

(1958) 03 KL CK 0020

In the High Court Of Kerala

Case No : Appeal Suit No. 846 of 1952 (M)

Easwaran Chettiar

APPELLANT

Vs

Valia Mannadiar
 Valia Mannadiar Vs Easwaran Chettiar

RESPONDENT

Date of Decision : 24-03-1958

Acts Referred:

Easements Act, 1882 — Section 13
Transfer of Property Act, 1882 — Section 8

Citation : AIR 1959 Ker 408

Hon'ble Judges : Vaidialingam, J;Kumara Pillai, J

Bench : Division Bench

Advocate : C.K. Viswanatha Iyer, for the Appellant; N. Sundara Iyer and V.R. Venkitakrishnan, for the Respondent

Final Decision : Dismissed

Judgement

Vaidialingam, J.—This is an appeal by the first defendant against the decree and judgment of the learned Subordinate Judge of South Malabar, Palghat restraining him by an injunction from interfering with the plaintiff's right to take the waters of the irrigation system emanating from the dam in Walayar river and also the decree for damages passed against him.

2. The case of the plaintiff was that the suit properties, and certain other items situated in Cochin State originally belonged to the first defendant's tarwad. A portion of the said properties called the Anakkal Challa forming; part of the bigger block called the Konganpara lands had been demised On Saewathom tenure by the first defendant tarwad in favour of its other member one Parukuty Mannadisayar, a sister of the first defendant. The first defendant and his sister hypothecated all their right, title and interest in the said properties to one Doctor Subramanin Iyer under a simple mortgage dated 20-7-1931 for about Rs. 30,000/-. On 26-11-1931. there was a Further simple mortgage over the said items in favour of one Ramaswami Tyer. The later filed O. S. 79/33 sub-court, Palghat and obtained a decree for sale to realise his mortgage amount. To

discharge this decree-debt and other amounts due to the first mortgagee, the first defendant and his sister again executed in favour of On first mortgagee", Mr. Subramania Iyer On 24-9-1934 a possessory mortgage for about Rs. 40,000/- and She mortgagee was put in possession of the entire properties. In the said mortgage-deed, the first defendant and his sister have stated that the mortgagee is entitled to take, use and enjoy the water of the irrigation Chals appurtenant to the mortgaged properties without any interference.

3. In the meanwhile, in respect of the balance amount due under the decree in O. S. 79/1933, the decree-holder therein brought the properties to sale and the properties were actually sold on 20th December 1934 and purchased by the usufructuary mortgagee. Doctor M.K. Subramania Iyer and he Obtained a sale certificate on 11-3-1935 and also got delivery of the properties including all rights to water specified therein,

4. The said Subramania Iyer ultimately on 3-4-1942 sold the suit properties to the plaintiff who thus became the owner of the properties and as such the person in possession and enjoyment of the same,

5. The plaintiff further alleged that on the same date as the usufructuary mortgage namely 34-9-1934 the first defendant and his sister created an equitable mortgage by deposit of title deeds in favour of the usufructuary mortgagee over the properties lying adjacent and situated in Cochin State, Ultimately, the equity of redemption over those items also was subsequently sold by the District Court, Trichur in execution of the decree of the Palghat sub court in O. S. 31/1934 and those properties were also purchased by the usufructuary mortgagee, Doctor M.K. Subramania Iyer. The said Subramania Iyer also ultimately transferred his rights in those properties on 12-5-1942 in favour of the plaintiff. Thus the plaintiff has obtained full title and rights over the entire properties known as the Konganpara lands of which about 310 acres and 81 cents was in the then British territory and about 9 acres was in the then Cochin territory.

