in paragraph 5 of his judgment clearly shows that the peishkush or permanent assessment in respect of these estates was the balance struck after making a deduction on account of the pay of the village servants which the proprietor had to meet. The figures appearing in Ex. V-A, Ex. VI-A and Ex. VIII-A appear to have been adopted by the Special Deputy Collector for assessing the amount of the village service cess to which the plaintiff would be liable. There is therefore no reason to hold that the plaintiff is now made to pay more than what was deducted from the peishkush on account of the obligation of maintaining and paying the village officers.

For the foregoing reasons, I must hold that the levy of the village service cess in question is legal and the plaintiff cannot therefore claim a refund of the same.

As the plaintiff's claim fails on the merits, it is unnecessary to consider the plea of limitation with respect to the amounts levied for faslis 1328 and 1329. It seems to me that, in view of the allegations made in the plaint, those payments can reasonably be deemed to have been made by the plaintiff under protest. If so, the proper Article applicable to the present suits would be Art. 16 of the Limitation Act which provides a period of one year. The claim as regards the refund of those amounts would therefore be barred.

In the result, these second appeals fail and are dismissed with costs.

N. R. R. *Appeals dismissed.*

PRIVY COUNCIL.

[From the High Court of Judicature at Madras].

Lord Atkin, Lord Thankerton, Lord Macmillan, Sir George Lowndes and Sir Dinshah Mulla.

12th May, 1931.

MADURA, TIRUPPARANKUNDRAM, ETC., DEVASTHANAMS ... *Appellant.*

v.

ALIKHAN SAHIB and others ... ... *Respondents.*

Waste land—General presumption of ownership in the Crown—Inapplicability in the case of waste land within a temple enclosure.

The general presumption that waste lands are the property of the Crown is not applicable in the case of waste land which is physically within a temple enclosure and over which such acts of ownership as are capable of being exercised have been consistently so exercised by the temple authorities from time immemorial.

Upjohn, K.C., and *Narasimham* for the Appellant.

L. De Gruyther, K.C., and *B. Dube* for the Respondents.

JUDGMENT.

Sir George Lowndes.—Their Lordships have to determine in this appeal the ownership of a barren hill in the Madura District of Madras. The claimants before the Board are the Government, represented by the Secretary of State for India in Council, and the Tirupparankundram Temple. The Mohammedan community, who have a mosque on the highest point of the hill, were parties to the proceedings in the Indian Courts, but they have not been represented on the present appeal. The Madura Taluk Board was also a party to the suit but has not appeared on the appeal.

In the trial Court, the temple, represented by its manager, was the plaintiff. He claimed the whole hill, with the exception of certain cultivated and assessed lands and the site of the mosque, as temple property. The Mohammedan defendants asserted their ownership of the particular eminence upon which the mosque stands, and of a portion of the main hill known as the *Nellitope*. The Secretary of State, who will be referred to as the respondent, claimed to be the owner of all the unoccupied portions of the hill as Government *Poramboke* or waste appertaining to the village of Tirupparankundram, which is admittedly Government property.

The suit was tried by the Subordinate Judge of Madura. He decided against the Government claim and in favour of the temple, except in respect of the *Nellitope*, and the actual site of the mosque with its flagstaff and the flight of steps leading up to it, which he held to be the property of the Mohammedan defendants. The decree of the Subordinate Judge was dated the 25th August, 1923.

The Government were apparently content with this decision. The unoccupied portions of the hill were probably of little value to them, and neither the Secretary of State nor the temple manager appealed. The Mohammedans were dissatisfied and appealed, but as their only grievance was against the temple, they did not make the Secretary of State a party. The result, their Lordships think, must have been unexpected.

The greater part of three years elapsed before the appeal came on for hearing. When it did, the learned Judges of the High Court thought that the Government ought to be represented before them. A notice was issued, and on the 20th April, 1926, the Secretary of State put in cross-objections contesting the decision of the Subordinate Judge upon every head of his judgment. The appeal was taken up again on the 4th May, 1926, and was somewhat summarily dealt with. The learned Judges found that the ownership of the hill belonged to the Government; they

dismissed the appeal by the Mohammedans, allowed the cross-appeal of the Secretary of State, and dismissed the suit. They agreed that both the Hindus and the Mohammedans had established certain rights over the hill, but thought it unnecessary to decide what they were. This, in some ways, strange conclusion was reached in a single day's hearing, though before the Subordinate Judge the trial had occupied the Court for more than thirty days, and the appeal before their Lordships has necessitated an unusually protracted hearing.

