
(1918) 12 MAD CK 0003
In the Madras High Court

C.V.C.T. Venkatachalam Chetty and Others

APPELLANT

Vs

Aiyamperumaul Tevan and Others

RESPONDENT

Date of Decision : 18-12-1918

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (1919) 37 MLJ 248

Judgement

1. These Second Appeals are filed against two batches of appeals of the Ramnad District Court which were decided by two District Judges who

have not taken altogether identical views on all points. In Second appeal, there are to main points for consideration.

(1) Whether the plaintiff is entitled to charge Sarasari or average paddy varam for dry lands irrigated by plaintiff's water. (2) what cesses the

plaintiff is entitled to charge.

2. On both these points, there have in the past been a number of suits between some of the same parties-one batch of suits in the Manamadura

Munsif's Court-a second batch before the special Deputy Collector of Ramnad and the third before the Deputy Collector of Devakotta. It is

contended for the appellants that the decisions in all these suits constitute res-judicata so far as the parties and property concerned are the same. In

the Manamadura suits there was no appeal beyond the District Court except in two cases which came to the High Court and in those two cases,

the High Court reversed the decision of the lower Courts. Mr. Moore accordingly holds that the question is not res judicata as regards the

defendants in the Manamadura suits who did not appeal, because to hold otherwise would lead to certain startling results and Mr. Venkataramiah

also appears not to consider the decisions as resjudicata and regards them as of small evidentiary value in view of the contrary opinion of the High

Court. It is difficult to see why questions that have once been settled between the parties should not be deemed to be resjudicata merely on the

ground that similar questions between the same parties have been decided otherwise in other litigation, and the learned vakil for the respondent

does not support the finding of the District judges on the grounds given by them, but so far as the cases decided by the Manamadura Munsif is

concerned, he relies on the language of Section 11 of the CPC for holding that they are not resjudicata. His contention is that u/s 11, the Court

which decided the first suit must have been competent at the time of such decision to try the subsequent suit and relies on a ruling in Kunji Amma v.

Raman Menon ILR (1892) Mad. 494 : 2 M.L.J. 262. We do not think that this case really supports his plea. No doubt the Judges said that they

were of opinion that the only reasonable construction to be put upon the words "" Court of jurisdiction competent to try such subsequent suit"" must

be held to refer to the jurisdiction of the Court at the time when the suit was heard and determined but that the Judges did not really mean to

decide that the Court must be competent on the date of judgment and not on the date of the institution of the suit appears to be clear from the fact

that they approved the view of the Calcutta High Court in Gopi Nath Chobey v. Bhugwant Pershad ILR (1884) C. 697, and Raghunath Punjab v.

Issus Chunder Chowdhry ILR (1884) C. 153. In the former of these cases it was clearly held at page 707 as follows: ""the reasonable construction

of the words "in a Court of jurisdiction competent to try such subsequent suit" seems to us to be that it must refer to the jurisdiction of the Court at

the time when the first suit was brought, that is to say, if the Court which tried the first suit was competent to try the subsequent suit if then brought,

the decision of such court would be conclusive u/s 13, although on a subsequent date, by a rise in the value of such property or from any other

cause, the said court ceased to be the proper court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that

property."" This view is followed in Raghunath Punjab v. Issus Ghuuder Chowdkury ILR (1884) C. 153 and also in Raichurn Ghosh v. Kutnud

Mohan Dutt Chowdhury (1898) 2 C.W.N. 297. At the date of institution of the first suit in the Manamadura Court; that court had jurisdiction to

try the subsequent suit and the fact that jurisdiction was taken away by the passing of the Estates Land Act shortly before the judgment was

pronounced would not make it a court not competent to try the subsequent suit within the meaning of Section 11. We therefore think that the

decision of the Manamadura Munsif which was not appealed against constituted res judicata as well as two decisions of this court. So far as the

cases decided by the Special Deputy Collector are concerned, there was no appeal and his decision is undoubtedly res judicata. In the third class

of cases before the Deputy Collector of Devakota, no appeal was preferred in some of the suits and his decision would therefore be final in those