6. Both the said blocks of lands known as the Konganpara lands are irrigated by one and the same system of irrigation namely a Chal which emanates from a darn in the Walayar river at a place where it passes through Cochin State and demarcated as Survey No. 468 in the Eravattan-parathy village, Chittur taluk of the Cochin State. The said Chat emanating from the said dam passes through certain lands belonging to a third party namely the Chondath tarwad and others until it reaches the plaintiffs properties. The said irrigation system has been in existence from about 1087 ME. and is one intended for the irrigation of the said Konganpara lands, to which the said Chal is appurtenant. The said irrigation system was being enjoyed by the predeceessors-in-title of the plain-tiff as well as by the plaintiff without any interference from anybody. After he purchased those lands, the plaintiff himself has spent enormous amounts to repair and rennovate the irrigation system.

7. The, plaintiff further stated that he has developed his estate by planting cocoanut, arecanut, graft mangoes, plantains, orange etc. He has also planted sugarcane on a portion of the lands. Though the plaintiff was using the water of the said irrigation system for all his purposes, the first defendant was attempting to interfere with the irrigation system. The first defendant, through his men, is wrongfully opening the water sluices and letting "he Chal water into the river thus causing diminished supply to the plaintiffs land. This act of the defendant has resulted in considerable damage to the plaintiff and he tentatively assessed his damages at Rs. 3.000/- with liberty to claim larger amounts after a proper assessment by a commissioner appointed by the court. The second and third defendants are stated to be acting under instructions of the first defendant and interfering with the irrigation system.

8. On all these allegations the plaintiff prayed for a decree restraining the first defendant and his men and servants from doing any hing in respect of the irrigation system compising the dam and the chal emanating therefrom that will in any way prevent the water from reaching the plaintiff"s lands to the detriment of the plaintiff and his lands situated both in the Cochin State and in the Brjish territory He also prayed for damages that may be found due to him.

9. The first defendant contested the suit. He denied the right of the plaintiff in the irrigation system and he also contended that the said irrigation system was not one appurtenant to the Kong para estate purchased by the plaintiff from Doctor M. K. Subramania Iyer. He contended that the said irrigation system was purchased by his tarwad in 1080 M.E. from one Susa and had never been mortgaged or sold to anybody by the tarwad. Water from this irrigation source was being let out not only to Konganpara and Anakkal Chalfa but also to several other lands held under the Vatasseri tarwad further lower down.

10. The first defendant also specifically contended that water from this suit Chal used to be let out to the tenants of Konganpara, Anakkal Challs and to lands further down for irrigation only on payment of Neervaram at the specific and uniform rate of one Para of paddy for one Para "of seed area for each crop. He also stated that water was so let out only to the paddy lands and not to Parambas or gardens.

11. The first defendant further contended that the enjoyment of the water by the plaintiff was on certain terms namely, that the Neervaram payable by the plaintiff for irrigating his lands from the water of the suit channel wag allowed to be spent by the first defendant for the repairs which the plaintiff was allowed to effect thereon. The plaintiff effected the repairs to the suit Chal only in pursuance of this arrangement and he was allowed to set off the Neervaram due by him in respect of the expenses incurred by him for the repairs.

12. It was also seated that the plaintiff had no title, control Or possession of the suit chal. The defendant is the aboslute owner of the irrigation system and in consequence of his absolute ownership, stooped the water for the irrigation of

the plaintiffs lands in view of the plaintiffs refusal to pay the legitimate dues of Neervaram. The first defendant admitted that water was not allowed to be taken for the plaintiffs lands because of the latter's refusal to pay Neervaram.

13. The first defendant further contended that in any event, the plaintiff is not entitled to water from the suit chal for the purpose of irrigating his garden and sugarcane crops. The first defendant expressed his willingness to supply water for the plaintiffs garden provided he entered into a separate agreement regarding the same on such conditions as may be settled between the parties.

14. The first defendant further disputed his liability to pay any damages to the plaintiff. In any event, he contended that he has acted only within his rights and the plaintiff has no rights whatsoever in the water of the chal unless he pays the Neervaram and even then water could be given only for the paddy lands and not for other lands. He denied that the plaintiff has suffered any damage whatsoever. On "these grounds the first defendant prayed for a dismissal of the suit.

