On that view the petition must fail and is dismissed with costs, two sets, one hearing fee.

Petition Dismissed.

SHANKAR NARAYAN RANADE

v.

UNION OF INDIA

1963
February, 8.

(P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA and J. C. SHAH JJ.)

Inam—Construction of sanad—Grant of village including water—If includs water of flowing river—Claim of riparian right —Validity—Bombay Land Revenue Code, 1879 (Act 5 of 1879), s. 37 (1)—Bombay Irrigation Act, 1879 (Bom. 7 of 1879), s. 5—Transfer of Property Act, 1882 (IV of 1882), s. 8.

The appellant was one of the sharers in the Inam village of vadner and brought a suit againt respondents claiming relief on the basis of his title to the running water of river valdevi. During World War II, the military authorities constructed residential quarters within and outside the limits of vadner. They built a dam across the river within the limits of vadner and dug a well near the bank of the river which was fed by the river water and the water was carried to the residential areas. The diversion of water and the use of land continued from 1942 to 1959, which deprived the appellant and the other Inamdars of their right to utilise that water for their own gain and of others ; this had caused injury and damage to them, for which, the appellant claimed compensation from the respondents. According to the respondents, by virtue of a notification under s. 5 of the Bombay Irrigation Act, 1879, the river had become a notified canal and consequently the Inamdars had lost their rights, if any, in the waters of the said river. They also took a plea of limitation. The trial court decreed the suit and held that the appellant was entitled to the compensation only for two years before the date of the suit and the rest of his claim was barred by time. The decree was challenged both by the

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appellant and the respondents by cross-appeals in the High Court. The High Court dismissed the appeal with modifications. Then followed an appeal to this court on certificate.

Held, that the use of the word "water" in the sanad, properly construed, excludes the running water of the river and it could not be said that title to the flowing water of the river went with the title to the bed of the river. If the sanad made no grant of the running water in terms, the appellant could not claim the same as the riparian owner.

Annapurnabai Gopal v. *Government of Bombay* (1931) 47 Bom. L. R. 839 and *Lyen* v. *Fish-Mongers' Company* [1876] I App. Cas. 662, referred to.

Held further, that the appellant could not be allowed to make an alternative case on the ground of his rights as a riparian owner as there was neither any allegation in the plaint nor any evidence on the record to that effect.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 212 of 1961.

From the judgment and decree dated December 11, 1957, of the Bombay High Court in First Appeal No. 640 of 1957.

G. S. Pathak, N. D. Karkhanis, B. Datta, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for the appellant.

C. K. Daphtary, Solicitor-General of India, N. S. Bindra and *R. H. Dhebar* for *P. D. Menon*, for the respondents.

1963. February 8. The judgment of the Court was delivered by

Gajndrageadkar, J.

GAJENDRAGADKAR, J.—The short question which this appeal raises for our decision is whether the appellant Shankar Narayan Ranade has established his title to the running water of the river Valdevi which runs through his Inam village Vadner. The said village had been granted to the ancestors of

the appellant by the Peswa Government in 1773 A.D. This grant was continued by the British Government when the British Government came in power. The river Valdevi has its origin in the hills of Trimbak and from those hills it flows to Vadner and then to Chehedi where it joins the river Darna and thus loses its individuality. The total length of this river is about 25 miles, while its length within the limits of Vadner village is about 2 miles 82 furlongs. The Darna river after its conjunction with Valdevi proceeds towards Sangvi and there is merged with Godavari river : The appellant is one of the sharers in the Inam village of Vadner and he brought the present suit No. 12/1950 in the Court of the Civil Judge (Senior Division) at Nasik, claiming reliefs against the Union of India and the State of Bombay, respondents 1 & 2 respectively, on the basis of his title to the running water of the said river.

It appears that in 1942, during the period of the II World War , the Military authorities constructed barracks and other residential quarters for the army personnel within and outside the limits of Vadner. They also built a dam across the river Valdevi within the limits of Vadner and dug a well near the bank of the river. This well was fed with water carried by two channels drawn from the river. When the water reached the well, it was pumped from the well and duly stored in four reservoirs where it was filtered and then it was carried by means of pipes to the residential area occupied by the military personnel.

The appellant then approached the military authorities and also the Government of Bombay and claimed compensation for the use of the water and the lands by the military authorities. Since his request for adequate compensation was not met, he filed the present suit on March 11, 1950, in a representative character under O. 1 r. 8 C. P. C.