The Tirupparankundram Temple is one of the famous rock temples of Southern India. It is situated at the base of a hill some 500 feet high; and is dedicated to Subramanya, the son of Siva. The inner shrine of the temple is hewn out of the hill and in it, carved in the rock itself, is the image of the deity. Around the base of the hill is a pilgrim's way, nearly two miles in extent. This is said to be essential to the worship of the devotees, who perform the ceremony of *Pradakshinam* by going round the image of the deity with the right shoulder continuously presented to him. As the image in the temple is an actual part of the hill, it is obvious that the performance of this rite necessitates the perambulation of the hill itself. This way, which is also used for processions of the temple car on ceremonial occasions, is known as the *Ghiri Veedhi*, and it is claimed as the property of the temple. It is referred to in numerous documents, dating back to 1844, as the *Malaiprakaram* of the temple. The Subordinate Judge states that *prakaram* is a Sanskrit word meaning the outer round of the temple, or fort : *malai* merely means hill.

Within the perimeter of the *Ghiri Veedhi* are certain cultivated and assessed lands, and also some houses, to which the temple makes no claim. But in addition to the main temple there are also within the *Ghiri Veedhi* certain smaller shrines of almost equal sanctity, and a number of old-established *mandapams* or rest houses, together with tanks and bathing places for the pilgrims, and at least in one place a garden for the use of the temple. These are scattered about irregularly over the lower slopes of the hill, which contains various springs, the water of which is supposed to be of great religious efficacy.

The temples are evidently of considerable antiquity, probably dating back to the 13th century A. D., and possibly earlier. The worship of Siva, to which they are devoted, is usually of a phallic nature, Siva as a member of the Hindu triad presiding over the destruction and reproduction of life. It is stated in a report of the Director-General of Archaeology in India, which is embodied in an order of the Local Government, that the whole

rock is worshipped by the Hindu community as a *Linga*, and there seems to be some reason to believe that Madura is the home of this peculiar form of worship (Nelson's Manual, Pt. III, 48). The hill itself is frequently referred to in temple documents and also in some of the early Government records as the *Swamimalai* or God's Hill.

It is, in their Lordships' opinion, clear on the evidence that such acts of ownership as are capable of being exercised in the case of a hill of this character have been consistently so exercised by the temple authorities for the greater part of a century. They have regularly repaired, and in some cases widened, the *Ghiri Veedhi* for the passage of the temple car, removing obstructions and taking stone as required from the hill. In one case they bought and took in a house site for this purpose. The record of these works goes back to 1835 and the sums expended were at times considerable. Prior to 1842 the temple was under the direct control of the collector of the District, and constant references were made to him with regard to the expenditure. In no case do the collector's replies suggest any limitation of the temple's proprietary rights over the unoccupied portions of the hill. In one instance in 1841 it appears that a Hindu devotee desired to build a new *mandapam* outside the *Ghiri Veedhi* to the north. This was submitted to the collector, who replied that it would be more useful if built beside the *Ghiri Veedhi*. His letter does not suggest that the sanction of Government would be required to such an appropriation of a portion of the hill.

Trees have also been planted on the *Ghiri Veedhi* and their produce and the timber have been regularly appropriated by the temple. In 1861 a claim seems to have been made to the sale proceeds of a dead tree. Complaint was made to the collector, and the *taluk tahsildar* was ordered not to interfere with the "avenue of trees surrounding the Tirupparankundram hill" as they belonged to the temple. Some years later a similar dispute arose, an inquiry was held and the sale proceeds of the tree were again awarded to the temple.

Considerable works have been carried out by the temple authorities from time to time for improving the water supply to the bathing tanks, conduits, culverts and other permanent structures being erected, and stone in large quantities being taken from the hill for their construction. On one occasion, as the temple accounts show, a number of bridges were built at a cost of several thousand rupees; on another a compound wall was put up round the precincts of one of the smaller temples, evidently enclosing a portion of the hill. On a third occasion a new *mandapam* was built.

The evidence of all these acts extending over the greater part of the time since the East India Company first came into possession of this part of the country, has been elaborately discussed by the Subordinate Judge. The conclusion to which he came was that they were acts of ownership, openly exercised by the temple authorities, and that taken in connection with the admitted title of the temple to the shrines and other buildings scattered over the hill, and their undoubted antiquity, they established the appellant's claim to all the unoccupied land within the *Ghiri Veedhi*. The path itself he held to have been dedicated by the temple to the public use, and to be vested in the Taluk Board under the provisions of Madras Act XIV of 1920, and this finding has not been disputed before their Lordships. But he held that the sub-soil of the *Ghiri Veedhi* and all other rights of property in and over it remained with the temple.