15. The second and third defendants filed a memorandum adopting the contentions of the first defendant.

16. The learned Subordinate Judge after a consideration of the entire documentary and oral evidence placed before him, came to the conclusion that the irrigation system was originally treated as a separate entity by the first defendant's tar-wad. The learned Judge also held that whatever rights the first defendant's tarwad had to the Konganpara estate have now devolved on the plaintiff by purchase. Though it was contended by the plaintiff that "the irrigation system also has been purchased ultimately by the plaintiff, the learned judge has not accepted this part of the plaintiffs case.

17. The learned Judge held that the entire rights in the Konganpara estate and irrigation system became vested in the first defendant's tarwad in absolute proprietary right which in law would amount to unity of possession. The learned Judge further held that the first defendant's tarwad had not mortgaged the irrigation system as such to anybody. But the learned Judge, in view of the way in which the said irrigation system was dealt with by the first defendant, came to the conclusion that the said irrigation system is appurtenant to the Konganpara estate which has been purchased by the plaintiff.

In this view, the learned Judge held "that the plaintiff is entitled to take the waters of the irrigation system for the cultivation of his Konganpara estate subject to one limitation namely that the plaintiff cannot deprive other persons entitled to the Saswathom and Verumpattom holdings of the normal use of water to which they are entitled. It also appears from the judgment that even the first defendant's learned counsel conceded that without the waters of this irrigation system it will not be possible to cultivate the Konganpara estate. The learned Judge finally found that the plaintiff can use water to the extent that is necessary for the cultivation of his estate. The learned Judge also held that the plaintiff is so entitled to use the water for the cultivation of his estate without any liability to

pay any Neervaram to the plaintiff. In this view, the learned Judge granted the injunction as prayed for.

18. Regarding the claim for damages, the learned Judge held that the plaintiff is entitled to Rs. 679-6-0 for loss sustained by him regarding the paddy crops. But regarding the claim for damages as regards sugarcane crop, the learned Judge rejected the plaintiff's claim in toto. Similarly, regarding the damage caused to plaintiff's coconut plants, arecanut and orange, the learned Judge awarded a small amount by way of damages. Finally, the learned Judge awarded to the plaintiff a decree for Rs. 1,000/- as and for damages.

19. The other claims of the plaintiff for damages were rejected.

20. The first defendant has filed this appeal against the decree for injunction and the damages awarded against him. The plaintiff has filed a memorandum of cross-objections claiming a larger amount as damages in respect of sugarcane and other trees etc,

21. Mr. C.K. Viswanatha Iyer learned counsel for the first defendant-appellant, has attacked the decree of the learned Judge. His contention is that the ownership of the Konganpara lands and the ownership of the suit chal are entirely different and were acquired by the first defendant's tarwad under independent title. The first defendant's tarwad has been collecting Neervaram for water supplied from the suit chal. The entire ownership, control and possession of the suit chal vested in the first defendant and even during the time when the ownership of both the estate and the chal vested to the tarwad, they have been dealing with them under, different rights, The doctrine of merger cannot apply at all to this case.

Even when the Konganpara estate has been sold, the tarwad's independent right in the suit chal remains in them and no right in the suit chal has ever been mortgaged, sold or otherwise dealt with in favour of any third party by the tarwad. The suit chal is not appurtenant to the Konganpara estate. The first defendant as absolute owner of the suit chal, was collecting Neervaram from the parties including the plaintiff and his predecessors-in-interest for water supplied to Konganpara estate. When the Neervaram was refused, the first defendant was entitled in law to stop the supply of water and as such, the action of the first defendant is perfectly legal and no injunction can be passed against his client, nor can a decree for damages be awarded;

22. On the other hand, Mr. N. Sundara Iyer, learned counsel for the plaintiff-first respondent, has supported the judgment of the trial court regarding the absolute right of the plaintiff to get water without payment of any Neervaram to the first defendant. He also very strongly relied upon certain transactions, which will be considered later, to show that the first defendant has never made any distinction between his rights in the Konganpara estate and the irrigation system. The irrigation system has also been dealt with, as being appurtenant to the Konganpara estate. He also supported the judgment of trial court regarding the

damages decreed to his client.

