

(1940) 07 MAD CK 0001
In the Madras High Court

S. Subbaraya Mudaliar

APPELLANT

Vs

Appathurai Samban and Another

RESPONDENT

Date of Decision : 31-07-1940

Acts Referred:

Citation : AIR 1943 Mad 756

Hon'ble Judges : Krishnaswami Ayyangar, J

Bench : Division Bench

Judgement

Krishnaswami Ayyangar, J.—These two second appeals arise out of two suits instituted in the Court of the District Munsif of Shiyali being

O. S. Nos. 204 and 205 of 1933. There was a third suit O. S. No. 206 of 1933 tried along with them raising identical questions. The suits were

instituted by the appellant to eject the several defendants in occupation of portions of a piece of dry land part of Survey No. 27 in the village of

Kondal, Shiyali Taluk. The patta for this land has all along stood in the name of the plaintiff and his predecessors-in-title. The plaintiff purchased

roughly two-thirds of the lands in the village of Kondal and among the items purchased was an extent of 32 cents in Survey NO. 27. The

defendants in O. S. No. 204 of 1933 are in possession of 7 out of 32 cents purchased by the plaintiff, while the defendants in O. S. No. 205 of

1933 are in possession of 6 cents thereout. It is unnecessary to consider the special facts of O. S. NO. 206 of 1933, which is not now before me

as it would appear that a second appeal was filed but was dismissed in the admission stage. The purchase by the plaintiff was made under Ex. L

dated 11th May 1933 executed by the previous owners, Somasundaram Pillai and Subramaniyam Pillai in favour of the plaintiff. In a partition in the

family of the vendors, evidenced by EX. D dated 17th June 1923 Survey No. 27 was treated as family property and was the subject-matter of

division. These two documents coupled with the fact that the patta has all along stood in the name of the plaintiff and his predecessors-in-title and

they it was that were paying kist due to Government constitute prima facie evidence of the title to the land in dispute being in the plaintiff.

2. The case of the plaintiff is that the defendants in the several suits and their ancestors have been pannai cultivators under the proprietors of the

village, and that they were allowed to reside in the suit sites and do cultivation work for the proprietors. The plaintiff pleaded the well-known

custom of the Tanjore district, to allot sites for residence for purakkudis, who do cultivation work under the mirasdars of the Tanjore District and

alleged that it is an incident of the custom that the cultivating tenant should surrender the site in case he ceased to work for or cultivate the land of

the mirasdar. The plaintiff then referred to the defendants having ceased to do work for the plaintiff from 1st August 1933 and prayed for a decree

for possession against the defendants. In O. S. No. 204 of 1933 there were two defendants, Appathurai Samban and Rethinam Samban, father

and son respectively, and they are the respondents in S. A. No. 430 of 1937. In O. S. No. 205 of 1933 also there were two defendants, namely,

Kuppan Samban and Perumal, father and son again, the respondents in S. A. No. 432 of 1937. As I have said, the case of the plaintiff is that these

defendants were in occupation of the respective sites in pursuance of the custom and that in view of the refusal to work for the plaintiff, they are

liable to be ejected. The defendants filed written statements denying the title of the plaintiffs, and denying that they and their ancestors were pannai

servants or purakkudi tenants under the plaintiff or his predecessors-in-title, nor ever rendered any sort of service to them. They denied the custom

pleaded by the plaintiff. They denied that the plaintiff or his predecessors-in-title were in possession of the suit sites within twelve years of the

institution of the suit and pleaded that they had perfected a title to them by adverse possession. It is to be observed that the defendants did not

plead that they were the owners of the land except to the extent that title was claimed by operation of the rules of the Limitation Act. There were a

number of issues framed in the suit, but the only important ones were issues 1 to 4 which were as follows:

- (1) Whether the plaintiff is entitled to the suit property ?
- (2) Whether the defendants or their ancestors were cultivating tenants under the plaintiff and his predecessors-in-title ?
- (3) Whether the alleged Tanjore custom is true and valid ?
- (4) Whether the suit is in time ?

