

Privy Council Appeal Nos. 102, 106, and 107 of 1914.

Kandukuri Balasurya Prasadha Row and								
Another	-	-	-	-	-	-	-	<i>Appellants,</i>
								<i>v.</i>
The Secretary of State for India in Council	-							<i>Respondent,</i>
Same	-	-	-	-	-	-	-	<i>Appellants,</i>
								<i>v.</i>
Same	-	-	-	-	-	-	-	<i>Respondent,</i>
Same	-	-	-	-	-	-	-	<i>Appellants,</i>
								<i>v.</i>
Same	-	-	-	-	-	-	-	<i>Respondent,</i>

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 3RD MAY, 1917.

Present at the Hearing :

LORD BUCKMASTER.
LORD PARKER OF WADDINGTON.
LORD PARMOOR.
MR. AMEER ALI.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* LORD PARKER OF WADDINGTON.]

These are consolidated appeals from a decree of the High Court of Madras, dated the 9th September, 1910, and made in three actions, in each of which Kandukuri Maha Lakshammamma (who has since died and is now represented by the appellants) was plaintiff and the Secretary of State for India was defendant. The plaintiff sought in each action to recover from the Secretary of State monies paid under protest in respect of water cesses which the Government of India had levied under the Madras Act No. VII of 1865, as amended by the Act No. V of 1900. The point to be determined was the right of the Government to levy these cesses. The cess the subject-matter of the first action was levied in respect of water used for the second crop on zeraiti lands, part of the estates of Urlam and Devadi, of

which the plaintiff was owner. Devadi was originally part of Urlam, and is hereinafter included in the expression "the Urlam Estate" or "the Urlam Zemindari." The cess the subject of the second action was levied in respect of water used for (1) the first crop on so much of the irrigated zeraiti lands belonging to the Urlam Estate as the Government alleged to be in excess of the area so irrigated at the time of the permanent settlement; (2) the first crop on so much of certain inam lands situate within the Urlam Estate, and of which the plaintiff was the inamdar, as the Government alleged to be in excess of the mamul or customary wet at the dates when such inam lands were respectively originally granted or subsequently settled; (3) the second crop on the whole of such inam lands. The cess the subject of the third action was levied in respect of water used both on zeraiti and inam lands for all the purposes above mentioned with respect to the cess the subject of the second action. It may be mentioned that the plaintiff succeeded in the High Court on the issue as to the Government's right to levy a cess in respect of water used for the second crop on all the inam lands except those situate in the village of Venkatapuram. The Government has not appealed to His Majesty in Council. It would seem therefore that the questions their Lordships have to decide are the following: *First*: Is the Government entitled under the Act to levy a cess for water used for the second crop on zeraiti lands parcel of the Urlam Estate? *Second*: The same question as to inam lands in the village of Venkatapuram. *Third*: Is the Government entitled under the Act to levy a cess for water used for the first crop on so much of the zeraiti lands parcel of the Urlam Estate as may be in excess of the area of such lands irrigated at the time of the permanent settlement? *Fourth*: Is the Government entitled under the Act to levy a cess for water used for the first crop on so much of the inam lands within the Urlam Estate as is in excess of the area of such lands irrigated at the respective dates when these inam lands were originally granted or subsequently settled? In order to answer these questions their Lordships must, in the first instance, examine the provisions of the Act itself.

The Act is intituled "An Act to enable the Government to Levy a Separate Cess for the use of Water supplied for Irrigation Purposes in certain Cases." It recites that in several districts of the Madras Presidency large expenditure out of Government funds has been and is still being incurred in the construction and improvement of works of irrigation and drainage to the great advantage of the country and of proprietors and tenants of land, and that it is right and proper that a fit return should in all cases alike be made to Government on account of the increased profits derivable from lands irrigated by such works. By section 1 of the Act as amended by the Madras Act, No. V, of 1900, it is provided (*inter alia*) that whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, or work belonging to or

constructed by Government, it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water cess as aforesaid shall be levied, and alter and amend the same from time to time. Then follow two provisos, the first for the protection of zemindars, inamdars, or any other description of landholder not holding under Ryotwari settlement; and the second, for the protection of landholders under Ryotwari settlement. Under the first proviso, where a zemindar, inamdar, or other landholder not holding under Ryotwari settlement is, by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under the Act is to be imposed for water supplied to the extent of this right and no more. Under the second proviso, no cess is to be levied under the Act in respect of land held under Ryotwari settlement which is classified and assessed as wet unless the same be irrigated by using, without authority, water from any source thereinbefore mentioned and such source is different from, or in addition to, that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land.