Cases. So far therefore as the previous litigations related to the same land or between the same parties, we think that the questions therein raised

and decided must be held to be res judicata. There are however other cases before us to which the principle of res judicata will not apply and these

will have to be decided on the merits. The contention of the respondent on the first of the two questions before us which was upheld by the 1st

Judge is that the charge of Sarasari is illegal because it is an enhancement of rent. Rent was originally charged for dry crops on the suit dry lands,

and the right to levy Sarasari now claimed is claimed on the ground that these lands have been irrigated by water taken from the landlord's tank

and for this water, he is entitled to a reasonable compensation. It has been held in *Thayammal v. Muttia* ILR (1887) Mad. 282. *Venkata Rao v.*

Vaithilinga Udayan (1901) 12 M.L.J. 22 and *Battina Appanna and Others Vs. Sreemanthu Raja Yarlagadda Venkataramalinga Bahadur Zemindar*

Garu, that a charge for water taken by the tenant is not enhancement of rent. No doubt u/s 3 (11) of the Estates land Act, such charge, even if not

consolidated with the rent will come within the definition of rent. But for that reason alone, it is not necessary to hold that the charge for water in

excess of the prior dry rent is an enhancement of rent.

3. It is suggested that the landlord's remedy would be to sue for compensation for the use of water taken, but that, within the meaning of the

Estates land Act, would be in effect a suit for rent and would be governed by the provisions of that Act. Nor can he sue for damages for loss of

water when as a matter of fact, he has consented to the tenant taking that water. It is not disputed that any water taken was taken with the

permission of the landlord, and we think it is only reasonable to infer from such taking by consent a contract between the parties that the landlord

shall be entitled to a reasonable compensation for the water. The question therefore would be whether the charge of Sarasari, which is the average

varam collected on paddy lands in the village, is a reasonable charge. It is very difficult to fix exactly the proper charge for the water for the

quantity of water taken must vary according to the season of the year and also the nature of the crop raised on the land. So far as the landlord is

concerned, the most profitable use of the water would be to facilitate the cultivation of a paddy crop as it would result in his obtaining his share of

the produce in paddy and the landlord might well say that all the water taken from his tank should be utilised for such purpose. If the tenant utilised

it for less remunerative crops, such as, chillies and cotton as in the present case, can he be heard to say that he should pay less? It is a somewhat

difficult question but we find that Sarasari has been levied in the past. Sarasari being a curious method of levying compensation, which would

hardly suggest itself to a landlord in modern days it is evident that it must be levied according to old existing custom, and this would also appear

from the techni"" cal meaning which is attached to the word itself. By its levy the landlord gets no more for his water than he would get by supplying

water to wet lands, and there seems to be no ground for depriving him of what he can ordinarily expect to get for his water. The tenant is not

bound to take water to dry lands, and consequently he suffers a hardship by being asked to pay the full price for water taken by him. He has his

remedy in his own hands i.e., he can cease to take water. The "landlord on the other hand has not a similar remedy, for the application of the water

to paddy crops or to vanpayir crops lies in the tenant's hands. In these circumstances it seems to us that the levy of Sarasari by the landlord is only

a reasonable and equitable compensation for water supplied by him, and must be allowed. As there is no finding as to whether water was taken for

the suit years appellant's vakil says he will be satisfied with a mere declaration. The decree will therefore be modified accordingly.

4. As regards the cesses claimed, Mr. Moore allowed all the cesses in respect of varapattu and varisaipattu lands. Mr. Venkataramiah disallowed

the cesses in the case of varisaipattu lands and as regards varapattu lands disallowed Amanji, Pakkilai and Tayirmutti. The appellant's vakil stated

that he does not press Pakkilai and Tayirmutti.

5. Varapattu lands are the ordinary wet lands in respect of which the landlord and tenant divide the actual produce, while varisaipattu lands are lands paying a fixed paddy rent.

6. The special Deputy Collector disallowed Pakkilai, Tayirmutti and Amanji and allowed the other cesses claimed on the ground that "" these cesses have been customarily paid by the ryots and collected by the landlord in kind as part of their rent."" There can be little doubt that the cesses have been paid for a long series of years by the tenants without objection.