3. The learned District Munsif considered issues 1 to 3 together and held on a consideration of the oral and documentary evidence that defendants

were cultivating the land of the plaintiff's predecessors-in-title and doing service under them sometimes as Pannai servants and sometimes as

Purakkudi tenants, found the title to the suit property in the plaintiff and upheld the Tanjore custom pleaded by him and supported by the witnesses

called on his behalf. On issue 4, he recorded the finding that the suit is in time, as the defendants denied doing service only from 1st August 1933.

As a result of his findings, the learned District Munsif gave a decree to the plaintiff for possession of the properties in dispute after removal of the

superstructure thereon put up by the defendants. The defendants in the three suits preferred appeals to the District Judge, East Tanjore. The

appeals were heard together and disposed of in one common judgment. The District Judge reversed the decrees of the District Munsif and

dismissed the suits. He considered the appeals under three heads:

- (1) Whether the plaintiff has a valid and subsisting title to the suit property ?
- (2) Whether the defendants or their ancestors were let into possession of the suit sites on the understanding alleged by the plaintiff ?
- (3) Whether the suit is in time ?

4. The learned Judge has recorded his finding in these terms:

In these circumstances, I do not think I will be justified in finding that the plaintiff has a valid and subsisting title to the suit properties or that the

appellants or their predecessors-in-title were let into possession of the properties under the custom alleged by the plaintiff.

5. The learned Judge conceded that the suit property was included in the sale deed which the plaintiff obtained from his vendors and that it was an

item dealt with in the partition deed in the family of the latter. He also accepted the position that the patta in respect of the suit land stood in the

name of the plaintiff and that the defendants did not contend that they ever paid

the kist due on the property. But he refused to attach serious value to the title standing in the name of the plaintiff and to the patta being in his name. As regards the patta, he made the observation that the patta is only evidence of possession, but that no inference in favour of the plaintiff's title could be drawn, as admittedly the defendants have been in possession from prior to the date of the patta, Ex. J. and the partition deed, Ex. D.

6. In my view, this is a remarkable statement for the learned Judge to make, remembering that the defendants never asserted an original title in themselves and also remembering that Exs. D and L prove a prima facie, title in the plaintiff and that it is not the defendant's case that they ever had the patta in their names or ever paid the kist. It is very difficult to accept the somewhat summary manner in which he disposed of the evidential value of the patta in this case. It is well known that in the Tanjore District--at any rate--there are many families Owning lands from time immemorial who can produce no other or better title deed than a patta, and why the learned Judge considered that the circumstance that the patta stood in the name of the plaintiff is not of an appreciably valuable character, more especially in the absence of any claim of original title in the defendants. I am at a loss to understand. If the learned Judge meant to say that the plaintiff had not made out a title to the property as having ever been in him I may at once say that this is a view for which there is absolutely no support in the evidence and is wholly contradicted by the documents produced in the case. Possibly the learned Judge meant that the plaintiff and his predecessors-in-title owned the property at some time, but that they lost their title by discontinuance or dispossession within the meaning of Article 142 or adverse possession under Article 144. It is true that the defendants and their ancestors have been for a long time in possession of the suit sites. But the documents filed in the case to which I shall presently refer and which were considered by the Courts below, make it abundantly clear that their possession cannot be regarded as either adverse possession or anything but derivative possession under the plaintiff. The nature of the defendants' possession has to be considered from two standpoints: (1) with reference to the custom pleaded and (2) on the direct evidence adduced in the case. First taking the custom, it is fairly clear from the decision of

this Court reported in *Lakshmana Padayachi v. Ramanathan Chettiar* (1904) 27 Mad. 517 that the custom pleaded is in vogue in the Tanjore

District according to which purakudis or artisans were allowed to occupy manaikats belonging to mirasdars free of rent so long as they cultivated

the lands of the mirasdars or rendered them services in other ways. It is useful in this connexion to refer to the statement contained in para. 11 of

the finding of the Subordinate Judge in that case at page 523:

As remarked by a Munsif in one of the judgments I have sent for, a manaikat is a matter of a necessity to a landlord. He may not be able to secure

good and willing tenants to cultivate his lands without giving them a manai to live on near the lands which he undertakes to cultivate. These

purakudis once they are admitted, live on the manais given and continue to cultivate the mirasdars' lands from generation to generation. In one of

the cases which have come before the Courts, it has been found that a landlord having no manai to let for his purakudi to live on had actually

converted a part of his nanjah land for such purpose and gave it to be occupied by his purakudi; and the latter having afterwards refused to vacate

it, when he ceased to cultivate the lands, was ejected from it by a suit in Court.

