

(1914) 12 MAD CK 0021
In the Madras High Court

Arunachella Ambalan and Others

APPELLANT

Vs

R.G. Orr and Others

RESPONDENT

Date of Decision : 04-12-1914

Acts Referred:

Limitation Act, 1963 — Section 22

Citation : 29 Ind. Cas. 634

Hon'ble Judges : John Wallis, C.J.; Seshagiri Aiyar, J

Bench : Division Bench

Judgement

John Wallis, C.J.—We have already given judgment as to the boundary question which arose between the villages of Karakudi and Sekkalakattai and have now to deal with so much of the appeal as relates to the claim of the Kattaiyur ryots to the kudivaram rights in the Sekkalakottai village, in which we have decided the suit lands are situated.

2. It is admitted that the suit village is one of the villages of the Sivaganga gemindari and as such the jemindar is entitled to the melvaram rights in the village, and it is not now suggested that he has been dispossessed of these melvaram, rights. It is said, however, that the onus is on him to show that he was in possession of the kudivaram rights within 12 years of suit. Now, as will abundantly appear from the Exhibits to which it will be necessary to refer, the suit land was waste land or jungle and mostly forest, and with regard the land of this character in a zemindari, the presumption is that the eemindar owns the kudivaram as well as the melvaram rights, and, therefore, the onus is on the ryots of the village to show, if they can, that the kudivaram right is vested in them.

3. Now applying these principles to the present case, we find the earliest document to which it is necessary to refer is Exhibit D, which is a decision by the Inam Commissioner in 1865 as to a dispute as to the boundary of the Sekkalakottai village between the Mahajanams as they are called, of the inam village of Kalanivasal on the one hand and the zemindar of Sivaganga and

Ambalagars of the village of Sekkalakottai on the other. These Ambalagars, it was suggested, were only the peons of the village. On the other hand, for the respondents it is said, that they may be the descendants of peons but really they were ryots in Kottaiyur and it is in their right that the present suit has been defended. Now, that decision shows that in 1865 the suit lands were jungle lands. It is true that it is mentioned in Exhibit D that certain houses had been built by the inhabitants of Karaikudi a few years ago and a pond had been dug, but the evidence shows that what was there referred to was a certain Muthupattanam hamlet which, according to Exhibits Y and LL, and I think, the present Commissioner's plan, Exhibit XI, is clearly outside the bounds of the present suit land, to the north-west I think here. I may say in giving judgment in the other appeal, we relied upon the fact that the stone shown as No. 1 in Exhibit D was identical with the stone marked No. 19 in Exhibit XI. But this further evidence as to this hamlet of Muthupattanam, which is marked in Exhibit D, shows that the stone was not No. 19 but was a stone further east, probably the stone marked as No. 6 in Exhibit LL. The effect of the plan, Exhibit Y, is to show that it is only in the present suit that a claim has been made to the land extending west as far as the stone No. 19 in the Commissioner's plan. Having regard to the other fact that in Exhibit D the stone E in the plan annexed thereto is mentioned as the boundary stone of Karaikudi and Sekkalakottai and the rest of the evidence, this error as to the identity of stone No. 1 with stone No. 19 in Exhibit XI in no way affects the conclusion we have arrived at.

4. To come back to the present case, the effect of Exhibit D is to show that this was forest land in 1865. Mr. T.R. Ramachandra Aiyar relies upon the fact that the, Kottaiyur ryots took part with the zemindar in the dispute with the adjoining inam village as a sort of assertion of their ownership of their kudivaram in Bekkalakottai. We are unable to attach any weight to that fact from this point of view. Kottaiyur ryots had been taking lands on patta from the zemindar in the Sekkalakottai village and they may well have been interested in seeing that the village boundaries were preserved in which at that time they, at any rate some of them, appear to have been filling up the position of Ambalagars or peons of the zemindar.

5. The next thing we come to is that about 1875 there was a demarcation carried out by the Survey Department of the boundary between Sekkalakottai and Karaikudi, and that is only material for the present purpose because the suit to contest that boundary line was brought by the Karaikudi ryots against the Kottaitur ryots and the judgment is Exhibit V, and it is strongly relied upon for the respondents. The ryots of the Karaikudi village claimed that the Jeudivaram right was vested in them, and the plaintiffs alleged the defendants Nos. 3 to 10 (i.e the Kottaiyur ryots) were exercising rights of ownership over the said 500 kurukkams just as if they belonged to Sekkalakottai that they are sued ... also as agents to the other proprietors of Sekkalakottai. The zemindar contended that he was improperly made a party to the suit, and Mr. T.B. Ramachandra Aiyar relies upon the fact that though it was alleged by the plaintiffs that the defendants

