Privy Council Appeal No. 26 of 1942.

The District Board of West Tanjore – – – – *Appellant*

v.

The Secretary of State – – – – – – *Respondent*

(3 *Appeals Consolidated*)

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL, 1943

Present at the Hearing:
LORD ATKIN
LORD THANKERTON
LORD CLAUSON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR
[*Delivered by* SIR MADHAVAN NAIR]

These are consolidated appeals from a judgment and three decrees of the High Court of Judicature at Madras, dated the 12th August, 1940, which affirmed a judgment and three decrees of the Subordinate Judge of Tanjore dated the 29th March, 1937, by which the plaintiff's suits were dismissed.

The appellant before the Board is the plaintiff—the District Board of Tanjore West. The respondent is the defendant—the Secretary of State for India.

The Rajas of Tanjore had granted certain villages as entire inams for the support of *chatrams* (religious endowments) which are now under the management of the appellant. These inams had been duly recognised and confirmed by the British Government. The appeals arise out of suits instituted by the appellant, as manager of the inams, for the refund of water cess collected by the respondent under the Madras Irrigation Cess Act (Act vii of 1865), hereinafter called " the Act," for faslis 1333-1342 (1923-1933), 1343 (1933-1934), and 1344 (1934-1935).

It may be stated at once, that what their Lordships have to decide in these appeals is not whether the water cess had been collected from the appellant legally under the Act, but whether the contingency contemplated by the parties in a compromise entered into between them on the 20th September, 1923, in O.S. 82 of 1921, and O.S. 95 of 1921 (Court of the Subordinate Judge, Tanjore) which were transferred to the District Court of Tanjore, as O.S. Nos. 1 and 2 of 1923, has or has not happened; for if their Lordships hold that it has happened, then the appellant will succeed; if they hold otherwise, then the appeals will fail.

In 1921, the District Board of Tanjore brought two suits (O.S. 82 of 1921 and O.S. 95 of 1921) for refund of water cess alleged to have been illegally collected in respect of the suit villages in two faslis 1329 (1919-1920), and 1330 (1920-1921). The defendant resisted the claim on various grounds. It is not necessary to refer to the contentions of the parties. It is sufficient to say that the suits were compromised before the District Court of Tanjore on the 20th September, 1923, and a decree was made in terms of the compromise in both suits. The compromise was as follows:—

> " That the plaintiff shall continue to pay water cess as usual in respect of the suit villages, subject to the condition that, if the Privy Council

should decide in any case that may hereafter be taken to it that the decision in the *Urlam Case* is applicable to inam villages, and if, accordingly, the water cess in the present case is not leviable, the defendant shall refund to the plaintiff the water rate so found not to have been leviable if levied, up to ten years past."

Kandukuri Bala Surya Row v. *The Secretary of State for India* (1917), L.R. 44 I.A. 166, is the decision referred to, as the decision in the *Urlam* case.

In 1924, Rameswaram Devasthanam, as trustee of a temple, brought a suit for declaration that the temple was entitled to free irrigation, in respect of the inam village of Viranvayal (Tanjore District) situate on the left bank of the river Korayar, from which water was taken to the village lands by a channel the works of which were under the Government control. The case came up on appeal before the Privy Council. Following the decision of the Board in the case of *The Secretary of State for India* v. *Subbarayudu* (1931) 59 I.A. 56, the Privy Council held that the owners of Viranvayal were not liable to water cess as they were riparian owners and owned the soil of the river *ad medium filum*, and that the river could not be said to belong to the Government. The judgment was pronounced on the 20th February, 1933, and is reported in 1933 Madras Weekly Notes, 559. The Board confirmed the judgment of the High Court. This case, *The Secretary of State* v. *S. Subramanya Iyer*, will hereinafter be referred to, for convenience, as the *Viranvayal Case*. The village of Viranvayal is not situated inside a zamindary, but lies outside in a non-zamindary tract, like the villages in the present case.

By letter dated 23rd June, 1933, the plaintiff brought it to the notice of the Government of Madras that in view of the above decision of the Privy Council the plaintiff has under the terms of the compromise decree in O.S. 1 and 2/23, become entitled to a refund of the water-cess collected in respect of the plaint villages for ten faslis past, and also requested that collection of water-cess of the said villages in future might be stopped. By their reply, dated 18th July, 1933 (G.O.Ms. No. 1275, Revenue Department) the Government stated that in the above decision the Privy Council has given no ruling as to the applicability of the *Urlam* decision to whole inam villages and they accordingly declined to pass orders as desired by the plaintiff (*see* para. 9 of the plaint).

In these appeals, the appellant contends as was contended in the Courts in India, that the contingency contemplated by the compromise mentioned above, has happened as a result of the decision in the above-mentioned *Viranvayal Case*, and that, in consequence, the District Board is entitled to the relief claimed in the suit.

In view of this explanation of the contingency, the question for determination in these appeals may be re-stated in a different form as follows:—

"Whether the decision of the Privy Council in the *Viranvayal Case* (*supra*) is to the effect that the decision of the Privy Council in the *Urlam Case* (*supra*) is applicable to inam villages in general."