7. I may observe that there are in some villages grama nathams or village sites which the mirasdar allows to be occupied by the cultivating tenant or

where the natham is insufficient in extent for the purpose of accommodating the cultivating tenants, the practice is for the mirasdar to convert his

other lands into manaikats in order that his purakudis and pannaiyals may live there and cultivate his land. In the present case, the land in dispute is

not grama natham but ordinary punja land in the patta of the plaintiff. The statement of the Subordinate Judge in this paragraph where he says that,

these purakudis once they are admitted, live on the manais given and continue to cultivate the mirasdars' lands from generation to generation,

is true and I may say almost universal in Tanjore District. It is necessary to bear this statement in mind in appreciating the view taken by the learned

District Judge, who has in more than one place in his judgment adverted to the absence of evidence on the side of the plaintiff that the defendants

were let into possession of the suit properties by him or his predecessors-in title. If the custom is for these purakudis and pannaiyals to remain in

occupation of the manaikats from generation to generation to ask the plaintiff to

give evidence to prove that the defendants or their ancestors were actually let into possession is to demand something which it is impossible for him to do.

8. Before the custom can be made available to the plaintiff it is no doubt necessary for him to establish that the defendants were pannaiyals or

purakudis cultivating his land, for if once title in the plaintiff as mirasdar is found and it is also found that the defendants and their ancestors have

been cultivating the land of the mirasdar all along, the custom would come to the aid of the plaintiff in a suit by him to eject the tenants when they

refuse to cultivate his lands. A series of account books have been filed, accounts maintained by the predecessors-in-title of the plaintiff. Exhibits F

series (F to F 10) are accounts from the year 1922 onwards and they show beyond a possibility of doubt that the defendants in the two suits, O.

S. Nos. 204 and 208 of 1933, were pannaiyals cultivating the land under the predecessor in-title of the plaintiff. Their genuineness is beyond

question and in fact was not disputed in either of the Courts below. It is not denied that the defendants are described in the ledger headings as

pannai servants. It is not clear from the learned District Judge's judgment as to whether he accepted these accounts as genuine or refused to do so.

He referred to the evidence of P. Ws. 1 to 5, who spoke to the fact that the defendants were doing pannai service under the plaintiff's

predecessors-in-title. The following observations then occur:

It is quite easy to get witnesses like P. W. 3. He claims to know something about this because he says he went to his brother-in-law's village and

therefore happened to know that the defendants were working as pannaiyals. The kariyasthans of the predecessors-in-title of the plaintiff are

interested in supporting the plaintiff's case, for they will have to support the warranty of title of their master.

9. But the learned Judge apparently over-looked the fact that P. W. 4, the karnam of the village, has given evidence on the point and that he is an

independent witness, whose evidence is not open to the criticism of either interest or partiality. As I have said, the Munsif in his judgment has

recorded the fact that the entries in the account books are not challenged by the defendants. By this statement I understand that the defendants did

not in the trial Court attack either the genuineness of 1½ the entries or their

evidentiary value. These accounts are of the nature that is common where a mirasdar has his land cultivated by the pannaiyals and there is not the slightest indication in the evidence to suggest that the plaintiff's predecessors-in-title were attempting to create evidence against the occupants of the suit sites. It does not appear to me that the learned District Judge made up his mind to reject the accounts altogether. He simply let go certain criticisms, but was not prepared to go to the length of holding that the accounts were untrue or unreliable. What I have said above about Exs. F series applies also to Exs. G and H series as well. The learned District Judge apparently on the view that the account books could not be brushed aside held them to be useless for the reasons given by him in para. 12 of his judgment. He said:

The account books themselves are not enough to show that the defendants have been pannai servants from the date on which they were let in possession of the properties. There is absolutely no evidence worth the name to show on what date these defendants got into possession of the properties.

