
(1917) 11 MAD CK 0006
In the Madras High Court

Kumarappa Reddi

APPELLANT

Vs

Manavala Goundan

RESPONDENT

Date of Decision : 23-11-1917

Acts Referred:

Citation : AIR 1918 Mad 1 : (1918) ILR (Mad) 374 : (1918) 7 LW 243 : (1918) 34 MLJ 104

Hon'ble Judges : Sadasiva Aiyar, J;Kumaraswami Sastri, J

Bench : Full Bench

Judgement

1. As regards the question of law referred to us I am of opinion that the decision in Kakarla Abbayya v. Raja Venkata Papayya Rao (1905) 29

M. 24 must be overruled. In the cases to which Sir Charles Turner was a party the Court no doubt examined the evidence in detail to see if it was

sufficient to support the custom, but in no case did they interfere with the findings except in Mirabivi v. Vellayana ILR (1885) M. 464 and

thereafter referring to the findings they observed that the question before them was ""whether there is evidence on which such custom could

reasonably have been found to exist"". They came to the conclusion that the evidence was not reasonably sufficient to support the custom. No

question of the limits of the Court's right of interference in second appeal was raised or decided in these cases. As regards Kaharla Abbayya v.

Raja Venkata Papayya Rao ILR (1905) M. 24. I am unable with great respect to agree with the observations of Subramania Aiyar, J. as to the

effect of the words "" usage having the force of law"" in that section. This section has a long history going back to the days of the Sudder Court. Act

XVI of 1853 gave a special appeal to the Sudder Courts from any decision passed on a regular appeal in any of the Subordinate Civil Courts "" 1st

on the ground that the decision hath failed to determine all material points in difference in the cause, or hath determined the same or any of them contrary to law or usage having the force of law". Under that section, as under this, where one of the material points in the case is the existence of a custom, that, as the Privy Council has recently laid down, is a mixed question of fact and law; and the Sudder Court was only entitled to interfere if the Subordinate Court had determined it "contrary to law or usage having the force of law", and not, also, as in ordinary appeals, on the ground that the Subordinate Court had determined the point contrary to the weight of the evidence. The words "usage having the force of law" in the section appear to me to be little more than words of amplification, and in any view not to give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact, than with, any other findings of fact. This section was reproduced in the successive codes of Civil Procedure with alterations that in no way affect its scope so far as the present question is concerned. The more recent decisions of Ayling and Seshagiri Aiyar, JJ. in *Pankajammal v. The Secretary of State for India* (1916) 32 M.L.J. 287 and of Mookerjee and Beachcroft JJ. in *Kailas v. Padmahisor* (1917) 25 Cal. L.J. 613 where all the cases are exhaustively reviewed, take the same view.

2. Even so, I am of opinion that the finding of the District Judge that the custom is inapplicable to this estate cannot be accepted. He does not find that there has been in law a discontinuance of the custom, but uses the fact that swatantrams are not proved to have been paid for a long time as evidence against the existence of the liability. He gives no effect to the record in the Settlement Register of 1878 that the lands in B schedule were liable to pay swatantrams. This is a strong instance of the assertion of the right on the estate and entitled to great weight, while on the other hand the refusal of the Settlement Officers to register the swatantram as payable in support of the lands in A schedule is not conclusive as they had no authority to determine the question. As regards Exhibits E, H and K. the District Judge finds that they indicate a right to tunduwarem even in suit lands against which no swatantram is entered in the register but observes they relate only to a small extent of land. Lastly we come to the documents Exhibit B in which the defendant agrees to pay swatantrams and Exhibit D series to the same effect which were taken from the other

tenants. These are strong admissions against interest, and the District Judge was not justified in dismissing them as of no importance because they are recent. The liability to pay swatantrams is a well known incident of mirasi tenure in Chingleput; but, as it is not universally applicable, it has been held by the Pull Bench in Sakkaji Rau v. Latchmana Gaundan ILR (1880) M. 149 that it is for the mirasidar to show that he is entitled to enforce it by the custom of the estate or the neighbourhood." The above, findings of fact by the District Judge are in my opinion sufficient to raise a presumption in the plaintiff's favour which is not rebutted by any other findings, and I would reverse the decrees and decree the suit with costs throughout.