It cannot be denied that, with regard to the true meaning and construction of this Act, various difficulties arise. In the first place, it might have been expected from the recitals that the cess which the Government is authorised to levy would have been confined to a cess in the case of land irrigated from works constructed or improved by Government and would have been in some way proportional to the extra profits derivable by reason of such irrigation. But this does not seem to be the effect of the first section. The amount of the cess is discretionary and, as a matter of fact, it is levied on the basis of the area irrigated, irrespective of actual or possible profits. Moreover, it appears to be leviable whether the Government has or has not spent money in constructing or improving the source from which the water is supplied. If, for example, a riparian owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving the source of supply. If, in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner.

In the next place, it is by no means easy to say what is meant by a river or stream "belonging to the Government." The same expression in an Act of the United Kingdom would probably connote a Government ownership of the bed or the banks of the river; but it is quite possible that the law of the Madras Presidency recognises some proprietary right on the

part of Government in the water flowing in rivers and streams. The law of the Madras Presidency as to rivers and streams certainly differs in some respects from English law (*Fisher v. Secretary of State for India*, Ind. L. R. 32, Madras 141). Further, the Madras Act, No. III, of 1905, appears to enact that (*inter alia*) all standing and flowing water, not the property of private individuals, is the property of Government, but subject to the natural and easement rights of other landholders. If this section be relied on, it is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation, is taking water from a stream belonging to the Government within the meaning of the Cess Act? If he is, the natural and prescriptive rights of riparian owners are seriously diminished by the Act and, where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*.

Lastly, it is by no means easy to decide as to the class of case which the first proviso is intended to meet. Their Lordships cannot accept the contention that the proviso applies only where there is an express contract that the supply to which the person claiming the protection of the proviso is entitled shall be free from anything in the nature of a future tax. It is enough, in their Lordships' opinion, that the person relying on the proviso shall show an engagement between the Government and himself or his predecessors in title by virtue of which he is, in fact, entitled to water for irrigation (1) from the source from which he is actually irrigating his lands; (2) to the amount of water actually used for such irrigation; and (3) without being subject to a "separate charge" for such irrigation. But there is a difficulty in arriving at what is the meaning of the expression "free of separate charge." A provision that the person relying on the proviso must prove that he is already being charged for the supply would be intelligible, for in that case by the imposition of a cess, he would be charged twice for the same thing. But this is not what he has to prove. Indeed, he has to prove the contrary. He must prove either that he is not charged already for the supply, or that the charge, if any, is not a "separate charge."

Their Lordships think that the real object of the proviso may be found in the following considerations: The cess under the Act is leviable on the land which is irrigated. It is therefore in the nature of a land tax, and by Section 2 is recoverable in the same manner as arrears of land revenue. Now the permanent land settlement in the Madras Presidency (as in the Presidency of Bengal) proceeded on the footing that, whatever may have been the interest of the zemindars and other landholders prior to the British occupation, the Government would grant to them and their heirs "a permanent property in their land for all time to come, and would fix for ever a moderate assessment of public revenue on such lands the amount of which

should never be liable to be increased under any circumstances." (See Section 1 of Madras Regulations No. XXV of 1802.) The Government, therefore, came under an obligation not to raise the jumma, or, as it is sometimes called, the peishcush, fixed at the permanent settlement in respect of the lands then granted. Under these circumstances the Government could not impose a cess for the use of water the right to use which was appurtenant to the land in respect of which the jumma was payable without in fact, if not in name, increasing the amount of such jumma, and thus committing a breach of the obligation undertaken at the time of the permanent settlement. If the right to use the water was paid for separately the case would be different. The existence of a separate charge would show that no payment for the use of the water was included in the jumma, and the imposition of a water cess, though it might increase the separate charge would not increase the jumma. Its imposition would not be a breach of the Government's obligation.