10. I do not understand the sentence to mean that it was the case of either side that the defendants were let into possession of the property in 1921 or 1922. What apparently the learned Judge means is that there is no direct proof that they were let into possession some time prior to 1922 or that they worked as pannai servants before that date. It may be conceded that the accounts do not take us beyond 1922, but from and after that year it is made out by the accounts that the defendants were pannai servants and were doing work for the mirasdars as such. The question is as to what is the legitimate inference to be drawn from this proved fact. Are we to assume that persons who are pannaiyals in possession of sites in the patta of the mirasdar did not fulfil the same character before 1922 ? Are we to assume that they came into possession of the property as trespassers or as owners in some way, whenever it might be that they came into possession ? Is it not right if the custom pleaded is true, to assume that persons who were in possession in 1922 as pannai servants were in possession upon the same footing always ? I regret to say that the learned District Judge has shut his mind to the necessary inference to be drawn from the proved fact that the defendants were working for the mirasdars as

pannaiyals in 1922 and later. As I have said, to expect the plaintiff to prove an actual letting is to ask him to prove something which it is impossible

for him to prove and which the law does not require him to prove. It is here that the custom steps in to fill up the gap, the custom which I am

clearly of opinion has been pleaded and which prevails in this village as in other villages of the Tanjore District.

11. In spite of the fact that there is no exception indicated in the judgment in 27 Mad. 6171 the learned Judge has observed that there is no

evidence to prove the prevalence of any such custom in the village, except the interested testimony of the servants of the plaintiff's predecessors-

in-title. He also observes, ""that the defendants have examined five witnesses who swear that there is no such custom."" In my judgment, the learned

Judge approached the question from an incorrect standpoint. The custom having been declared in 27 Mad. 5171 to be in vogue in the whole of the

Tanjore District, if any person or persons assert that that custom does not prevail in any particular village, the burden is upon him to prove the

exception and not for the party who alleges the custom. It is easy for the defendants to assert that the custom does not obtain in the suit village and

if the burden lay upon the defendants, it might be that I may feel bound by such a finding, but inasmuch as the learned Judge has misconceived the

true rule of onus in cases of this sort, I am of opinion that the learned Judge's finding that the custom does not prevail in this village cannot stand.

The learned Judge's view that the suit is barred by limitation as the defendants had been in possession of the property for more than twelve years is

based upon his finding that the custom did not apply and that the defendants were not pannai servants cultivating the lands of the mirasdar. As

these findings are the result of errors of law and cannot be supported, it follows that the possession of the defendants must be held to be the

possession of pannaiyals under the Tanjore custom referred to above.

12. Before concluding this judgment, I should refer to the incorrectness of the view, taken by the District Judge that the plaintiff in a suit of this kind

is bound to prove a right to eject, or as he terms it, that the defendants were let into possession at some particular time. This point was considered

as of great importance in the decision of this Court which went up to the Privy Council in the case reported in *Seturatnam Aiyer v. Venkatachala*

Goundan A.I.R.(1920) P. C. 67. The learned Judges in the High Court refused to attach weight to the fact that the plaintiff was the pattadar of the land in dispute. The opinion was expressed that it is not enough that the plaintiff made out his title, but that he must go further and prove, if he wants to eject a person from his land, that the latter came into possession as his tenant under a contract which entitled him to eject. When the matter went up to the Privy Council their Lordships felt it desirable to point out the error of this view and made the following observations, though they confirmed the judgment of the High Court on other grounds:

There are passages in the High Court's final judgment which unquestionably invite the comment that the learned Judges misapprehended the proper incidence of the burden of proof. Thus the learned Judges say, "We hold that the mere fact of the plaintiff being pattadar does not entitle him to any presumption in his favour." This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title, but also to negative the defendants' claim to permanency, and if this is what was meant it was wrong.

13. For the reasons explained above, the judgment of the learned District Judge cannot be supported. The second appeals are accordingly allowed with costs here and in the lower appellate Court and the decrees of the District Munsif restored. The court fee payable to the Government must be paid by the respondents.