23. The substantial case of the plaintiff in the plaint is that the suit irrigation system is one intended for the Konganpara lands to which the said irrigation system is appurtenant and that the plaintiff is entitled to water for the irrigation of his lands without any liability for payment of Neer-vararn. Though this was the case pleaded in the plaint, yet before the learned Judge a contention was advanced on behalf of the plaintiff that the irrigation system has also been purchased by Doctor M.K. Subramam^a Iyer and later on those rights have been conveyed to the plaintiff also. But the learned Judge has rejected this contention and has held that the irrigation system as such has not been purchased by either the plaintiff or his predecessor in-interest, Doctor M. K. Subrama-nia Iyer. Though this point has been held .^against the plaintiff in this court, Mr. N. Sundara Iyer, learned counsel for the plaintiff, did not attack the finding and was content to proceed on the basis that the rights claimed by his client are only on the basis that the irrigation system is appurtenant to the Konganpara lands. In view of this, it is not really necessary for us to cover so many documents which have been considered by the lower court.

24. A short history as to how the irrigation system came to vest in the first defendant's tarwad can now be given. The first defendant's tarwad was already the owner of the complete block of lands called the Konganpara estate. One Subramania Patter was a Saswathom holder of a portion of the Konganpara esate known as Anakkal Challa,. This Subramania Patter executed on 31-7-1892 a Pattom chit Ex-BI to Chondath tarwad. In that it is stated that the Chondath tarwad has given him permission to divert water from the junction of travatlupara river and the Walayar river and take the same for his cultivation purposes by means of a chal dug through the lands of the Chondath tarwad. The said Subramania Patter agrees to give (he necessary water for the Chondath tarwad also. On 3-2-1893, one Susa obtains permission under Ex-B6 from the Cochin Government to construct a stone embankment at the bend of the Walayar river somewhere near Iravattipara Pathi De-som.

Under Ex-B2, on 4-5-1893, the said Subramania Patter executes a mortgage of Anakkal Challa in Konganpara to the first defendant's mother. In that it is staled that he has got a Saswathom right in the Anakkal Challa and that he has constructed a chal for irrigating the said Anakkal Challa. For the expenses incurred in connection with the construction of the said chal, the said Anakkal Challa lands are mortgaged to the tarwad. It is further slated that the mortgagor therein will construct a chal" leading up to the Eri it Konganpara lands in the possession of the tarwad and give water for the crops therein on condition that the tarwad pays him a Neervaram of 525 Paras of paddy per year.

25. Exs. B20, A7 and B3 dated 4-12-1894, 21-12-1894 and 26-11-1894 show the further cons-truction of the chal by Susa. Ultimately on 9-1-1905 under Ex. B4 Susa and his brother execute a sale deed in favour of the mother of the 1st defendant regarding the dam sluice and tie chal which is the subject-matter of

this appeal. The assignors in that document assign their complete rights to the first defendant's tarwad in the dam, the chals constructed in the properties of the Chondath people and all their rights in the suit chal. Ex-B4 further states that in future, first defendant's tarwad is entitled to the use of water flowing in the suit chal. Thus, on 9-1-1905, the first defendant's tarwad becomes the owner of the irrigation system at a time when they were already the owners of the Konganpara estate which was being irrigated by the said irrigation system..

26. As already stated, Mr. C.K. Viswanatha Iyer's main contention is that in spite of the fact that the two rights have become joined in the first defendant's tarwad, such a fusion will not in law make the one merge in the other and thus destroy their independent legal character; whereas on the other hand, Mr. N. Sundara Iyer learned counsel for the respondent takes the stand that there is a complete fusion of all interest in the first defendant's tarwad and the principles of Section 8 of the T.P. Act and Section 13 of the Easements Act will apply with regard to the transactions entered into by the first defendant's tarwad as owners of the Konganpara estate.

