
(1918) 09 MAD CK 0022
In the Madras High Court

B. Rajarajeswara Sethupathi alias Muthuramalinga
Sethupathi Avergal, Rajah of Ramnad

APPELLANT

Vs

Meerasa Marakkayar and Others

RESPONDENT

Date of Decision : 10-09-1918

Acts Referred:

Madras Estates Land Act, 1908 — Section 13(3)

Citation : 50 Ind. Cas. 892

Hon'ble Judges : Phillips, J;Kumaraswami Sastri, J

Bench : Division Bench

Judgement

1. The series of decisions in the District Court and High Court relied on by the District Judge do not altogether establish a custom that waste is not chargeable even if it be due to the ryots' wilful neglect vide Arunachallam Chettiar v. Mangalam 35 Ind. Cas. 329 : 40 M.P 640 : 20 M.L.T. 70 : 4 L.W. 37 : 31 M.L.J. 168 and Udayal v. Arunachala Chettiar 27 Ind. Cas. 872 : (1915) M.W.N. 190 : 2 L.W. 145 and Ramasami Servaigaran v. Athivaraha Chariar 44 Ind. Cas. 663 : 23 M.L.T. 183 : 7 L.W. 471 : (1918) M.W.N. 340 recently decided. The custom upheld in those cases was that waste dry lands were not chargeable unless left waste by wilful neglect. The District Judge is, therefore, directed to reconsider his finding and decide whether the custom found by him is supported by the evidence or whether the custom is as found in the cases referred to above. In the latter case, he must further decide whether plaintiff has proved that any of the waste in these suits was due to defendants' wilful neglect.

2. The finding should be submitted within six weeks from this date and ten days will be allowed for filing objections.

3. In compliance with the order contained in the above judgment, the District Judge of Hamnad at Madura submitted the following.

FINDING.

4. I have been directed to submit a finding on the following issue:

Whether the custom found by the District Judge is supported by the evidence or whether the custom is as found in the cases referred to above and in the latter case, whether plaintiff has proved that any of the waste in these suits was due to the defendants' neglect

5. My predecessor observed that the evidence in the case is that certain portions of holdings were left uncultivated in suit Faslis, that this was not due to default on the part of the ryots, that rent has never been charged on waste but that the question has been raised and contested but not settled between the landlord and ryots since Fasli 1318." He also relied on certain decisions in support of the view that rent was not chargeable on waste.

6. As regards the decisions relied on by my predecessor, their Lordships observe that they do not altogether establish a custom that waste is not chargeable even if it be due to the ryots' wilful neglect", and that the custom upheld in the reported cases was "that waste dry lands were not chargeable unless left waste by wilful neglect."

7. Now to come to the oral evidence on record, I find that the only matter that has been satisfactorily proved is that no charge used to be made for waste till Fasli 1317 and that from Fasli 1318 the matter has been under litigation. The witnesses examined on both sides swear generally that it is not customary to charge for waste. But the question does not appear to have been put to them specifically whether the custom they referred to is an absolute custom, irrespective of default on the part of the ryots. I am not, therefore, prepared to find upon the strength of these loose statements that such an absolute custom has been established. The mere omission or failure to collect rent for waste lands until Fasli 1317 is not sufficient to establish a custom that such lands could never be charged even if they were left waste through the wilful neglect of the tenants. I may also add that such a custom, even if established by the evidence, must be rejected as unreasonable. The following observations of Justice Sadasiva Aiyar in *Ramasami Servarigaran v. Athi varaha Chariar* 44 Ind. Cas. 663 : 23 M.L.T. 183 : 7 L.W. 471 : (1918) M.W.N. 340 appear to me to be pertinent: "I do not think that a custom to let lands lie waste without regard to reasonable area, and without regard to good or bad seasons and existence or absence of facilities for irrigation) for indefinite periods at the tenants sweet will and pleasure with absolute freedom from liability to payment of any rent is a reasonable custom which can be recognised by Courts." *Hamammi Servaigoran v. Athivaraha Chariar* 44 Ind. Cas. 663 : 23 M.L.T. 183 : 7 L.W. 471 : (1918) M.W.N. 340. I find on the first part of the issue that the evidence is not sufficient to establish an absolute custom which appears to have been found by my predecessor. I find that the custom is as found in the cases referred to in the order of remand.