The only acts on the part of Government which he thought could be regarded as assertions of a proprietary right were two attempts to quarry stone on the hill. The first occasion was in 1879 when the railway was under construction. The temple authorities were asked whether they had any objection and whether they claimed rights over the hill. They did object, emphatically. The superintendent of the temple wrote that "the big hill and the *malaiprakaram* street belonged to the temple" and were in its possession: that they had employed watchmen to prevent the quarrying, and he asked that it should be stopped: and this apparently was done. In 1904 the Government again attempted to lease the quarrying rights: the temple authorities again objected, and the lease was cancelled. There was also some oral evidence about quarrying, but the Subordinate Judge thought it was of no value. Their Lordships have perused this evidence and see no reason to differ from the Subordinate Judge's estimate of it.

Their Lordships do not regard the abandonment by Government of their quarrying proposals as an admission of the temple's rights over the hill, but it is at least consistent with their existence. The Subordinate Judge took the view that abandonment, on a claim of ownership by the temple, deprived the incidents of any probative value on behalf of the respondent, and their Lordships think that this is correct.

The learned Judges of the High Court do not appear to have doubted the facts upon which the Subordinate Judge relied, nor do they discuss them in any way. They regard them as "quite consistent with the ownership of the hill being with" Government, and to "be explained as acts done with the permission of the sovereign authority."

Their main criticism of the Subordinate Judge is that "he refused to draw the proper presumption from the admitted facts of the case," and that this vitiates his consideration of all the evidence. The presumption which they draw is that the unoccupied portions of the hill belong to Government, and they appear to base this upon historical grounds.

It is necessary, therefore, to trace shortly the fortunes of the temple in the 17th and 18th centuries, for which the authorities relied on are principally the "Madura Gazetteer," and Nelson's "Manual of the Madura Country," a compilation of great interest which has frequently been cited before this Board.

There appears to be no doubt that under the Nayakkan Kings of Madura the seven temples in, and in the immediate neighbourhood of the capital were endowed with large revenues derived from a number of villages. The temples were known as the *Hafta Devasthanam*, and included the Tirupparankundram Temple. It seems probable that this endowment was due mainly to the generosity of Tirumala, a famous member of that dynasty who reigned from 1623 to 1659. During the century and a half that followed, the history of Madura is a confused record of internecine warfare, in which the incursions of Mohammedan, Mysorean and Mahratta invaders played the largest part, and these were succeeded by the gradual, but by no means peaceful, penetration of the East India Company. During these troublous times the *Hafta Devasthanam* lands seem to have disappeared piecemeal. What remained of them when Chanda Sahib, nominally representing the Nawab of Arcot, established himself in Madura in 1738 were then confiscated. His domination was interrupted by another invasion of the Mahrattas, who probably restored a portion of the old endowments. They again were ousted by the Nizam in 1744, and the temples fared no better than before. Then followed the intervention of the East India Company. Madura was eventually subdued by their troops under Mahomed Yusuf Khan, who in due course established himself as ruler. In 1763 he was beseiged in Madura by the Company's army, and after a memorable defence was betrayed and executed.

Thenceforward Madura seems to have come gradually under the Company's control, and after the fall of Seringapatam the civil and military administration of the District was formally made over as part of the Carnatic, to the British under Lord Clive's treaty with Azim-ul-Dowlah of the 31st July, 1801. (Aitchison's Treaties, 4th Ed. X, 57.)

Mahomed Yusuf Khan (above referred to), who was apparently a Hindu by birth, re-established the endowment of the temples by a money grant, possibly derived from the revenues of the confiscated villages, but the villages themselves were not restored.

This was the position when Mr. Hurdis, who was already in charge of the adjoining District of Dindigul, became the first British Collector of Madura, and carried out an elaborate survey and settlement of the country. He was in considerable doubt as to the course that should be adopted with regard to the *Hafta Devasthanam* lands. The Board of Directors ordered their restoration to the temples, but for some unexplained reason this order was never carried out, a *tasdik* or annual allowance in money being paid in lieu thereof to each of the temples. The Tirupparankundram *tasdik*, according to Nelson's account, was a sum of Rs. 2,651-8-3.

Their Lordships will now return to the matter with which the present appeal is immediately concerned. The question is whether any presumption should be drawn from the confiscation of the endowed villages as to the proprietary rights in the waste land situate within the *Ghiri Veedhi* and forming part of the *Malaiprakaram*. It is admitted that the village of Tirupparankundram, in which the temple is situated, was part of this endowment.