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In this suit, the appellant speaking for himself and for the other sharers in the Inam village of Vadner alleged that the Jagirdars of the village were full owners of the entire area of that village, including the land, the stream and the water flowing through the stream within the limits of the village. According to the plaint, the acts of diversion of water committed by the military authorities had deprived the appellant and the other Inamdars of their right to utilise that water for their own gains and thus, had caused injury and damage to them. As compensation for this damage, the appellant claimed Rs. 1,11,250/- from the respondents. The appellant further made a claim for Rs. 750/- as compensation for the use of his land by the military authorities. The diversion of water and the use of land continued from 1942 to 1949. Some other incidential reliefs were also claimed by the appellant.

Respondent No. 2 contested the appellant's claim. It urged that the Inamdars were not the grantees of the soil, but were the grantees of the royal share of the revenue only; and it was urged that in any case, they had no ownership over the flowing water of the Valdevi river. Respondent No. 1 adopted the written statement of respondent No. 2 and filed the Purshis in that behalf. According to the respondents, the river Valdevi had become a notified canal by virtue of a notification issued on February 17, 1913 under section 5 of the Bombay Irrigation Act, 1879, and in consequence, the Inamdars had lost their rights, if any, in the waters of the said river and respondent No. 2 had the absolute right of the use of the said water. A plea of limitation was also made by both the respondents.

The learned trial Judge made findings in favour of the appellant on all the issues. He held that the Inamdars were the grantees of the soil, that the

river Valdevi and its flowing water belonged to them, that the notification on which reliance was placed by the respondents was invalid, that the acts of the military authorities were unauthorised and that the appellant was consequently entitled to the compensation for the use, by the military authorities, of the water of the river and his lands and also for the loss of his income from the river bed. According to the trial Court, the appellant was entitled to this compensation only for two years before the date of the suit and the rest of his claim was barred by time. Accordingly, it passed a decree in favour of the appellant for an amount of Rs. 26,788/1/- as compensation for the use of water up to December 31, 1949, directed that the compensation for the use of water for the period subsequent to January 1, 1950 should be ascertained in execution proceedings, and awarded compensation @ Rs. 100/- per annum for the use of the land, and Rs. 50/- per annum for the loss of income from the river-bed during the period that the act of the military authorities continued.

This decree was challenged both by the appellant and the respondents by cross-appeals Nos. 634/1954 and 640/1953 respectively. The appellant claimed a larger amount of compensation, whereas, according to the respondents, no compensation was payable in respect of the alleged diversion of the running water of the river Valdevi. It appears that before the High Court, the respondents did not dispute the finding of the trial Court that the Inamdars were the grantees of the soil and conceded that the rights of the Inamdars such as they were to the waters of the river Valdevi had not been extinguished by the notification issued under the Bombay Irrigation Act. It was, however, urged that the Valdevi river being a notified canal, the military authorities could have used its water by making appropriate applications under

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ss. 17 and 27 of the said Irrigation Act; but since there was no evidence to show that any such applications had been made, the said point did not survive. The main argument urged by the respondents in their appeal was that the appellant was not the owner of the running water of the stream and so, he had no right to claim any compensation for the alleged diversion of the said water by the military authorities. The High Court has substantially accepted this contention. It has held that as owners of the lands in the village situated on both banks of the river the Inamdars were entitled to the use of the water of the river as riparian owners and what belonged to them was water which they took out from the river and appropriated to their use; they were, however, not entitled to claim title over the flowing water of the river and so, the diversion of the flowing water of the river cannot sustain their claim for compensation. The decree passed by the trial Court in respect of compensation for the wrongful use of the lands was not challenged by the respondents. In the result, the High Court modified the decree passed by the trial Court by setting aside that part of it which related to the compensation for the use of the water of the Valdevi river by the military authorities and confirmed the rest of the directions issued by the decree. It is against this decree that the appellant has come to this Court with a certificate issued by the High Court; and the main point which has been urged before us by Mr. Pathak on behalf of the appellant is that the High Court was in error in rejecting the appellant's claim that the Inamdars of the village were the owners of the running water of the river Valdevi during its course within the limits of the Inam village of Vadner.

In support of the appellant's case, Mr. Pathak has urged that in construing the Sanad on which the appellant's title is founded, it would be necessary to

bear in mind two important considerations. The first consideration is that the flowing water of a river constitutes property which can belong to a citizen either by grant or otherwise; and assistance is sought for this argument from the provisions of section 37 of the Bombay Land Revenue Code (Act V of 1879). Section 37 (1) provides, inter alia, that all public roads, lanes and paths which are not the property of individuals, belong to the Crown, and amongst the items of property specified in this clause are included rivers, streams, nallas, lakes, tanks and all canals and water-courses, and all standing and flowing water. The argument is that this sub-section postulates that the items of property specified by it can belong to private individuals, and it provides that if they are not shown to belong to private individuals, they would vest in the State. Therefore, in construing the Sanad, we ought to remember that the river and its flowing water constitute property which can be granted by the Ruler to a citizen.