8. The next question I am to consider is whether plaintiff has proved that any of the waste in these suits was due to the defendants' wilful neglect. No question appears to have been put about this matter during the examination of P.W. No. 1. P.W. No. 2 swears that land No. 170 is cultivable though sandy, that land No.

317 is quite fit for cultivation, that land No. 1186 is cultivable land, that land No. 163 may be cultivated once in 3 or 4 years and with trouble taken by the ryot and that if there is heavy rain land No. 392 may be cultivated with horse-gram, that about 2 Kulis of land No. 330 are cultivable in parts and that on the rest of the lands horse-gram may be grown when there is heavy rain. He states further that 1 1/2 or 2 Kulis of land No. 571 is covered with a tope and that the remainder of the land is cultivable, that land No. 214 is a little high but is cultivable and that No. 209 is riot saline but quite fit for cultivation. In fact the evidence of P.W. No. 2 shows that the lands which are said to be uncultivable could be cultivated.

9. D.W. No. 1 swears that in Faslis 1321 and 1322 lands Nos. 602, 681, 607, 424, 1354 and 1355 were cultivated, that lands Nos. 163, 325, 326 and 330 were waste being sandy and high level and that lands Nos. 1353, 1354 and 1355 are Kollais in village-site. He admits in re-examination that all the waste lands may become cultivable when there is timely rain, though he adds that there was no sufficient rain in the suit Faslis. D.W. No. 2 swears that except 10 Kurukkams in land No. 317 the rest is cultivable and that 6 Kurukkams out of the said 10 Kurukkams form a watercourse. D. W. No. 3 swears that some of the lands were cultivated in the suit Faslis and that other lands were left waste. But he admits that they could also be cultivated if there was sufficient rain. I have no doubt upon the oral evidence of the witnesses examined in the case that the lands are capable of cultivation provided there is sufficient rain.

10. The next question for consideration is whether during the suit Faslis there was or was not sufficient rain for the cultivation of the lands in dispute. There is nothing in the evidence of plaintiff's witnesses about this matter, but the witnesses examined for the defendants swear that there was not sufficient rain. But they are all interested witnesses and I am not prepared to act upon their evidence.

11. The decision turns, therefore, on the question as to whether the burden of proof lies on the plaintiff or on the defendants. In the case referred to above, Justice Sadasiva Aiyar observes that it would, lie on the ryots to prove that the lands were left waste not through any default on their part. If that view should be upheld, my finding will be that the ryots have not proved to my satisfaction that they had not sufficient facilities for cultivating the lands in question during the suit Faslis. I find, however, that the issue as remitted in the order of remind directs me to find whether plaintiff has proved that any of the waste in these suits was due to defendants' wilful neglect. If their Lordships intended to throw the burden on the plaintiff, I must find that he has riot made out wilful neglect on the part of the tenants.

JUDGMENT.

12. We accept the finding that the custom is that waste dry lands are not chargeable unless left waste by wilful default. This was the custom referred to in

the order of remand and we cannot go behind that order now. On this finding we think that the burden of proving wilful default is on the landlord. The finding is that no charge has ever been made for waste dry lands, and under the law as varied by the custom the contract between the parties is that waste lands are not to be charged unless left waste by the wilful default of the tenant. In this view it is undoubtedly incumbent on the landlord to prove the default on which he relies to make the waste land chargeable. The District Judge finds that he has not discharged this burden and we accept this finding.

13. As regards the charge for Vanpayir, the Judge finds in Second Appeal No. 169 of 1917 that the temporary wells by aid of which the crops were grown are improvements within the meaning of Section 13(3) of the Estates Land Act. We accept this finding and would apply it also in the other cases in which no such finding is given, for we can see no reason to restrict the meaning of improvement to a permanent improvement, for temporary improvements can materially enhance the value of the holding for the period during which they are in existence.

14. On another ground plaintiff's claim to crop-war rents must be disallowed. The tenants admitted only a rate of 5 1/2 Fanams per Kurukkam, and the District Judge finds that plaintiff has failed to prove any other rates to be payable.

15. The second appeals are accordingly dismissed with costs.