That the object of the first proviso was to safeguard the obligation not to increase the jumma is borne out by a consideration of the second proviso. The incidents of Ryotwari tenure are governed by custom, and include a right to receive from the owner of the soil (whether the Government or a private individual) a supply of water sufficient for the irrigation of the mamul wet lands comprised in each holding. The owner of the soil is, on his part, entitled to his customary share in the actual produce. It has, however, long been the practice on Government estates to make periodical settlements with the Ryots whereby the Government's share in the produce is commuted for a fixed annual payment, in assessing which the wet lands are separately classified. The annual payment is incapable of increase during the period for which the settlement is made. It is paid (*inter alia*) for the Ryot's right to water for irrigating his mamul wet lands, and would be increased if a new cess were imposed for this supply. The second proviso seems to be intended to provide against this result.

Their Lordships therefore conclude that whether or not there are other possible cases which the first proviso was intended to meet, it at least covers the case of engagements with the Government arising out of the permanent settlement. If by virtue of such settlement a zemindar is entitled to take and use water from any such source of supply as mentioned in the Cess Act, and this right is part of or appurtenant to the property in respect of which he pays a single jumma or peishcush, no cess can be levied under the Act in respect of the water which he is so entitled to take and use.

The appellants claim the benefit of the first proviso, relying mainly on the engagement with the Government constituted by the permanent settlement of the Urlam Estate, but as to the inam lands in some degree also on engagements arising out

the inam grants or subsequent inam settlements. Obviously if their claim be well-founded the appeal must succeed on this ground alone, and it will be unnecessary for their Lordships to deal with the other questions which have been argued. Their Lordships therefore propose to consider in the first instance whether, and to what extent, the appellants are within the first proviso. That they are to some extent within the proviso was admitted in the Courts below, and was not really contested before their Lordships' Board. The respondent's contention was really this: The appellants, he said, may well be entitled without separate charge to certain water rights under the permanent settlement or in respect to inam lands under the inam grants or subsequent inam settlements, but those rights must in all cases be limited by the mamul prevailing when the particular settlement or grant relied on was made. The mamul did not extend to a second crop on any of the zeraiti lands in the Urlam Estate or to the inam lands in the village of Venkatapuram, nor did it extend to any wet land which was not mamul wet at the date of the settlement or grant on which reliance is placed. The Government has not charged cess for any water taken or used in accordance with the mamul. If they have done so they will refund the amount so charged; but they claim the right to charge cess for water taken in excess of the mamul whether for the second crop on mamul wet land or for any crop on land in excess of the mamul wet. This contention depends for its validity on the true effect of the particular settlement or grant upon which reliance is placed, and the true effect of such settlement or grant depends upon its terms taken in connection with the circumstances existing when it was made. Their Lordships will first consider the effect of the permanent settlement of the zemindari or estate of Urlam. They will postpone for the present all questions as to the inams.

The Urlam Estate had no separate existence prior to the permanent settlement. Till then it was part of a larger district consisting of (1) haveli lands and (2) lands belonging to a religious community of Brahmins known as the Agraharam, such last-mentioned lands being held under inam grants. This district was bounded in part by the River Vamsadhara, and some time prior to the permanent settlement extensive works had been carried out for the purpose of supplying the district with water from the river. These works included four main channels known as Jalmour, Polaki, Lukulam, and Mobagam. The first three appear to have been cut by one Ramaradhanulu, a member of the Agraharam, who was also a renter under Government of the whole or the greater portion of the haveli lands within the district. The origin of the Mobagam channel is lost in obscurity. Each channel derived its water by means of weirs and sluices from the River Vamsadhara, and the water was distributed throughout the district by means of branch channels and subsidiary channels ending in many

instances in village tanks or reservoirs. The prosperity of the district depended to a great extent on the supply of water thus obtained.

In 1802 the Government proceeded to carve out of this district four estates or zemindaris, subsequently known as Jahmour, Nagarakatakam, Urlam, and Polaki, and to assess the permanent land revenue or jumma to be paid for each estate. Having assessed the permanent jumma the Government in July 1803 caused these four estates or zemindaris to be put up for public auction. At the auction all four estates were sold. It appears that in the advertisement announcing the sale particular attention was called to the fact that the village tanks or reservoirs had been repaired or improved for the benefit of purchasers, and particular stress laid on the benefit which the country would derive from the improvement of the properties offered for sale. In due course after the sale each purchaser obtained a sanad, but none of these sanads is now forthcoming. The corresponding kabulyat in the case of the Urlam Estate is, however, in evidence. It refers to the Urlam sanad, the terms of which must have corresponded in all material particulars with those of the kabulyat. Their Lordships see no reason to suppose that the other sanads were not framed on the same lines.