Sadasiva Aiyar, J.

3. I confess that I have felt great hesitation in arriving at a conclusion on the question whether in Second Appeal the High Court has got a right to itself examine the evidence with reference to which the finding of the District Judge on the issue of custom was given. On the one side, there are the decisions of this Court in Hanumantamma v. Rami Reddi ILR (1881) M. 272, Vishnu v. Krishnan ILR (1883) M. 3 and Mirabivi v. Vellayanna ILR (1885) M. 464 where several learned Judges of this Court (including Sir Charles Turner, C.J. and Muthusami Aiyar, J.) have assumed as indisputable that this Court has got such a right. I agree with Sir S. Subramania Aiyar, (Officiating Chief Justice) in Kakarla Abbayya v. Baja Venkata Papayya Rao ILR (1905) M. 24 that "it is impossible to believe that the learned Judges who decided" those cases "overlooked so obvious an objection." In Kakarla Abbayya v. Raja Venkata Papayya Rao, Sir S. Subramania Aiyar (Officiating Chief Justice) and Boddam, J. directly decided that whatever may be the English law, where a question of "usage having the force of law," is concerned, the High Court in Second Appeal ought to have and has the power to consider even the oral evidence as regards facts, incidents and instances on which the parties relied in the lower Courts to prove or to disprove the alleged usage. The tendency of recent decisions in this Court has been to follow the Calcutta decisions. In Kailas v. Padmakisor (1917) 25 C.L.J. 613 that very learned Judge Sir Ashutosh Mukerjee who was one of the Bench which decided the case very exhaustively deals with the question and I shall extract

from that judgment the material conclusions arrived at therein.

(1) "The question of the existence of an alleged custom is a question of fact".

(2) The finding of the lower Appellate Court "is liable to attack on the ground that irrelevant evidence has been received" "or that relevant evidence has been excluded".

(3) "also on the ground that there is no evidence of the alleged custom" or "that the finding is based on legally insufficient evidence" "or that" the facts found do not constitute evidence of the alleged custom".

(4) also "on the ground that legal principles or tests have been erroneously applied or that the Court has not correctly appreciated the essential attributes of a custom" "or has overlooked the distinction between a custom and a usage".

(5) "consequently, the question whether the facts found prove the existence of the essential attributes of a custom is a question of law which may be discussed in second appeal.

4. I am naturally very loth to differ from the opinion of Sir S. Subramania Aiyar, J. especially as he give B very cogent reasons for his conclusion in

Kakarla Abbayya v. Raja Venkata Papayya Rao ILR (1905) Mad. 24 but I think that there are certain dicta of their Lordships of the Privy

Council which are more binding upon me. In Ramgopal v. Shamskhaton ILR (1892) Cal. 93 their Lordships quote their own decision in Ramratan

Sukal v. Nandu ILR (1891) Cal. 249 and lay down as regards construction of Sections 584 and 585 of the old CPC (re-enacted practically in the

same terms in the new code) that "it has now been conclusively settled that the third Court cannot entertain an appeal upon any question as to the

soundness of findings of fact by the second Court; and if there is evidence to be considered, the decision of the second Court, however

unsatisfactory it might be if examined, must stand final." Now, the findings as to instances of usage, as to the genuineness of documents put forward

as regards usage and the credibility of witnesses are clearly findings of fact. But as pointed out by their Lordships of the Privy Council themselves

in Palaniappa Chetty v. Daivasikamani Pandara Sannadhi (1917) 33 M.L.J. 1 the Judge's findings as to "what were the things actually done in

alleged pursuance of custom" may be findings of fact but whether the facts so found satisfy the requirement of the law is a question of law. The

decision in Kakarla Abbayya v. Raja Venkata Papayya Rao I.L.R (1905) Mad. 24 is not expressly referred to in Pankajammal v. The Secretary

of State for India (1916) 32 M.L.J. 237. Mr. T.R. Ramachandra Aiyar who appeared in the latter case assures us that (Kakarla Abbayya v. Raja

Venkata Papayya Rao I.L.R (1905) Mad. 24 was in the minds of the learned Judges who decided the latter case and that it was quoted to them.