27. Before considering the legal aspect, we have to consider the way in which the first defendant's tarwad dealt with these properties and the water rights in favour of third parties.

28. There was a simple mortgage, by the first defendant and his sister of the Konganpara estate on 20-7-1931 under Ex. B18 in favour of Doctor M. K. Subramania Iyer. There was also a puisne mortgage on 26-11-1931 under Ex. B27 in favour of one Ramaswamy Iyer. This Ramaswamy Iyer obtained a decree in OS. 79/1933 Sub-Court Palghat. The first defendant and his sister, in order to pay this decree-holder and also to discharge the simple mortgage under Ex. B18, executed a possessory mortgage on 24-9-1934 under Ex. A1 to Doctor M.K. Subramania Iyer. Ex. B18 stood discharged and a portion of the decree debt due to Ramaswamy Iyer was also paid off,

29. Certain recitals in this document are very important as they will throw a flood of light on the manner in which the first defendant's tarwad dealt with their rights regarding the ownership of the Konganpara estate and the ownership of the chal. On the date of Ex. A1 there is no dispute that the first defendant was the absolute owner of both the estate and the irrigation system and there is also no dispute that after 1905 the first defendant's tarwad would not have been plying any Neervaram because both the rights are in them.

30. The relevant recitals in Ex. A1 show that the mortgagee, Doctor M. K. Subramania Iyer was put in possession of the Konganpara estate and also the chal, and the mortgagee was entitled to take water coming along the said chal for the irrigation of the mortgaged property.

31. The said document does not, in our opinion, give any indication that the first defendant's tarwad was dealing with the two rights in different ways. Under the document, power is given to the mortgagee to carry out the repairs to the water

channel existing on the properties and also to incur certain other expenses namely, payment of Government assessment etc. After meeting those expenses, the mortgagee is authorised to appropriate the balance income towards interest due on the usufructuary mortgage. After such deduction, the balance interest payable by the mortggor is stated to be Rs. 865 which again was stated to be personally payable by the mortgagors-- see para 5.

32. Para 9 of the said document further recites that the mortgagee, shall repair the water channel in the properties and keep the same in a fit condition so that both the parties shall use the water in the channel without any mutual inconvenience and discord.

33. Apart from the fact that there is nothing in this document to indicate that the mortgagors were dealing with their rights in the estate and their rights in the irrigation system in any way independently or differently, the document is scrupulously silent about the payment of any Neervaram by the mortgagee for the water used by them from the said channel. No credit is given in favour of the mortgagor (the present first defendant) for any amounts that may be due to him for Neervaram so long as the usufructuary mortgagee is in possession. Not only that, the actual expense incurred by the usufructuary mortgagee for the repair of the irrigation system is debited to the mortgagor's account. This, coupled with the non-stipulation regarding the payment of Neervaram clearly shows, in our opinion, that the irrigation system was treated as appurtenant to the Konganpara estate which is entitled to water from the suit chal without any liability for payment of Neervaram. The only right that has been reserved under this document in favour of the tarwad was its right to take water also for the irrigation of the other lands of the tarwad. As already stated, Mr. N. Sundara Iyer does not contend in this court that his client has title to the irrigation chal by purchase and therefore it has become unnecessary for us to find out what was sold and purchased by Subramania Iyer under Exs. A2, A14 and later on conveyed to the plaintiff under Exs. A4 and A16. There is also MUCH force in the strong reliance placed by Mr. N. Sundara Iyer on the fact that the tarwad gave as security under Ex. A6 the documents regarding water rights. That will clearly show that the right to take water from the suit chal for the cultivation of Co-chin Konganpara lands was also admitted by the mortgagors at the time of the mortgage. The learned Judge has stated in para 10 of his judgment that it has been conceded by the learned counsel for the defendants that without the waters of this irrigation system it is not possible to cultivate the Konganpara estate.