Both Courts in India have held that such is not the effect of the decision in the *Viranvayal Case*.

In 1865, the Government passed the Madras Irrigation Cess Act, with a view to obtain a fit return for the expenditure incurred in the construction of irrigation works, from landlords and tenants to whom such works had proved beneficial. Shortly stated, under proviso i to section I (*a*) of the Act, the Government are entitled to levy a separate cess for water, if the water with which the lands are irrigated is supplied or used from any river, stream, channel, tank or work belonging to, or constructed by, Government, provided that the zemindar or inamdar whose land is so irrigated is not entitled by virtue of any engagement to irrigation free of separate charge. At the permanent settlement with the zemindars, and also at the inam settlement with the inamdars, lands granted to them were classified as so many acres dry, wet, garden and poramboke (unassessed waste), in order to ascertain their yield to fix the Government demand—peiskush or quit rent. After the settlements, there had been a gradual extension of wet cultivation in the zemindaris and inam villages, with water taken from the Government sources of irrigation. Accordingly the Government began

to levy water cess in such cases for wet cultivation *in excess* of the mamool extent classified as wet at the settlements. In the litigation that followed as a result of this measure between inamdars and zemindars on the one hand, and the Government on the other hand, the Madras High Court held that the levy was legal with respect to both inam (see *Chidambara Rao* v. *The Secretary of State for India* (1902) 26 Mad. 66), and zemindari villages (see *Kandukuri Mahalakshmamma* v. *The Secretary of State for India*, I.L.R. 34 Mad. 295)—not, however, without differences of opinion amongst the Judges (see *The Secretary of State for India* v. *Janakiramayya*, I.L.R. 37 Madras 322).

The decision of the High Court in *Kandukuri Mahalakshmamma* v. *The Secretary of State for India* (*supra*) came on appeal before the Board and was set aside in the well-known decision referred to as the decision in the *Urlam Case*. It was there held, that the permanent settlement made with the zemindars was an engagement within the meaning of the first proviso to section I of the Act; that the effect of the settlement was to vest the channels, with their head sluices and the tanks or reservoirs in the zemindars through or within whose zemindaris the same respectively passed or were situate; and that the zemindar and the inamdars holding under him were entitled by right of easement to take water from the river belonging to Government, not by reference to the extent of land at the time of the settlement, but by reference to the nature of the sluices and channels; that the cess for water was in the nature of a land tax and that so long as the easement right as indicated in the judgment was not enlarged the cess could not be levied for the excess water taken for irrigation without breach of the obligation, undertaken by Government by the permanent settlement, not to increase the jamma then fixed. The meaning of the terms " river or stream belonging to Government " was not discussed by their Lordships. The river " Vamsadhara " was assumed to belong to the Government, though the question was considered also, on the assumption that the river did not belong to them. The meaning of the terms " river belonging to Government " came up for decision later in the case of *Secretary of State for India* v. *Subbarayudu* (*supra*).

It will be observed that the decision in the *Urlam Case* did not deal with the right of *inamdars as such*, to take excess water from a Government source, for the irrigation of inam villages, as the inams in the case were situate within the zemindari and were covered by the Urlam sannad. The actual decision is therefore inapplicable to the present case where the inams are not situate within any zemindari, but lie in ryotwari tracts. This is conceded by the appellant's learned counsel, his argument being that the principles of the decision would apply to such cases also and have been actually applied in the decision in the *Viranvayal Case*. What their Lordships have to decide is not the general question, whether the principles of the decision in the *Urlam Case* would apply to such cases also, but the narrow one, whether the principles have been actually applied in the *Viranvayal Case*.

In the case of *Secretary of State for India* v. *Subbarayudu* (*supra*) the Privy Council applied the principles laid down in the *Urlam Case* to certain inams situated within a zemindary, which had been granted after the permanent settlement; and decided that the property in land bound by a river even if the river be tidal and navigable, has inherent in it the riparian right to take water for irrigation and that on a permanent settlement that right is included in the property without being specially mentioned, being not an easement but a natural right. Their Lordships also decided that " ' a river is one belonging to the Government ' for the purposes of section I of the Act, if at the point at which the water is taken, the bed of the river belongs to the Government, and that is so, when the Government is proprietor of the land abutting on the river on both sides, or where the river is tidal and navigable."

It is conceded that the case also does not expressly cover the case of inam villages outside a zemindary, but it is submitted before the Board that the doctrine of riparian rights enunciated in the case would apply by implication to inam villages and that this was decided in the *Viranvayal Case*, to which their Lordships will now refer.

The material portion of the judgment—which contains the necessary facts, and the decision thereon—delivered by Lord Atkin is as follows:—

> " The first was as to whether this river from which the water was derived for irrigation belonged to the Government. That was a point which had been in controversy in principle for a considerable time in Madras. The facts in this case were that the temple authorities were riparian owners and that they owned the soil of the river *ad medium filum*. It has been finally decided by the judgment of this Board in the case of *Secretary of State for India in Council* v. *Sannidhiraju Subbarayudu*, 1931 (59 I.A. 56), that where the riparian owner owns the bed of the stream up to the *medium filum* the river could not be said to belong to the Government, in other words if the Government sought to establish that the stream belonged to them they would have to show that they owned the whole bed of the river. The claim of the Government for payment of cess therefore failed in that respect and was not contended for before their Lordships."