The Urlam kabulyat does not mention any water rights. It does not even refer to the existence of main or branch or subsidiary channels or of the tanks or reservoirs in the several villages. It mentions the advantages likely to accrue to the zemindar and his people by the public revenue being put on a permanent foundation, and it refers to the jumma payable for the zemindari as a permanent annual tax, of which no increase can be ever made, whatever changes or improvements the interests or pleasure of the zemindar may lead him to introduce in his zemindari. It contains also an agreement by the zemindar to enter into engagements with his Ryots in manner provided by Section 14 of the Madras Regulation XXV of 1802, and to encourage such Ryots to improve and extend the cultivation of the land. Subject to his observing the conditions of the kabulyat, the zemindar is authorised to hold the zemindari in perpetuity for himself and his heirs.

Their Lordships regret that they have not been supplied with a map or plan showing the boundaries of the four zemindaris, the subject of the auction sale, their position with regard to each other, and the extent to which the four main channels with their numerous branches or subsidiary channels lay within the boundaries of each estate. It appears, however, to be common ground that the four zemindaris together comprised all the haveli lands within the district, including those contiguous to the River Vamsadhara, together with the head sluices of the four channels, and, if the principles of English law governing the grant of land bounded by a stream or river be applicable in the Madras Presidency, they comprised also the

river bed *usque ad medium filum* and the weirs by which water was diverted from the river into these main channels.

Three of the four zemindaris, namely, Jalmour, Nagarakatakam, and Urlam were sold in 1809-10 in order to raise arrears of land revenue. Two of them, namely, Jalmour and Nagarakatakam were bought by the Government, and thenceforward became Government land subject to Ryotwari tenure. The third, namely, Urlam, was bought at the same time by the plaintiff's predecessor in title. The sluice gates of the Mobagam channel were admittedly in the Urlam zemindari. The sluice gates of the Polaki channel were originally in Urlam, but appear to have been removed about 1824 to the Government village of Parlam, which would thus seem to have been within Jalmour or Nagarakatakam, for the Government did not acquire the Polaki zemindari till 1850. The sluice gates of the Jalmour channel were admittedly in the Jalmour zemindari; those of Lukulam are now admittedly on Government lands, but it is impossible to determine on the evidence in which zemindari they were comprised at the permanent settlement. They were certainly not comprised in Urlam.

The Jalmour main channel does not pass through any village in the Urlam zemindari. From it, however, some 130 acres of Urlam derive their water supply either by regulators in the main or branch channels, or by subsidiary channels through the estate, ending in one instance at least in a village tank. The Jalmour channel also now irrigates some 6,000 acres of Government land and some 1,100 acres belonging to the Agraharam. The Lukulam, Polaki, and Mobagam main channels all pass for considerable distances through the Urlam zemindari. Lukulam now supplies water to some 1,000 acres of Urlam land, some 500 acres of Government land, and some 2,500 acres belonging to the Agraharam. Polaki now supplies water to some 500 acres of Urlam, some 10,000 acres belonging to the Government, and some 1,500 acres belonging to the Agraharam. Mobagam now supplies water to some 3,500 acres of Urlam and some 500 acres of Government land. No doubt most, if not all, of the Government lands now supplied with water from these four channels were originally comprised within the zemindaris of Jalmour, Polaki, or Nagarakatakam. Moreover, though the area of land under each of the four channels may have increased since the permanent settlement, the general purpose which each channel served at the date of the permanent settlement can, in their Lordships' opinion, be properly inferred from the facts as they now exist.

Before proceeding further, it may be useful to summarise the conclusions arrived at by the Subordinate Judge and the High Court respectively. The Subordinate Judge held that the Vamsadhara River was not a river belonging to the Government within the meaning of the Cess Act. He held, however, that the head sluices of the Jalmour, Polaki, and Lukulam channels, with the initial portions of the channels themselves, belonged

to Government, and must be looked on as the source of supply of water for the lower portions of the whole system of irrigation dependent upon them, and it was immaterial that parts of these main channels, or the branch or subsidiary channels leading therefrom, or the tanks or reservoirs in which some of the subsidiary channels ended, belonged to the owners of the villages through which they passed or in which they were situate. He held further that the rights of the owners of these villages were confined to using the water in the main branch and subsidiary channels and tanks or reservoirs for the purposes for which the same had been used at the time of the permanent settlement. They could not therefore, without the consent of the owner of the head sluices and the initial portions of the channels, lawfully use the water for a second crop unless second crops were within the then existing mamul, or extend wet cultivation beyond the area of the then mamul wet. On the other hand, he held, with regard to the Mobagam channel, that its head sluice and its initial portion did not belong to Government but to the owner of the Urlam zemindari, who had an unlimited right to the use of the water in the channel subject to the mamul rights of others. These findings appear to involve the following propositions:—