34. There is also the oral evidence of PWs. 1 and 5 who are the Kariasthanas of the Chondath farwad that the rent payable for taking water through the Chondath lands was paid by Doctor Subramania Iyer and subsequently by the plaintiff and never by the first defendant after the date of the mortgage under Ex. A1. There is also the evidence of Doctor Subramania Iyer as P.W. 15 that after the date of Ex. A1 he has been attending to the maintenance and repair of the chal and that he has never been paying any Neervaram to the first defendant. He

has also stated that he was in possession of the suit chal from the date of Ex. A1. There is also the evidence of the plaintiff as P.W. 2 that after his purchase he has been in possession and enjoyment of the suit channel from the date of his purchase. He has also denied the case set up by the first defendant in his written statement that the plaintiff was allowed to repair the channel and set off the repair charges as against the Neervaram payable by him. There is absolutely nothing in writing to evidence such arrangement and the learned Judge has accepted the evidence of P.W. 2 on this point. There is absolutely no acceptable evidence on the side of the defendant to show that there was any such arrangement or agreement with the plaintiff,

35. There is also the evidence of P.W. 15 who is a very respectable man, that the suit properties cannot be cultivated without the waters of the suit irrigation system. In fact, he has also stated in answer to a question in cross-examination that while he was in possession, the water from the suit channel was used for his paddy lands and also for the garden and sugarcane crops that were raised on the land by his tenant. In view of all the circumstances mentioned above, it follows that the suit irrigation system with the water flowing therein is appurtenant to the plaint schedule properties and that the owner namely, the plaintiff herein is entitled to take those waters for the cultivation of the said properties without any liability for payment of any Neervaram to the first defendant or anybody else. Therefore, the findings of the learned Judge on issues 3, 4 and 6 are accepted and hereby confirmed.

36. In spite of this finding, the learned counsel for 1st defendant contended that there is no fusion in law of the rights of the tarwad regarding the estate which was already owned by them and their rights in the suit chal which was acquired by them only as late as 1905, and that unless there is a complete identity of the two rights there cannot be a fusion and merger of the two rights. He has relied upon certain passage in Cheshire's Modern Real Property, 7th edition at page 788. At page 788 the learned author gives the essentials of merger as follows:

"(1) that the estates shall unite in the same person without any intervening estate; and

(2) that "the person in whom they unite shall hold them both in the same right."

We are not able to know how this passage supports the contention of Mr. C.K. Viswanatha Iyer that there cannot be a merger to tie present case. The first defendant's tarwad was already the owner of the Konganpara estate and subsequently, they also became the absolute owners of the irrigation system which was irrigating those lands. Therefore, this is pre-eminently a case where both the essentials mentioned by the learned author have come into play. In fact, the learned author himself says:

"The term "merger means that, where a lesser and a greater estate in the same land come together and vest, without any intermediate estate's, in the same person and in the same right, the lesser is immediately annihilated by operation

of law. It is said to be "merged" i.e., sunk or drowned, in the greater estate."

Mr. C. K. Viswanatha Iyer also referred as to the exceptions of the doctrine of "merger" stated in Halsbury's Laws of England, Second Edition Vol. 27 at page 811. In our opinion, the case before us does not come within those exceptions.

37. The learned counsel also relied upon the decision of the Calcutta High Court in *Tinkori Pathak Vs. Ram Gopal Pathak and Others*, On the basis of this decision he concluded that the unity of title of the two estates will not extinguish an easement. But it will be seen that the learned Judges at page 10 of the reports clearly lay down that (sic) of title of the two estates will not extinguish an easement, unless the ownership of the two estates be co-extensive, equal in validity, quality and all other circumstances of right and the learned Judges also give certain exceptions where mere unity of possession will not extinguish an easement and that there will only be a suspension during the time of such unity of possession. Here again, we have to point out that the decision of the Calcutta High Court does not at all assist the appellant. Even the view of the learned Judges there is that there will be an extinguishment of the easement if the ownership is co-extensive, equal and valid and all other circumstances of right. In this case, this test is more than amply satisfied because there has been a complete unity of title in the *tarwad* in respect of both the estate and the *chal*.