Their Lordships next held that the " water " was not supplied from works constructed by Government.

The suits now under appeal relate to inam villages situated outside a zemindari (i.e., in a non-zemindari tract) and confirmed as valid inams by the inam commission. The argument of the learned Counsel to the effect that the Privy Council in the *Viranvayal Case* have decided that the decision of the *Urlam Case* applies also to inam villages in general is thus stated in ground No. 5 of their case.

> No. 5. " Because the *Urlam Case* has been the basis of all subsequent decisions of the Privy Council and the principles propounded there were applied to *Subbarayudu's Case* and as *Subbarayudu's Case* was followed in *Viranvayal Case* (*supra*) there was thus in effect an application of the *Urlam* decision in the *Viranvayal Case* also."

The Subordinate Judge held that the extent of engagement in the case of inams must depend on the nature of the grant or the terms of the inam settlement in each case; that a consideration of the question did not arise at all in the *Viranvayal Case* having regard to the fact that the Government did not press the contention that the river belonged to the Government; and that it was not shown that water was supplied from work constructed by Government. He therefore rejected the appellant's contentions.

On appeal, the High Court after discussing the scope of the decision in *Viranvayal Case* held that there was no express decision that the principle in the *Urlam* decision applied to inams also in that case and that it was decided on the " only ground that the Government could claim the river to belong to them only if they showed that they owned the whole bed of the river, and not on the basis of any grant of lands abutting the river which carried with it easementary or riparian rights as in the *Urlam Case* and in *Subbarayudu's Case*." In the result, they also rejected the appellant's contentions.

Their Lordships are in accord with the reasoning of the High Court. In these appeals, as already stated, they are not concerned with the question whether from the principles applied by the Board in the *Urlam Case* which applied to zemindari lands and inams in a zemindary, an inference may be drawn that those principles would apply to inams outside zemindaries also, i.e., to inams in general, but are concerned only with the question whether those principles have as a matter of fact been applied to such inams in the *Viranvayal Case*. It was held in the High Court by Ramesam and Madhavan Nair JJ., that those principles would apply to such inams also (see *Yahya A Ally Saheb* v. *The Secretary of State*, 53 M.L.J. 769), and this decision has been followed in subsequent decisions in Madras. This Board has now held in the *Swamigal Case* (1941 L.R. 69 I.A. 22) approving the principles of those decisions and construing the terms of the grant that the principles of the *Urlam* decision would apply to inams also; but this decision being subsequent to the *Viranvayal Case*, the specific decision relied on by the appellant in the compromise cannot be availed of for construing the terms.

The short question for their Lordships' decision is whether it has been decided in the *Viranvayal Case* that the decision in the *Urlam Case* is

applicable to inams in general. Their Lordships are of opinion that it has not been so decided. There is no express reference to the *Urlam* decision in the *Viranvayal Case*, nor is there any reference by implication to the principles embodied in it. *Subbarayudu's Case*, which referred to the *Urlam* decision, was used in the judgment in the *Viranvayal Case* only to support the proposition that where as a fact the riparian owner owns the bed of the stream *ad medium filum*, the river could not be said to belong to the Government. The facts of the case have already been stated. Only two points were dealt with in the *Viranvayal Case*. The first was, whether the river from which water was derived for irrigation belonged to the Government, and the second, whether the water was supplied from works constructed by the Government. The first was not pressed by the Government and the second was found against them. Having regard to the fact that half the bed of the river belonged to the inamdars, the Government were unable to contend that the river belonged to them. As stated in the judgment of the Board, if the Government sought to establish that the stream belonged to them, they would have to show that they owned the whole bed of the river. As they were unable to show this, evidently because the facts were otherwise, their Lordships held that the claim of the Government for water cess failed. The High Court have shown that the Government could not have taken up any other position consistent with the pleadings in the case. Their Lordships have no doubt that the Board did not decide in the *Viranvayal Case* that the inamdar as riparian owner owned half the bed of the river and was thus entitled to irrigate free of separate charge. This appears to be clear from what the learned Counsel for the Government stated, viz., that he was unable to contend that water was taken from a river belonging to Government. It follows that in the circumstances the argument in ground No. 5 of the appellant's case that as *Subbarayudu's Case* was followed in the *Viranvayal Case*, there was in effect an application of the *Urlam* decision to the *Viranvayal Case* also must be rejected. In this view their Lordships hold that they are not satisfied that the contingency contemplated in the compromise of 20th September, 1923, has happened. The appeals therefore fail, and their Lordships will humbly advise His Majesty that they should be dismissed with costs.

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In the Privy Council

THE DISTRICT BOARD OF WEST TANJORE

v.

THE SECRETARY OF STATE

DELIVERED BY SIR MADHAVAN NAIR

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