Of course I accept his statement. The position laid down in Kakarla Abbayya v. Raja Venkata Papayya Rao I.L.R (1905) Mad. 24, namely, that

the evidence can be gone into in, detail in the High Court in Second Appeal is characterised in the judgment in Pankajammal v. The Secretary of

State for India as an "" extreme contention."" The learned judges proceed to say that "" the value to be attached to the evidence let in, its reliability

and in a measure, its relevancy are all matters for the Court below."" They again indicate their inclination to the view that the usage having the force

of law mentioned in Section 100(a) of the CPC should be confined to the usages referred to by Petheram, C.J. in Nivath Singh v. Bikki Singh ILR

(1883) All 650. While the reliability of evidence let in is for the lower Appellate Court, I think (with the greatest respect) that the value to be

attached to the evidence (provided it is not mere "" opinion "" evidence) supposing it is accepted as true and the relevancy of evidence are questions

to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognised judicially in several

cases, the lower Appellate Court finds against the existence of a proper custom on the ground that in its opinion the instances are insufficient in

number, the High Court is clearly entitled to hold that on the facts found by the lower Appellate Court, the custom is legally established. As regards

the observations of Petheram, C.J. in Nivath Singh v. Bikki Singh ILR (1883) All 650 they have been expressly overruled by their Lordships of the

Privy Council in Ramgopal v. Shamskhaton ILR (1992) Cal. 93. However, as I said already, I feel (though after some hesitation) that I should

follow the principles laid down in Kailas v. Padmakisor (1917) 25 C.L.J. 619 in preference to the conclusions in Kakarla Abbayya v. Raja

Venkata Papayya Rao ILR (1905) M. 24. as the former decision seems to be more in consonance with the dicta of the Privy Council in Ramgopal

v. Shamskhaton ILR (1992) Cal. 93 and in Muhammad Kamil v. Imtiaz Fatima ILR (1909) All. 557 and in Anant Singh v. Durga Singh ILR

(1910) All. 363.

5. In the present case, accepting the facts as found, I agree with my Lord that they do satisfy the requirements of the law as to the existence and

validity of the custom. I am inclined also to hold that we are entitled u/s 103 of the CPC to go into the genuineness of the documents in Exhibit C

series (except C1), the District Judge, in my opinion, having not given a finding about the genuineness of these documents (except C1) and I would

find that they are genuine. They strongly corroborate the other evidence as to custom.

6. Further, the document Exhibit B executed by the defendant is a clear admission of the existence of the custom in 1905 and of defendants'

liability to pay thunduwaram according to that custom. Their Lordships of the Privy Council in Chundra Kunwar v. Chaudhri Narpal Singh ILR 29

All 194 quoting from English cases state "'What a party himself admits to be true may be reasonably presumed to be so'". "'The express admissions

of a party to the suit are evidence, and strong evidence against him.'" No explanation was given by the defendant from the box as to his admission

in Exhibit B and "'unless and until he explains such admission'" "'the fact admitted must be taken to be established'" (page 195) The lower Courts

merely argue in a circle when they find that Exhibit B has no consideration because the liability by custom to pay thunduwaram is not established.

Further the lower Courts have ignored the consideration that as regards the right to thunduwaram, the mirasidar has a far less heavy burden to

discharge than when he lays claim to Natham Poramboke lands etc. (See judgments in the Full Bench case in Seshachala Chetty v. Chinnasami

ILR (1916) M. 410.

7. I therefore agree in reversing the lower Court's decrees and allowing the appeal as proposed by my Lord.

Kumaraswami Sastri, J.

8. I agree with the conclusions arrived at by my learned brother Sadasiva Aiyar, J. and have nothing useful to add.