38. On the other hand, Mr. N. Sundara Iyer relied upon the principles laid down in Section 8 of the Transfer of Property Act as also Section 13 of the Indian Easements Act. Section 8 of the Transfer of Property Act states that unless a different intention as expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interests which the transferor is then capable of passing in the property and in the legal incidents thereof. That Section 8 will apply also to mortgages will be seen from the decision in *Sholalal v. Nanhe-lal* 17 Ind Cas 129 and also the decision of the Privy Council in *Asghar Peza Khan v. Mahomed Medhi Hossein Khan* ILR Cal. 556.

39. Further it will be seen from the decision of the Privy Council in AIR 1940 11 (Privy Council) at p. 14 that the purchaser under a mortgage decree gets the right title and interest in the mortgaged subjects which the mortgagor had at the date of the mortgage and charged there-by. There cannot be any dispute (that on all the relevant dates, the Konganpara estate was entitled to be irrigated by the *suit chal* and that was a right which the first defendant-mortgagor had in the properties.

40. We have already pointed out that there was nothing in Ex-A 1 to show that the mortgagors expressed any different intention regarding the *suit chal*. There was absolutely no reservation of any of the rights, of the mortgagor in the *suit chal*. Not only that the mortgage document further even recognised the right of the mortgagee to utilise the water in the *dial* for cultivating the lands. Therefore, in our Opinion, the principles of Section 8 of the Transfer of Property Act will apply. We are also of the opinion that the principles of Section 13 of the

Easements Act especially Clause (b) will apply to the case before us. There is no different intention expressed or implied to show that the owner of the Konganpara lands is not entitled to take water from the suit chal. There is no dispute that the water of the suit chal is necessary for entering the Konganpara lands as it was enjoyed when the transfer took effect.

41. In this connection, we may also refer to the decision of the Madras High Court in Souriraja Naidu and Another Vs. Rajagopalan and Others, where Clause (b) of Section 13 of the Easements Act was invoked. In that case, it was found that the plaintiff's lands, before being transferred to the plaintiff, were irrigated by means of a channel passing over the plot which remained in the defendant's possession. The learned Judges observed at p. 304 (of Mad LJ): (at p. 813 of AIR) as follows:

"An easement apparent and continuous and necessary for enjoying the portions severed from the transferor's land will pass to the transferee unless a contrary intention is expressed in the instrument of transfer. It appears as has been found by the courts below, that before the plaintiff's plots were severed from the defendant's plots these wet lands were irrigated by means of the channel passing over the plot which still remains in the defendant's possession. Unless there was a stipulation to the contrary at the time of the transfer, the transferees were entitled to the same facilities of irrigation that used to be attached to the land transferred before it was transferred and the defendants are not entitled now, 20 years later, to tell the transferees to look out for some new source of supply on the ground that they do not wish to let them enjoy those irrigation facilities which were attached to the land before it was sold."

This judgment followed an earlier Division Bench ruling of the Madras High Court reported in Morla Gangulu and Another Vs. Thata Jagannatham and Others, The decision in Souriraja Naidu and Another Vs. Rajagopalan and Others, was again followed in Krishna Ayyar and Another Vs. Ayyappa Naick, by Mr. Justice Krishnan.

42. To a similar effect is the decision of a Division Bench of the Travancore-Cochin High Court, reported in Kochu Menon v. Achuthan Nair. AIR 1952 Trav-Co 400. The learned Judges have held that where an artificial water-course passes through the lands of several owners, (here is the strong presumption that the water-course was originally constructed under an expressed or implied agreement between all the owners concerned whereby all the owners agreed to exercise rights over the water of the water-course. In such cases, unless facts that might destroy such presumption are forthcoming, one of the owners cannot claim exclusive right for the entire water flowing through the channel, nor could the water be diverted or lessened in quantity by the owner of the land at its source or by owners of land through which it passes to the injury of the lower owners down the stream. The rights of owners of wet land in natural and artificial channel have been discussed in the decision of the Privy Council in Ramessur Persad Narain Singh v. Koonj Behari Pattuk ILR Cal 633. Their Lordships held that the right to water flowing to a man's land through an artificial water-course

constructed on a neighbour's land must rest on some ground or arrangement proved or presumed.

