue)

No. 1584 Misc., dated 12th April 1897.

Read letter from J. Andrew, Esquire, Ag. Collector of Tanjore, to the Secretary to the Commissioners of Land Revenue, Madras, No. 1032/Rev. of 1897, dated 8th March 1897.

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Resolution

Submitted to Government.

2. The circumstances which led up to the litigation referred to in the above letter are briefly as follow:-

In the Mamilam taluk, there is a channel called the Talakani voikal which runs North & South; it receives the drainage of the lands in the Sengalipuram village lying to the West, forms the source of irrigation for the lands in the villages lying to the east of it, and at each end it is connected with a river, the Velappar which flows from West to East to the North of all the villages & the Solasudamaniyar forming the Southern boundary of the villages. The two rivers have high flood-banks. On the Eastern bank of the Talakani voikal, which bank is also high, there are thirteen sluices through which water is taken for purposes of irrigation by the ryots of the Eastern villages and large head sluices at the Northern & Southern ends by which water is admitted from the two rivers whenever required for irrigation. In seasons of high flood and heavy rain these head sluices have necessarily to be closed, to protect the intervening villages from inundation, and if, in addition, the 13 small sluices are also

shut, the flood water in the western village (Sengalipuram) has no means of escape and temporarily submerges the cultivated lands until the floods in the rivers subside. The remedy to be adopted for improving the drainage of the village having come up for consideration, the Executive Engineer suggested that the Revenue officers might, in the exercise of the general right of Government to regulate the supply of water for purposes of irrigation and drainage, open the 13 sluices on the Eastern bank of the Talakani voikal in times of flood and see whether the flood water of the Sengalipuram village could not be passed down to the sea through the sluices without submerging the lands in the Eastern villages. The suggestion was given effect to as a temporary measure in 1891; and this led to the institution of O.S.No.139 of 1893 in the Tiruvallur District Munsiff's Court by the ryots of the Eastern villages.

3. The Plaintiffs in the suit alleged that, as mirasidars of the Eastern villages, they had an exclusive right to use the poramboke lands thereof as they chose, that the Eastern bank of the Talakani voikal and the sluices therein having been constructed by their predecessors, they had from the very time of the constitution of the village exercised a right to open the sluices when water was required for irrigation, and to close the same when they had to drain the village water to the East & that this right having also been judicially declared by the Kumbakonam Zilla Court on the occasion of the wrongful interference with one of the sluices by one of the Sengalipuram villages in 1820, they had, by adverse enjoyment for over 60 years, acquired a right of easement to open or close the sluices at their pleasure. They added that the drainage water of the Sengalipuram village used to flow into the Veleppar Northwards through the Rottakannu (Double vent) sluice, ^{therein} and that the Revenue officers having at the instance of the ryots of that village discharged the drainage water through their sluices, they had sustained damage by the submersion of their lands. They accordingly prayed for a declaration of their right to open and close the 13 sluices, the double vent sluice ^{above referred to & the irrigating sluice} from the Veleppar & for award of damages.

4. It was contended on behalf of Government that the Talakani voikal and the branch channels, as well as the poramboke lands forming the bed thereof, belonged to the State, that the practice of opening & closing the 13 sluices conferred on the Plaintiffs no right, either by way of easement or otherwise, to prevent Government

from making the requisite arrangement for regulating the supply, distribution and drainage of water in ryotwari villages, and that the flood water of the Sengalipuram village could not be drained into the Veleppar through the double vent sluice in times of heavy rains; it was added that the Plaintiffs had no right to close the 13 sluices so as to obtain the natural drainage of the country and drain back the rain water on the Sengalipuram lands. It was further pleaded that the Plaintiffs had sustained no damage by the opening of the sluices, that the judgment of 1820 was not binding on Government and that the Plaintiffs had no right to open or close the Talakani Head Sluice.

5. The District Munsiff decreed in favor of the Plaintiffs & granted a perpetual injunction against the defendants. He found that they were the owners & proprietors of the villages and had as such the natural right to take only as much water as they required and to obstruct the flow of a larger quantity of water through their irrigation channels or through the sluices which had been constructed by them, that they had also acquired a prescriptive right to open & close the head sluice, the double vent regulator and the 13 sluices, and that damage must have occurred by the passing of the drainage water of the Sengalipuram village through the villages. On a consideration of the evidence adduced in the case, he further observed that the Sengalipuram flood water had ~~never~~ always drained northwards & never eastwards through the sluices, and that the judgment of 1820 had been passed only after the failure of attempts at amicable settlement of the dispute between the villagers by the Revenue Department.

6. The Government Pleader was thereupon consulted as to the advisability of preferring an appeal. He was of opinion that an appeal should be preferred ^{to} try the question of fact whether the 13 sluices are only irrigation sluices for the Plaintiffs' lands or also serve the purpose of

draining the lands of the Sengalipuram village, and that in finding that the Plaintiffs had acquired a right of easement as against Government also, the Munsiff had overlooked clause (a) of Section 2 of the Easements Act V of 1882 declaring the right of Government to regulate the collection, retention & distribution of the water of rivers, streams and channels. He added that the issue of a perpetual injunction against Government was in contravention of clause (d) of Section 56 of the Specific Relief Act and that the suit was also liable to be dismissed for misjoinder of parties and causes of action.