were exercising Kudivaram rights over the suit land, the zemindar took no objection and asked to be dismissed from the suit. This contention is no doubt entitled to considerable weight, but on the other hand it must be remembered, as appears from the evidence in the case, that at the time the suit came on for hearing the zemindarini, who was originally made a defendant, had died and that there was a contest which gave rise to considerable litigation between the claimants to the estate, and it is perhaps not surprising that in these circumstances minor matters of this sort should not have attracted very much attention. However nothing was decided on this point, and the suit was eventually compromised on the terms that the defendants should swear that the boundaries settled by the Commissioner were correct which they did.

6. The next thing we have to deal with is Exhibit E, which is dated the 12th March 1881 a coivle by which the zemindar assigned the molvaram rights in the suit land and a much larger tract, amounting to 100 kurukkams, to one Dlagappa Chetty. It is said by Mr. T.B. Ramachandra Aiyar that this was not inconsistent with the existence of kudiraram rights in the Kottaiyur ryots. I should mention that shortly before Exhibit E the zemindar's rights were recognised by Exhibits W and WI, which were petitions by Kottaiyur ryots for permission to construct houses and to reside in the suit land and this is relied upon by the plaintiffs as an admission that they could not reside there without such permission. This evidence is entitled to very considerable weight.

7. Then we come to Exhibit VII dated 17th June 1884. Exhibit E of 1881, in favour of Ulagappa Chetti, is said to have been benami for Arunachellam Chetti purchasing from 8 Kottaiyur ambalams or ryots the kudivaram, rights in 30 kumkkams of the 100 kurukkams which he had leased from the zemindar by Exhibit E for a sum of Rs. 8,000. Now the evidence is that the land so purchased has always been left waste, and the explanation given in the evidence as to why this purchase was made, was that it was for the purpose of convenience which does not seem to be a very satisfactory explanation. However, it appears that those lands were waste until the present day. Mr. T. Rangachariar has made various suggestions that the transaction is not what it seems on the face of it. But without going into that all that we think it necessary to say is we are not prepared to attach much weight to it as evidence of the rights claimed by the defendants in the suit lands.

8. Before coming to the facts which lead up to the present suit, I may refer to the oral evidence, which has been given of the possession of suit lands by the zemindar. There is evidence that the zemindar and his lessees had maintained watchmen and also had granted pattas for trees. Exhibits CO and EE are such pattas and Exhibit CC is shown to be for trees situated in the suit land. The granting of such pattas in forest land for trees only points rather to the kudwaram rights being in the zemindar than in the ryot. As I have said before the onus is on the ryots of a village in a case such as this to show that they have kudivaram rights in jungle lands of this nature. The suit land adjoins the village

of Karaikudi where there are a number of wealthy Chettis, and that village having been built on the suit land formed a very eligible site for additional houses for this community and this, according to Mr. Rangaebari, is the explanation of the dealing with it already mentioned. Our conclusion on the evidence is that down to 1890 it is not shown that there were any "houses upon the suit land.

9. Now, Exhibit M is a report made to the Sivaganga lessees, who had just then entered on their lease, upon the Sivaganga zemindar's rights by their Plantation Superintendent. He reported that it was very necessary that watchman should be appointed for this forest situated near the houses of Karaikadi, that it was a suitable place for building houses and that the Chettis intended to build houses thereon and that the zemindar could derive an income therefrom. And the order on that is of course it is necessary that kavalgars should be appointed". Exhibit M is another report much to the same effect on which the order is "ameen to be careful that Chettis make no encroachments in this jungle land". The next document Exhibit VIII of the 28th September 1891, is another document by which the Kottaiyur ryots purported: to sell 7 and odd Ttunmtams in the Sekkalakottai village to the north of the suit lands for the price of Rs. 250. This again no doubt was an assertion of their title, but it was not part of the suit land. We do not know what was done upon it, and we are not prepared to regard this as an assertion of title by the Kottaiyur ryots as against the zemindar.