The other consideration on which Mr. Pathak has relied is that under the provisions of section 8 of the Transfer of Property Act, it should be assumed that unless a different intention is expressly or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. Mr. Pathak contends that assuming that prior to the grant, the Peshwa Government as the ruling power of the day was the owner of the river and its flowing water, when the said Government made a grant to the appellant's predecessors, the principle enunciated by s. 8 of the Transfer of Property Act should be applied and the grant should be construed to include all rights, title and interest of the grantor, unless there is a contrary provision either expressly made, or implied by necessary implications.

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Bearing those two considerations in mind, let us consider the terms of the Sanad itself. The Sanad is drawn in terms which are consistent with the pattern prevailing in that behalf in those days and contains the usual familiar recitals. The relevant portion of the Sanad reads as follows :—

> "Seeing the respectable Erahsins, performing Snan Sandhya (bath and prayer) leading ascetic life, devoted to the performance of their duties as laid down in Shrities and Smrities, the Government has constructed houses there and given to (them). Thinking that if the same are given to them, it would be beneficial to the Swami and to the Kingdom of Swami, the village of mouje Vadner, Pargana aforesaid in
> (a) (b)
> Swarajya as well as Moglai-Dutarfa (on both sides) has been given to them as Nutan (New)
> (c) (d)
> Inam together with Sardeshmukhi, Inam Tizai,
> (e (f) (g)
> Kulbab-Kulkanu, Hali-Patti, and Pestr-Patti excluding (the rights of) Hakkadar and Inamdar and together with water, trees, grass, wood stones and hidden treasures, for maintenance of their families."

The Sanad then defines the shares in the current revenue of the said village amongst the respective shares. In the concluding portion, it makes certain other provisions with which we are not concerned in the present appeal. This Sanad was executed in 1773 A. D. During the British rule, this Sanad was confirmed in 1858 A. D. It is common ground that the material terms which have been construed for the purpose of determining the title of the appellant are contained in the earlier Sanad.

It would be noticed that the Sanad refers to the rights in water, trees, grass, wood, stones and hidden

treasures. It is well settled that the word "water (jal)" refers to water in tanks or wells and does not refer to the flowing water of the river. Indeed, if a grant of the river including its flowing water is intended to be made, the Sanad would have definitely used the word "river (nadi)", because it is well-known that when rivers, drains or culverts are intended to be gifted, the Sanads usually use the words "nadi and nalla". Therefore, on a plain construction of the relevant words used in the Sanad, there can be no doubt that what is conveyed to the grantee by the Sanad is stationary or static water in the ponds or wells and not the flowing water of the river. The specific reference to water meaning water of the well or the pond serves two purposes ; it defines the kind of water which is conveyed, and by necessary implication, excludes the grant of flowing water of the river. Sanads containing words like these have frequently been considered by the Bombay High Court in the past and it has been consistently held that the word "water" means only water in the ponds or wells and does not refer to the flowing water of the river, *vide Annapurnabai Gopal v. Government of Bombay* [1]. Therefore, the two considerations on which Mr. Pathak strongly relied in support of his construction of the Sanad do not really assist him. The language of the Sanad precisely defines the nature of the water that is conveyed and in doing so, by necessary implication, excludes the flowing water of the river.

Mr. Pathak, however, suggests that it is not disputed by the respondents that the Sanad in question grants title to the soil of the village and is not confined to the royal share of the revenue only ; and he argues that the grant of the soil necessarily means the grant of the bed of the river while it flows within the limits of the Inam village. If the bed of the river has been granted to the appellant's predecessors by the Sanad, why does it not follow that the water flowing

(1) (1945) 47 Bom. L.R. 839.

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on the said bed during the said limits belongs to the appellant? The title to the running water of the river must, Mr. Pathak says, go with the title to the bed of the river. There are two difficulties in accepting this contention. The first difficulty is that the use of the word "water (jal)" in the Sanad, as we have already held, excludes the running water of the river. Besides, it is by no means clear that the title to the flowing water of the river necessarily goes with the title to the bed of the river. As was observed by Lord Selborne in *Lyon v. Fish-mongers' Company.* "The title to the soil constituting the bed of a river does not carry with it only exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it." Therefore, the argument that the grant of the soil of the village including the bed of the river must necessarily include the grant of the title to the flowing water of the river cannot be accepted.