The Subordinate Judge thought that there was nothing in the long story, which their Lordships have attempted to summarise in the preceding pages, to suggest that the temple had ever been ousted from its possession of the hill.

The High Court, on the other hand, took the view that the hill being part of the village, it must be presumed to have been confiscated with the village, and to have become in 1801 Government property.

The conclusion to which their Lordships have come is that the Subordinate Judge was right. There is no trace in the historical works to which they have been referred of any interference by the Mohammedan invaders with the sacred hill or the immediate surroundings of the temple. They and the other predatory forces which established themselves from time to time in Madura, no doubt seized the revenue-producing lands which formed the joint endowment of all the temples, and these must have included the cultivated and assessed lands within the *Ghiri Veedhi*, but there seems to be no suggestion that the Tirupparankundram Temple or any of its adjuncts passed at any time into secular hands. It was probably during some interval of Mohammedan domination that the mosque and some Mohammedan

houses were built (though the Mohammedans themselves ascribe the mosque to a much earlier period), but this was an infliction which the Hindu occupants of the hill might well have been forced to put up with ; it is, their Lordships think, no evidence of their expropriation from the remainder.

But the more relevant period to consider is that following the cession of sovereignty in 1801. The only rights which the temple can assert against the respondent are rights which the East India Company granted to them or allowed them to retain (see *Secretary of State* v. *Bai Rajbai* (1) and their Lordships think the evidence shows that the temple was left after 1801 in undisturbed possession of all that it now claims. Indeed, the policy of the Directors seems to have been rather to restore to the temples what they had been deprived of in the long years of anarchy which had preceded British rule, than to mulct them of any remnant that was left. It is, in their Lordships' view, hardly conceivable that the East India Company would have wished, for no gain to themselves, to appropriate what was plainly the *prakaram* of an ancient temple studded with shrines, *mandapams* and other accessories to the worship of its devotees. Nor is there in the reports of Mr. Hurdis, or of any of his successors, which are summarised in the Nelson Manual, any hint of such a policy or of any claim by Government to rights over the hill.

Their Lordships do not doubt that there is a general presumption that waste lands are the property of the Crown, but they think that it is not applicable to the facts of the present case where the alleged waste is, at all events physically, within a temple enclosure. They see no reason to disagree with the Subordinate Judge's discussion of the authorities on this question. Nor do they think that any assistance can be derived, under the circumstances of this case, from the provisions of the Madras Land Encroachment Act, III of 1905, on which the respondent has relied.

There is one other document to which their Lordships think it desirable to refer. It is said to be a list of temple properties appertaining to the *Hafta Devasthanam*, dated in 1863, and signed by two native revenue officials. The extract printed in the record refers to the Tirupparankundram Temple, and against an entry of "*Subrahmany Swami* temple and hill" sets out a number of measurements totalling 572, 544 square feet, which appears to be approximately the area included within the *Ghiri Veedhi*. The document was admitted in evidence on behalf of the temple without objection, as the record shows.

(1) 42 I.A., 229=I.L.R., 39 Bom., 625=2 L.W., 731 (P.C.).

Its materiality is that under the Religious Endowments Act of 1863, all temple endowments, which had been vested in the Board of Revenue under Madras Regulation VII of 1817, were to be handed back to local committees, and it is said that this was a list or record of the properties prepared for this purpose under Government instructions.

The appellant thought that the document would be elucidated by a certain Government Order of 1861, and called upon the Local Government to produce it, but they declined to do so, nor did they offer any explanation of the document at all, though it came upon the record at an early stage of the case. The Subordinate Judge thought it showed that at the date of its preparation, at all events, the whole hill was regarded by the Government officials as temple property. The High Court make no reference to it in their judgment. Before the Board the only suggestion for the respondent is that it is a mere record of the area of the hill, and that the collocation of the temple and the hill lends no support to the appellant's case.

Their Lordships do not regard the document of itself as of any great probative value, but its date is certainly significant, and in the absence of any explanation from Government, they think that the inference drawn by the Subordinate Judge was justified.

On the whole their Lordships are of opinion that the appellant has shown that the unoccupied portion of the hill has been in the possession of the temple from time immemorial and has been treated by the temple authorities as their property. They think that the conclusion come to by the Subordinate Judge was right and that no ground has been shown for disturbing his decree. They will therefore humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court dismissing the appellant's suit should be set aside and that the decree of the Subordinate Judge, dated the 25th August, 1923, should be restored. The Secretary of State must pay the appellant's costs in the High Court and before this Board.

N. R. R. *Appeal allowed.*

T. L. Wilson & Co: Solicitors for the Appellant.

Solicitor, India Office: Solicitor for the Secretary of State.