10. Then we come to Exhibit XII which has given rise to the present litigation. That is dated 18th January 1893 and purports to be a sale of what are practically the suit lands, though they are described as only 11 kurtikkams whereas the suit lands are somewhat more. It simply recites that these 8 ambalams, as they describe themselves, have sold these 11 leurukkams of vacant land and trees in Kottaiyur village within the boundaries mentioned there for Rs, 2,500. Following on this we have Exhibit Q series; Exhibit Q is dated 20th May 1893. This shows that the estate servants reported that certain persons at Karaikudi were building on the plaint land. The order on that was, Exhibit Q "As it appears from the said arzi that the undermentioned persons construct buildings in the places appertaining the Sakkalakottai village, the head office also has been informed that what has been constructed tip to date should be left alone and that the further construction of the said business should be stopped." Exhibit Q2 reports that accordingly they have been told to stop the work, and that they claimed under a coile made to Ulagappa Chetty, that is to say Exhibit E of 1881. The supervisor reported that he thought the buildings were outside the limits of the grant to Ulagappa Chetty and he asked for a copy of the original in order to verify this, but no copy appears to have been sent to him. It afterwards turned out that these lands were really outside the boundaries of Ulagappa Chetty's grant. Mr. Rangachariar relies upon the fact that the persons building the houses relied upon this grant rather than upon the purchase under Exhibit XII from the Kottaiyur ryots, as showing that the latter was only a bogus title-deed. This building gave rise to litigation and two suits were filed: one Original Suit No. 18 of 1894 by the Karaikudi Chettis, that is to say, by the Chettis to whom the

village of Karaikudi was leased by the zemindar, to establish that the plaint lands formed part" of the Karaikudi village; while the other suit, Original Suit No. 4 of 1894, was brought by the Karaikudi ryotston the cancellation of Exhibit XII on the ground that they too had share with the Kottaiyur ryots in the kudivaram rights in the village of Sakkalakottai, The zemindar and the Sivaganga lessees sought to be made parties to Original Suit No. 18 of 1894, but their application was rejected by the Subordinate Judge. The suit, Original Suit No. 18 of 1894, was compromised and the compromise was that the Chettis recognised the khudivaram rights of the Sakkalalcottai ryots in the suit lands and other lands which are not the subject of dispute in this suit; and it is suggested on behalf of the plaintiffs that this compromise was a collusive one, at any rate, it is not in any way binding upon them. This compromise was in 1895. The present suit was tiled by the Sivaganga lesssees in the year 1901 and there have been some comments on the delay; but is to be remembered that these Sivaganga lessees had only recently come into the possession of the zemindari and that there we"re a great many other things to attend to besides this suit. I do not think this circumstance weighs very much against them. We think the defendants have not succeeded in proving that the suit was out of time, because for the reasons I have: already given, we are satisfied that it is shown that the zemindar was in possession of the suit lands until 12 years of suit: we think it is only in the year 1890 or 1892 that these buildings began to be erected on the suit lands. This is all the evidence to which it is necessary to refer in detail. On the whole, we have come to the conclusion that, on the evidence in this suit, as regards the suit lands the Kottaiyur ryots have not shown that they were possessed of the kudivaram rights. It is perfectly true that we find assertions of such rights by the kudivarm ryots from time to time after 1877 assertions which they endeavoured to give effect to by the conveyances which I have mentioned. As I have already said, the suit lands were a very eligible site for the extension of the Karaikudi village and for building houses by the Chettis and it is very material that the Kottaiyur ryots should be anxious to establish their claim to valuable pieces of property. But we are satisfied that the possession both of the melvaram and the hudn aram lights of what was originally jungle land was originally in the zemindar. We are not satisfied that he was ever effectively dispossessed of them by the Kottaiyur ryots, although they no doubt made claims to the kudivaram from time to time. In the result we agree with the conclusion of the Subordinate Judge and dismiss this appeal with costs.

11. As regards the question raised by Mr. T. Rangachariar that the 5th plaintiff--to whom an assignment was made by the other plaintiffs in the course of this suit--that he ought to have been given a decree, I am unable to accept the respondent"s contention that the suit, though instituted in times barred u/s 22 of the Limitation Act as against the 5th plaintiff, the assignee from the other plaintiffs of their cause of action, who was allowed to continue the suit u/s 372, Civil Procedure Code, because the period of twelve years had expired when he was brought on. The Limitation Act deals with the institution of suits; and Section

22 should, in my opinion, be confined to cases in which the new plaintiff is added or substituted in his own right so that he may be considered to be instituting a suit, and not to cases in which a suit properly instituted is allowed to be continued by an assignee u/s 372, Civil Procedure Code. That section was not like Section 32 made subject to the provisions of the Limitation Act; to hold it to be so subject is, in my opinion, to defeat its object and bring about the undesirable situation which it was enacted to avoid. Both sections must be read consistently if possible, and I think Section 22 very perfectly receives the restricted construction I have mentioned. The authorities in this Court which will be referred to by my learned brother do not preclude up from so holding.