7. An appeal was accordingly preferred to the District Court, which has now dismissed the Plaintiffs' suit on the ground that they should not have sued jointly for enforcing or obtaining a declaration of their individual rights. The District Judge has at the same time gone into the merits of the case and found that the Plaintiffs had a valid cause of action. He observes that judging from the decision of the Kumbakonam Zilla Court in 1820, a Razinamah of 1821 and the Paimash account of 1829, it is clear that the Sengalipuram villages have never, at all events since 1820, exercised any right to drain off the surplus water of their village through the 13 sluices, and that the natural right of the owners of high lying land to pass on the surplus water to the lower land extends only to surface drainage water (but not to water flowing in a defined channel) and was in the present case interrupted at the time of construction of the Talakani voikal. As against Government the District Judge has found that Section 2 of the Easements act refers only to the water of rivers, streams or Government irrigation channels but not to the control of surface drainage, that to cause the accumulated drainage water to flow on to the lands of an adjacent owner is to interfere with his enjoyment of the land and is actionable as a private nuisance, and that there is no provision of law under which Government, any more than a private proprietor and owner of a channel, can commit a nuisance of this sort on ryotwari lands. He however admits that the Government is the proprietor of the Talakani voikal and of the branch channels, as trustee for its ryots, and is entitled to interfere in the event of occurrence of any water dispute between the ryots of the Western & Eastern villages, and that no easement could have been

acquired against Government, as the circumstances of the case negative the presumption of a grant to the Eastern villagers of the right to open or close the 13 sluices at will, much less the double-vent sluice and the self-irrigating sluice at the northern end of the Talakani voikal. In conclusion, he adds that if Government had opened the sluice for irrigation purposes, the plaintiffs would have had no cause of action. In the present case, however, the sluices were opened for a different purpose and the drainage water did not flow in the Government channels only, but submerged the lands in the Eastern villages. He accordingly held that the actual submer-sion of the plaintiff's crops had amounted to a nuisance and to a denial of their right to exclude the drainage water from their lands and that they were therefore entitled to damages.

8. As the plaintiffs in the suit are likely to institute fresh suits for damages in the Civil Courts, the Collector of Tanjore proposes that the opinion of the legal advisers of Government may be obtained beforehand, as to whether the District Judge's views in regard to the regulation of surface drainage by Government are open to question. The Board supports this proposal and requests that the opinion of the Honorable the Advocate General may be obtained in the matter as the question involved is one of great importance.

9. The Collector of Tanjore is requested to forward a copy of the District Munsiff's Judgment in the original suit direct to Government together with the two maps returned to him with Board's Proceedings No. 4962 Misc., dated 28th August 1893.

(True Extract)

Reed

Secretary.

To The Secretary to Government, R.D., with Collector's letter in original & a file of papers to be ret'd.
The Collector of Tanjore.

Id. R.H.

O p i n i o n .

Re - The right of Government to regulate surface drainage involved in A. S. No 386 of 1896 (vide G. O. No 2256 Mis dated 3rd May 1897 Revenue Department)

U p o n the facts found by the District Judge in connection with the question of drainage of the surface water of Sengalipuram Village, I am of opinion that the view maintained by the District Judge is correct in law

2. The surface water in question seems to be the rain water falling on the Sengalipuram lands which has to be drained when there is excess of rain. This right of drainage is what is referred to in law as a servitude which arises from the situation of the property, lands on a lower level being subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man - (vide Illustration i to section 7 of the Indian Easements Act, 1882).

3. Government has no manner of right to regulate the drainage of such surface water, by reason of both the land on which such surface water accumulates and the land on a lower level being held on ryotwari tenure and irrigated by Government water. It is true that in the present case the surface rain water of Sengalipuram flows into the Thalakanal channel which lies between Sengalipuram and the Plaintiff's village of Thalayalamadu, and is admitted by the irrigation channel of Plaintiffs villages supplied at both ends by natural streams. It is not found by whom, or at whose expense, the channel in question was constructed, and has been maintained. Even on the assumption that it was constructed at the cost of Government, I am of opinion that section 2 of the Indian Easements Act, which expressly declares in clause a that nothing contained in that Act is intended to derogate from any right of the Government to regulate the distribution of the water flowing in any channel or other work constructed at the public expense for irrigation, has no application to a case in which, as here, the Government asserts a claim, not for

not for the distribution, collection or retention, but for the disposal or getting rid, of water flowing in such channel. The drainage of surplus irrigation water stands altogether on a different footing based on an implied agreement arising from the circumstances that all the ryots holding lands irrigated from a common source belonging to Government enjoy the advantages of such irrigation subject to the usual incidents thereof.