First.—The effect of the permanent settlement was to vest the head sluices of the four channels, the channels themselves, and all branch and subsidiary channels and tanks or reservoirs in the zemindars, through or within whose zemindaris the same respectively passed or were situate.

Second.—The zemindars who thus acquired the head sluices, with the initial portions of the channels themselves, became entitled to take into the channels from the river as much water as they chose, subject only to the rights of lower riparian owners on the river, and as little as they chose, subject to the obligation to send down each channel sufficient water to satisfy the mamul rights of persons entitled to water from the system supplied by each channel.

Third.—If the owner of the head sluice or the initial portion of any channel sent down more water than would satisfy those mamul rights, the proprietors of other parts of the channels or of the branch or subsidiary channels or the tanks or reservoirs were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the sanads granted at the permanent settlement.

Fourth.—It was merely the accident of the Government having subsequently purchased the zemindaris of Jalmour, Polaki, and Nagarakatakan which in any way brought their powers under the Cess Act into play. Had those zemindaris still existed in private ownership, each of these channels would have been precisely in the same position as the Mobagam channel.

The High Court disagreed with the Subordinate Judge on the question as to the Vamsadhara River. They held that it belonged to Government, and must, for the purposes of the Cess Act, be looked on as the source of supply of the whole system of irrigation dependent on the four main channels. They agreed with the Subordinate Judge that the effect of the permanent settlement was to vest the head sluices, the four channels, and all branch and subsidiary channels, and the tanks or reservoirs, in the zemindars, through or within whose zemindaris the same respectively passed or were situate. They held that the water rights of the owners of the head sluices and the initial portions of the channels, as of all other persons entitled to water from the system supplied by these channels, were confined to the mamuls at the date of the permanent settlement, and that the Government could therefore charge water cess in respect of water used in excess of the then mamul, either for a second crop where no second crop had been customary, or for irrigating land in excess of the original wet area. These findings appear to involve the propositions (1) that the easements of taking water from the Vamsadhara conferred by the sanads were confined to taking sufficient water to satisfy the mamul rights, and (2) that, if without objection from the Government, more water were taken, the proprietors of the various portions of the main channels, branch or subsidiary channels, or of the tanks or reservoirs, were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the sanads granted at the permanent settlement.

In their Lordships' opinion, there can be no real doubt that the Courts below were right in holding that the effect of the permanent settlement was to vest the channels, with their head sluices and branch and subsidiary channels, and the tanks, or reservoirs, in the zemindars through or within whose zemindaris the same respectively passed or were situate. As pointed out by the High Court, this would be in full accordance with the policy enunciated in the well-known Fifth Report. Indeed, no reason can be suggested for implying in favour of the Government any reservation of this system of irrigation. It is not shown that the Government were retaining any of the land thereby irrigated. They were parting, or had parted, with (if not the whole), at any rate, the greater portion of such land. If they retained any, it would be enough to imply a reservation of water rights in respect of the land so retained. It is true that, on this footing, disputes were not unlikely to arise (indeed, they did arise) as to the relative rights of the several zemindars or their ryots. But the probability of such disputes is not sufficient reason for implying a reservation. They could not concern the Government, and were capable of settlement by arrangement, or through the medium of the Courts. On the other hand, the reservation of the main channels and other works would certainly have raised questions as to the Govern-

ment's liability for repairs or otherwise. But, while agreeing in this respect with the conclusion of the Courts below, their Lordships do not think that such Courts attached sufficient importance to that conclusion. In their opinion, the fact that the ownership of the channels and works passed under the several sanads is of the utmost importance in ascertaining the water rights thereby conferred.