12. As regards the memorandum of objections, the Subordinate Judge has found that the zemindar and his lessees are not entitled to recover possession of the buildings on the suit lands without compensation, on the ground that they encouraged the owners to build there. As I have mentioned already, the effect of the evidence is that in 1891 objection was taken when those who claimed under Ulagappa Chetty's grant built the building but they were not further interfered with. In these circumstances we are not prepared to differ from the conclusion at which the Subordinate Judge has arrived.

13. For the reasons given the decree will be amended by giving the 5th plaintiff a decree and otherwise the appeal will be dismissed.

14. Seshagiri Aiyar, J.--I agree that the appeal should be dismissed. I would add a few words on the question of law argued by Mr. T. Rangachariar. He asks us under Order XLI, Rule 38, of the Code of Civil Procedure, to amend the decree of the Subordinate Judge by giving a decree to the 5th plaintiff for possession along with plaintiffs Nos. 1 to 4. Plaintiffs Nos. 1 to 4 assigned their rights to the 5th plaintiff in June 1908, when the suit was pending. The decree was passed in December 1908: and as the new Limitation Act of 1908 came into force only in January 1909, this question has to be decided under the Act of 1877. Mr. C.S. Venkatachariar contends that u/s 22 of that Act, the claim of the 5th plaintiff was barred by limitation, as he was added as plaintiff in the suit more than 12 years after the accrual of the cause of action in 1893. The language of the section covers on the face of it all cases of addition and substitution of parties. But as contended by Mr. T. Rangachariar, the proviso to the section shows the classes of cases contemplated by it. I think he is right in his contention that the section should be restricted only to cases where the substituted or added plaintiff asks that his own rights should be adjudicated upon in the suit. And the section would apply also to cases where the original plaintiffs were not entitled to all the reliefs claimed in the plaint in their own rights. This view is strengthened by the amendment of the Act which places the assignee in the same position as the legal representative of the plaintiff. To hold otherwise would be practically to ignore Section 372 of the old Code of Civil Procedure. That section enables the Court to permit an assignee of the rights of the original plaintiff to continue the suit. It would be anomalous to hold that the assignee who has the right to

continue the litigation is not entitled to obtain a decree in his favour. I am of opinion that Section 22 of the Limitation Act applies only to cases where the added or substituted plaintiff wants to litigate a right for himself independently of the rights of the original plaintiff. Mr. C.S. Venkatachariar relied very strongly upon the Full Bench decision of the Calcutta High Court in *Abdul Hahman v. Amir Ali* 34 C. 612 : 5 Cri.L.J. 486 : 11 C.W.N. 511 : 2 M.L.T. 312 (F.B.). In that case the referring Judge and Mr. Justice Harrington were of opinion that the bar of Section 22 will apply to the substitution of a plaintiff and not to the addition; and the only question referred for the opinion of the Full Bench was whether a case of substitution came within the mischief of Section 22. I am unable to see how the case of addition can stand on a different footing from that of substitution. I must respectfully dissent from the Full Bench ruling, in so far as it lays down that where a new plaintiff is substituted u/s 372 he will be affected by a period of limitation different from that which is applicable to the original plaintiff. The view of the learned Judges in *Ilai Charan Mandal v. Bisivanat Mandal* 26 Ind. Cas. 410 : 20 Cri.L.J. 107 lends support to the view I have taken. Mr. Justice Wilson in *Subodini Debi v. Oumar Ganoda Kant Roy Bahadur* 14 C. 400 came to the same conclusion. *Chunni Lal v. Abdul Alt Khan* 23 A. 331 is another authority for the same position. The decision in *Fatmabai v. Pirbhai Virji* 21 B. 580 is not opposed to this view, Mr. Justice Miller in *Subbaraya Iyer v. Vaithinatha Iyer* 5 Ind. Cas. 931 : 33 M. 115 : 7 M.L.T. 185 expresses a doubt regarding the correctness of the view taken by Mr. Justice Wilson in *Subodini Debi v. Cumar Ganoda Kant Boy Bahadur*. Mr. Justice Sankaran Nair who took part in that case apparently does not share this doubt. On principle I am of opinion the right view is to hold that where a plaintiff is added in consequence of the assignment of rights from the original plaintiff his right to a decree is not affected by Section 22 of the Limitation Act. The decree should be amended by giving the 5th plaintiff a decree for possession along with plaintiffs Nos. 1 to 4.