7. The Karnam (P.W. 1) deposes that on Varapattu lands Kanganam, Eswaran Koil Mahimai, Kulavettu, Kadiraruppu (Cooly), Karnam

Swatantram, Kudivaram, Kaipichai, are deducted as common charges and the balance divided between the landlord and tenant. Out of these

common charges some go to the landlord and some to the ryot. He states that out of the Kadiraruppu 3 measures are taken out of every 14

marakals and added to the landlord's share as Amanji. As regards Varisai-pattu lands, he states that Kanganam, Kulavettu, Tayirmutti, Amanji,

Eswaran Koil Mahimai, Pakkilai, Swatantram, Vamadai, Vaikkalkaitu are the cesses levied.

8. The plaintiff appeals against the decision of Mr. Venka-tramiah disallowing the cesses claimed and the defendants have tiled a Memorandum of

Objections against the decision of Mr. Moore as regards the cesses allowed.

9. In our judgment in Thiruvananther Sevuga Pandia Thevar v. Sankara Moorthi Naidu ILR (1918) Mad. 97 : 36 M.L.J. 100 we have given what in

our opinion are the tests to be applied and the considerations which should weigh with the Court in allowing or disallowing cesses which have been

paid for a long time without dispute and to the difference between cesses which are deducted out of the gross produce and those deducted out of

the tenant's share. We observed as follows : ""In considering whether any particular cess claimed and which has been paid for a serious of years is

enforceable or not the first thing to be considered is whether the cess claimed has any direct or proximate bearing on the purpose for which the

land is let. If the cess is payable in respect of such purpose it will prima facie be one which is binding on the parties and the onus will be on the

tenant to show that owing to some special circumstance it is not binding on him.

When the cesses are in their nature unconnected with the object for which the land is let, they can only be claimed by the landlord under contract between him and the ryot, supported by consideration or usage for which legal origin is neither proved or presumed from the nature of the cess and long course of payment." While on the one hand mere length of payment will not, as pointed out in *Sundram Aiyar v. Theetharappa Mudaliar* 40 Ind.Cas. 159 give to a cess, which is purely voluntary or which is on its face illegal, acquire a binding character, payment during a long course of years will be presumptive evidence that the payment of a cess had a legal origin, if the case is of such a nature that a contract to pay it may be reasonably inferred.

10. As regards cesses deducted out of the gross produce before division of the varam there is nothing to prevent the parties from agreeing that certain expenses, which they consider to be beneficial to both of them, should be met by them in common and in such cases so long as the levying of the cess is not a device by the landlord to give himself a purely personal benefit, the purpose for which the cess is levied is immaterial. It will of course be open to the tenant to show that the purpose for which the cess is levied has failed or that the landlord has not been appropriating the cess to the purpose for which it is claimed and levied.

11. So far as cesses in connection with temples are concerned they have been held to be purely voluntary in *Siriparapu Ramanna v. Mallikarjuna*

Prasada Naidu ILR (1893) Mad. 43, *Ramalingam Chettiar v. Ramaswanmi Aiyar* (1902) 13 M.L.J. 379, *Devanai v. Raghunatha Rao* (1913)

M.W.N. 886, *Eswaran Koil Mahimai* will therefore be disallowed.

12. As regards varisaipattu land there is obviously no necessity for Kanganam which is a cess for superintending harvest or the landlord gets a

fixed paddy rent irrespective of the produce and no supervision is necessary. *Tayirmutti* and *Pakillai* have been given up. *Eswaran Koil Mahimai*

is for the reasons above given not enforceable. The Deputy Collector has disallowed *Amanji* and it has not been shown that the cess is one that

can be enforced.

13. We do not see sufficient grounds to disallow the other cesses. They have been paid for several years without objections and have been found

by the Deputy Collector to have been paid for a long series of years as part of

the rent. The decree of the lower Courts as regards cesses will be modified accordingly.

14. Appellants will get costs in Second Appeals 1327-1353 1356-1361, and will pay costs in 1956-1973 and in the Memo of objections. Each party will bear his own costs as also in S.A. 1354-1355.

15. These Second Appeals and the Memo of objections having been set down to be spoken to, the Court delivered the following

16. The statements submitted by the parties will be forwarded to the District judge for report as to the correct amount to be awarded, in each

decree after hearing the parties. The report will be submitted within two months from the date of receipt of records in his Court and seven days will be allowed for tiling objections.