In this connection, it is necessary to remember that the river Valdevi flows through the village only for the distance of 2 miles & 2 furlongs. It is not a case where the whole of the stream of the river from its origin to its merging in another river runs entirely through this village. If a river takes its origin within the limits of an Inam village and its course is terminated within the limits of the same village, that would be another matter. In the present case, if the appellant's right to the following water of the river is conceded, it would mean that the Inamdars would be able to divert the water completely and destroy the rights of the other riparian owners whose lands are situated outside the village. They may be able to pollute the water or do anything with it to the prejudice of the said riparian owners. Such rights cannot be claimed by the appellant unless the Sanad in his favour makes the grant

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of the running water in terms. As we have already seen, the Sanad not only does not make any such grant, but by necessary implication also excludes the running water from the purview of the grant.

Mr. Pathak then attempted to argue that the diversion of the water of the river Valdevi during the relevant period affected the appellant's right as the riparian owner and that, according to him, would furnish him with a cause of action for claiming damages against the respondents. In this connection, Mr. Pathak invited our attention to the observations of Parke, B. in *Embrey* v. *Owen*. (1). "Flowing water," said Parke, B., "is publici juris 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.—The right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes ; but this is not an absolute and exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorised use of this common benefit that any action will lie."

In this connection, Mr. Pathak has also referred us to the decision of the Privy Council in the *Secretary of State for India* v. *Subbarayudu* (2). In that case, the Privy Council has elaborately considered the nature and extent of the rights which a riparian owner can claim. "A riparian owner", observed Viscount Dunedin, "is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. In ordinary cases, the fact that his land abuts on the stream makes him the proprietor of the bed of the

(1) (1851, 6 Ex. 353 ; 155 E.R. 579. (2) (1931) L.R. 59 I.A. 56, 63-64.

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stream *usque ad medium filum.* But he may not be. He may be ousted by an actual grant to the person on the other side, or he may be and often is ousted by the Crown when the stream is tidal and navigable, the solum of the bed belongs to the Crown." It was also observed that "the right of a riparian owner to take water is first of all, for domestic use, and then for other uses connected with the land, of which irrigation of the lands which form the property is one. This right is a natural right and not in the strict sense of the word an easement, though in many cases it has been called an easement."

We do not, however, think that it is possible for us to allow Mr. Pathak to raise this alternative argument before us, because it is clear that the reliefs claimed by the appellant were based only on one ground and that was, the title to the flowing water of the river. In paragraph 8 of the plaint the appellant has specifically stated that he was claiming the amount of compensation for the use of water belonging to the plaintiff and in paragraph 3 it has been clearly averred that the running water of the river belongs to the appellant and so, by the unauthorised acts of the military authorities, the appellant and the Inamdars were not able to let out their bed of the stream for the plantation of water-melons etc., and were thus put to loss. In other words, the plaint has made no allegation even alternatively that the appellant and the other Inamdars of the village had certain rights in the flowing water of the river as riparian owners and the illegal acts of the military authorities had affected the said rights and thereby caused damage to them. In fact, as the High Court has pointed out, there is no evidence on the record which would sustain the appellant's claim that the acts of the military authorities had prejudicially affected the appellant's rights as a riparian owner to the use of the water, and that means, on the record

there is nothing to show that any damage had been caused to the Inamdars of the village as a result of the diversion of the water caused by the military authorities. Therefore, we are satisfied that the appellant cannot now make an alternative case on the ground of his rights as a riparian owner.

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The result is, the appeal fails and is dismissed with costs, two sets; one hearing fee.

Appeal dismissed.

RAI RAMKRISHNA & OTHERS

v.

THE STATE OF BIHAR

1963

February, 11

(P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA and J. C. SHAH, JJ.)

Taxing Statute—Tax on passengers and goods—Retrospective operation—Validity—Restrictions, if unreasonable—Fundamental rights, if infringed—State's power of taxation—Constitution of India, Arts. 19(1)(f) and (g), (5), (6), 304(b), Seventh Schedule, List II, Entry 56—Bihar Finance Act, 1950 (Bihar 17 of 1950)—Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961, (Bihar 17 of 1961) ss. 1 (3), 23(b).

On March 30, 1950, the Bihar Legislature passed the Bihar Finance Act, 1950. That Act levied a tax on passengers and goods carried by public service motor vehicles in Bihar. The appellants challenged the validity of the Act and certain provisions of the Act were struck down by this Court. The respondent then issued the Bihar Ordinance No. II of 1961 on August 1, 1961. By that Ordinance, the provisions of the Act of 1950 which had been struck down by this Court were validated and brought into force retrospectively from the date when the earlier Act purported to come into force. Later on, the provisions of the said Ordinance were incorporated in the Bihar