Assuming that the Vamsadhara River belongs to Government, the case may be looked on in this way. The owner of a river and of contiguous land through which passes a channel constructed for irrigation purposes and supplied with water from the river, grants the contiguous land together with the channel. Obviously some right or easement of taking water from the river must pass. The only question is as to the measure of this right. In their Lordships' opinion, the right must be measured by the physical conditions, such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel, and not by the purposes for which the grantor or his tenants have been accustomed to use water from the channel prior to the date of the grant. The water in the channels may never have been used by the grantor or his tenants at all, but it would be absurd to hold on that account that no easement or right of taking water from the river passed by the grant. The case would have been very different if the contiguous land had been granted reserving the channel. In that case if any easement passed, it would be an easement in respect of which the channel and not the river was the servient tenement, and if no water had been or were being used by the grantor or his tenants, it may well be that there were no existing physical conditions by which the principle of continuous and apparent easements could be brought into play. In such a case no easement or right to use water from the channels would pass under the grant.

It follows from these considerations that the zemindar in whose estate the head sluices and initial portions of each of the four channels in question were situate obtained under his sanad the right to take water from the Vamsadhara (assuming it belonged to the Government) limited only by the size of the channel and the nature of the sluices and works by which water was diverted from the river into the channel. The Government could not complain if the amount of water taken were within this limit. After the water was lawfully taken into the channel, the Government had nothing further to do with the matter; the subsequent distribution and use depended on the rights *inter se* of the zemindar and others entitled to take water from the system supplied by the channels in question.

It may be observed that the Government could not grant the zemindaris otherwise than subject to the customary rights of the ryot cultivators and the rights of all holders of inams

under existing inam grants. The zemindars in whose favour the sanads were made took therefore subject to those rights. In other respects the rights *inter se* of the several zemindars under their sanads would, in their Lordships' opinion, be analogous to the rights of upper and lower riparian owners on a natural stream. Each would be entitled to have the full supply taken into the main channels. Each would be entitled to make use of the water in any channel through his own lands or in tanks or reservoirs in villages within his estate, but in exercising this right each would be bound to have due regard to the existence not only of the rights of the ryots and inamdars in the lower portions of the irrigation system, but to the rights similar to his own of the other zemindars in whose estates any portion of the system was situate. Further, each zemindar might be entitled to take water from a channel or branch channel in the estate of the others if at the time of the settlement and on the principle of continuous and apparent easements circumstances pointed to the intention to create such a right. It follows that each zemindar could (subject as aforesaid) legally authorise his ryots to use water to the use of which he was himself entitled for the growth of second crops on their holdings or for increasing the area of land within their boundary for the time being under wet cultivation. In taking advantage of such authorisation the ryots would be entitled to rely on the engagements with the Government arising out of the permanent settlement to the same extent as the zemindar himself. All these zemindari rights would moreover arise under and be dependent upon engagements with the Government embodied in the sanads granted at the permanent settlement, and payment for them would be included in the jummas.

Assuming, on the other hand, that the River Vamsadhara does not belong to the Government, the right of taking water from it into each of the four channels could not depend on any easement created by virtue of the permanent settlement. It would depend in part upon the natural rights of riparian owners and in part on prescriptive rights existing at the date of, and passing under, the sanads, or acquired since the sanads were granted. Moreover, in the case of these prescriptive rights, it would be the lands of the lower riparian owners and not the river itself which would constitute the servient tenement. The Government would have even less interest in the amount of water taken into the channels than if the river belonged to it and constituted the servient tenement. The rights *inter se*, however, of the grantees of the four zemindaris would be, for all practical purposes, the same. The rights of the proprietor of Urlam under his sanad could not in any case be affected by the subsequent purchase by the Government of the three other zemindaris.

The construction of the sanads in the way their Lordships construe them has the advantage of being in ample accord with the known policy and objects of the permanent settlement.

The uncertainty as to the ownership of the soil and the liability to arbitrary and varying assessments to the land revenue had (to use the language of Regulation XXV of 1802) "obstructed the progress of agriculture, population, and wealth." The policy was to encourage such progress, and accordingly we find in the Kabulyat of the Urlam Estate (which is admittedly a common form Kabulyat) an undertaking by the zemindar to encourage his ryots to extend and improve the cultivation of the land. The same point is emphasised in the advertisement for the sale at which the zemindaris were sold. In this part of India water is essential for improvements in agriculture. These facts coupled with the actual grant to the zemindars of the channels, branch channels, and works, constituting an extensive system of irrigation which must have been created for the benefit of the lands comprising the several zemindari estates, manifests, in their Lordships' opinion, an intention that the water therefrom should be used to the utmost extent for the purpose of improving the estates, and increasing the population or wealth of the district. On the construction of the sanads adopted by the High Court, water could not properly be used for any such purpose. Indeed, though the channels, branch channels, and works constituting the irrigation system were included in the grants, no right to use such system passed at all. For the grants were necessarily subject to the existing rights of the ryots and inamdars, and according to the decision of the High Court it was only in respect of these rights that any water could be used from the system.