4. The question in this case seems really to be one between the ryots of Sengalipuram and the ryots of Plaintiffs villages as to whether the latter are bound to receive through the sluices of the said irrigation channel the flood waters of Sengalipuram and for that purpose to keep the sluices open. From their relative situation the Sengalipuram ryots no doubt are entitled that all surface waters of their village which would naturally flow should be allowed to descend into the lands of Plaintiffs Villages without any obstruction (I.L.R. 1 Madras 335, I.L.R. VIII Calcutta 468). The obstruction, if any in the present case, seems to be the embankment on the eastern side of the Thalakani channel which appears to have been in existence from a period anterior to 1820. The law in regard to such obstruction is thus laid down at pp. 274, 275 of Addison on Torts, sixth edition :- "If the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the higher lands to be flooded, he is responsible in damages for infringing the natural right of the possessor of such higher lands to the natural outfall and drainage of the soil, unless he has gained a right to pen back water by express grant or undisputed enjoyment". Whether the District Judges view as to poramboke lands being vested in Government in trust for the public be sound or otherwise, he does find that the Government is the proprietor of the bed of the said irrigation channel and the site of the said embankment which lie between Sengalipuram and Plaintiffs villages. The obstruction, if any, is thus really on Government land. Unless therefore it could be implied that, when the channel was constructed and the embankment raised for the benefit of securing irrigation to the Plaintiffs villages from natural rivers, it was agreed that the rain waters of Sengalipuram should be allowed to

to flow into the Plaintiffs villages through the sluices primarily intended for irrigation purposes, it is difficult to see on what principle Sengalipuram ryots can insist upon the Plaintiffs opening the sluices for the discharge of such surface water by artificial means. If there has ever been an invasion of the rights of Sengalipuram ryots, it was the raising of the embankment on Government land upwards of 60 years ago. The raising of the embankment by Government, or at any rate on Government land, is not necessarily an invasion of the rights of Sengalipuram ryots (vide Coulson and Forbes on Waters page 147). Whether the more correct statement of the law on the point is that "the proprietor of the lower land cannot raise any dam to prevent the flow of water from the higher land" (vide article 501 Quebec Code and p 85. Goddard on easements, Fourth edition and note 11 thereto, and I.L.R. XVIII Madras 159), or that he cannot raise a bank for any purpose whatever, however reasonable it might be for the natural enjoyment of his property (vide section 7 (a) Easements Act), if such embankment will have the effect of preventing such flow (vide article 640 Code Napoleon, Blaxlands Digest of English law p. 360 Angell on water courses p. 123), the erection of such dam will not be an actionable wrong, if the water could escape by other natural means, or provision is made for its escape otherwise.

5. In the present case it is expressly found by the District Munsiff that since the excavation of the channel and the raising of the embankment the flood waters of Sengalipuram were drained into the Valappar river through the double-vent sluice in the Talakani channel, and the District Judge does not dissent from this finding and actually finds that since 1820 at any rate the Sengalipuram villages never openly exercised the right of draining their surplus water through the sluices in the eastern bank of the channel. Admittedly it was only in 1891 that the Revenue authorities under the suggestion of the Executive Engineer, arranged for the drainage of the rain waters of Sengalipuram through the said sluices, an arrangement which was immediately followed by the institution of the present suit. Upon the facts found, the irresistible inference seems to be either that the construction of the channel and the embankment did not

materially affect the drainage of the rain waters of Sengalipuram (vide I L R XII Calcutta 323 and Sutherlands Weekly Reporter F. B. No p 25), or that at that time or shortly thereafter on the representation made by the Sengalipuram ryots special arrangements were made for such drainage through the said double vent sluice. In any event, their natural rights have long ago been forfeited by abandonment (vide VII Sutherlands Weekly Reporter p 498), and rights in restriction of such natural rights - acquired by prescription by Government and the ryots of Plaintiffs villages (vide section 7 of the Indian Easements Act).

C. I think it highly probable that the Plaintiffs whose suit has been dismissed in appeal, by the District Judge of Tanjore solely on the - ground of misjoinder of causes of action will prefer a second appeal to the High Court, if they have not done so already, and I am not sure that the view taken by the Lower appellate Court on the question of misjoinder will be upheld by the High Court, especially as the Plaintiffs in the - Court of First instance itself appear to have withdrawn their claim for damages and limited their reliefs to a declaration of right and injunction.

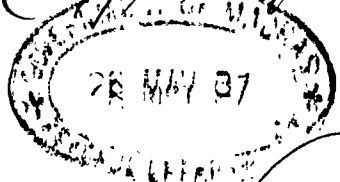
Madras,)
20th May 1897)

V. Bhashyam Iyengar
Acting Advocate General

(True copy)

Ernest Barclay
J. P. H. Morgan
Government Solicitor.

(1897) Department



From Ernest Barclay
Government Solicitor
Madras

To The Secretary to Government
Revenue Department
Ootacamund

11° 319

Dated 22nd May 1897 }
Recd

Enclos:

Forwarded with enclosures
with reference to the
Order of Government No
2236 Mis: dated 3rd May
1897. Revenue Department
Ernest Barclay
Government Solicitor

C No 4427 of 97

G.O. (Mis) No. 2997 of 14th June 97.

Communicated to the Board
of Revenue with an expression of ~
concurrence in the opinion expressed
by the Hon. the Advocate General.

11/4/97

From orders.

To

The Board of Rev (L.R.)
with enclosures.

(A.)
12 June 97