43. Therefore, it follows that the suit chal is one appurtenant to the Konganpara estate and the latter estate is entitled to use the water from the suit chal without any liability for payment of Neervaram. It also follows that in 1905 when the rights in the suit chal were also purchased by the first defendant's tarwad, there has been a complete merger of the two rights in them. The first defendant's tarwad has also been dealing with both the rights in common without making any differentiation regarding the two rights. The rights of the tarwad in the suit channel have not been, separately reserved by the tarwad under Ex-A1. On the other hand, Ex-A1 recognises the rights of the mortgagee to take water from the suit chal. The oral evidence also clearly shows that the suit lands cannot be cultivated without the water from the suit chal. The first defendant has not been able to establish that notwithstanding all these circumstances, he is entitled to stop the supply of water unless Neervaram is paid to him. Therefore, we hold that the plaintiff is entitled to the injunction as prayed for by him.

44. Mr. C.K. Viswanatha Iyer further contended that the portion known as Anakkal Challa must be treated in a different way. According to him the sister of the first defendant was the Sas-watham holder of those properties & her special rights must be recognised. We are not able to accept the contention because we find that even this Saswathom holder has joined along with the first defendant in execution of Exs. B 18, B 27, A1 and other documents. There is absolutely no reservation of any rights by the sister of the first defendant who was a party to Ex. A1. Both the brother and the sister recognised the right of the usufructuary mortgagee to utilise the water from the suit chal for cultivating his lands. In the absence of the Saswarthom holder having specifically reserved any of her special rights in the document, to which she was a party, it is not possible to differentiate her case from that of the first defendant. Therefore, this contention of Mr. C. K. Viswanatha Iyer cannot be accepted.

45. The last contention of Mr. Viswanatha Iyer was that the right of the plaintiff in any event, must be restricted to the circumstances that existed on 24-9-1934 namely, the date of Ex. A1. On this basis, he contended that the plaintiff may be entitled to water only for the paddy lands and not for the sugarcane, orange, and other trees which are all now reared by the plaintiff. Here again, we cannot accept the contention of Mr. Viswanatha Iyer because there is the clear evidence of P.W. 15, the usufructuary mortgagee under Ex. A that while he was in possession, the water from the suit chal was used for irrigation of paddy field as also for garden and sugarcane crops which were raised on the lands. There is no acceptable evidence on the side of the first defendant to disprove these statements and they go to show that even as early as 1934 the Konganpara estate was entitled to irrigation from the suit chal for all types of cultivation that was being carried on. Therefore, it was not possible for us to restrict the right of the plaintiff in any such manner.

46. Mr. Viswanatha Iyer also", contested the decree passed against his client for damages. There is also the memorandum of cross-objections by the plaintiff regarding the disallowance of his higher claim for damages. In our opinion, the learned judge has considered all the aspects of the matter including the commissioner's report and has come to a correct conclusion fixing the damages payable by the first defendant to the plaintiff at Rs. 1000. Neither Mr. Viswanrrtha Iyer, who wants that decree to be cancelled, nor Mr. N. Sundara Iyer who wants the decree for damages to be enhanced, have been able to satisfy us in any manner that the findings of the learned Judge on this point call for any interference. Therefore, the decree of the learned Judge for damages passed against the defendant is also confirmed and the memorandum of cross objections filed by the plaintiff is dismissed.

47. In the result, the decree and judgment of His learned Subordinate Judge of South Malabar, Palghat, are confirmed and this appeal dismissed with costs of the plaintiff respondent¹ and the memorandum of objections is also dismissed with costs.