Both the Courts below appear to have arrived at the conclusion that the water rights which passed by the sanads were limited by the mamuls at the permanent settlement for the following reasons: The assessment of the permanent jumma in the case of each zemindari was arrived at on the basis of the then actual produce of the land. An annual value was placed on this produce, and a proportion of the annual value was fixed as the jumma or peishcush. The water actually used in growing the annual produce thus comes within the assessment. The use of the water for other purposes was not assessed at all, and therefore does not pass by the sanad grants. In their Lordships' opinion, this process of reasoning is fallacious on two grounds: It does not follow that the assessors in fixing the proportion of the annual value which should constitute the jumma or peishcush did not take into full account the possibility of improving the cultivation of the lands, the subject of the grant, by means of the irrigation system comprised therein. The jumma or peishcush was in the case of each of the zemindaris in question admittedly high. Again, it does not follow that all which is not brought into account in fixing the jumma or peishcush is excluded from the grant. On this footing many things of great importance to the enjoyment of a zemindari would not pass by a zemindari

grant, for example, waste land, farm buildings, tanks, or, in the present case, irrigation channels. As pointed out in the recent case of *Rajah Ranjit Singh Bahadur v. Srimati Kali Dasi Debi and others* (unreported at present), the property taken into account in arriving at the jumma is by no means necessarily the same as the property upon which the jumma is chargeable, and all that is chargeable with the jumma or peishcush is included in the grant.

There being no evidence whatever that more water is being taken from the river than would be justified by the sanads—construed as in their Lordships' opinion they ought to be construed—it follows that the appellants must succeed in respect of the zeraiti lands on which the cesses in dispute were levied. It remains to consider the case of the inam lands.

Inams are Government grants subject to quit-rents, and in some instances to services. They were not assessed for land revenue at the date of the permanent settlement. The inams now in question existed at the date of the permanent settlement, and the quit-rents payable in respect thereof were by the Urlam sanad made part of the assets of the Urlam Estate. They are constantly referred to in the inam records as within the Urlam Estate. They were sometime since acquired by the plaintiff or her predecessors. The appellants, therefore, are the inamdars as well as the persons entitled to the quit-rents under the Urlam sanad. The water for the use of which the cesses in dispute were levied was used by the zemindar on inams which belonged to him and were within his zemindari. The question is whether the zemindar was entitled so to use this water. In their Lordships' opinion, the answer to this question must be in the affirmative. The only persons who could complain of such use would be persons whose rights to take water from the irrigation system in question were interfered with by such user, and there appears to be no such person. If the cess were levied on the plaintiff as Urlam zemindar, he brings himself within the first proviso by virtue of the engagement with Government arising out of his zemindari sanad. If the cess were levied upon him as inamdar, he can rely on the same engagement to the same extent as could a tenant of zemindari land authorised by the zemindar to use the water. It is, therefore, in their Lordships' opinion, unnecessary to consider the terms of the original inam grants or the effect of any subsequent inam settlement. The appellants must succeed also as to the inam lands.

The result is that the appeal succeeds, both as to zeraiti and inam lands. The right thing will be to discharge the orders of the Subordinate Judge and the High Court, and to declare that the rights of the zemindar of Urlam under the Urlam sanad to irrigate the Urlam Estate (including inams therein) from the Jalmour, Polaki, Lukulam, and Mobagam channels or their branches, is not limited by any mamul, and that such zemindar, not being subject to any separate charge for such

irrigation, is within the protection of the first proviso to Section 1 of the Cess Act No. VII of 1865, as amended by the Act No. V of 1900. The appellants will be entitled to recover the amounts paid under protest with interest at 6 per cent. per annum and their costs here and in the Courts below. Their Lordships' will humbly advise His Majesty accordingly.

In the Privy Council.

KANDUKURI BALASURYA PRASADHA
ROW AND ANOTHER.

v.
THE SECRETARY OF STATE FOR
INDIA IN COUNCIL

SAME

v.

SAME

SAME

v.

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