

(1935) 03 MAD CK 0041
In the Madras High Court

S.P. Sundaram Pillai and Others

APPELLANT

Vs

Karuppayee Ammal and Others

RESPONDENT

Date of Decision : 29-03-1935

Acts Referred:

Citation : AIR 1935 Mad 1073 : (1936) ILR (Mad) 5 : 160 Ind. Cas. 1015 :
(1935) 42 LW 771 : (1935) 69 MLJ 48

Hon'ble Judges : Venkatasubba Rao, J; Ramesam, J

Bench : Full Bench

Judgement

Ramesam, J.—For reasons which will appear lower down it will be convenient to take up the latest of these Second Appeals Nos., viz.,

292 and 293 of 1933. These Second Appeals arise out of two suits filed u/s 144 of Act I of 1908. The plaintiff is the same ryot and the defendant

is the same landlord in both cases. In Summary Suit No. 1077 of 1930 (S.A. No. 293 of 1933) he holds under patta No. 47 and in the other suit

No. 1078 of 1930 (S.A. No. 292 of 1933) he holds under patta No. 27. The suits are filed on the ground that the defendant levied an extra

charge for water supplied to the suit holdings in addition to the dry rate to which the lands were admittedly liable. The lands were formerly dry

lands. After the Periyar project came, they had the benefit of the Periyar water and the lands were converted into wet lands and on account of this

the defendant charged a higher rate. The question in these Second Appeals is whether this higher rate is leviable. In paragraph 3 of the plaint the

following allegation is made by the plaintiff. ""The said lands are entirely Periyar-fed and are cultivated only with that water. The land-holder has not

contributed either towards their irrigation facilities or towards their improvement and for such user of the Periyar water, the Government levies and

collects water rate from the plaintiff." This paragraph in the plaint is replied to in paragraph 5 of the written statement. "The allegation that the lands are entirely Periyar-fed and are cultivated only with that water is false. The defendant has given water facility for raising the second crop and it was only with this defendant's water that the second crop has been raised." What exactly the water facility given by the defendant is has not been described in this paragraph. The plaintiff also claims, besides the refund of the amount wrongfully levied for water charge, Rs. 100 as penalty for the illegal exaction by the defendant. The survey numbers with which we are concerned are (1) 25, 60 and 61 in S.A. No. 292 and 60 and 63 in S.A. No. 293. These (other than S. No. 69) are dry lands converted into wet for which the landholder claims a larger rent even for the first crop which is described as tirvai jasti. In this appeal we are concerned only with S. Nos. 25, 60 and 61, in respect of which both the Courts allowed tirvai jasti. We are not concerned with S. No. 63 as tirvai jasti in respect of it has been disallowed by both the Courts. I may mention also that fasli jasti was claimed in respect of S. No. 69; but both the Courts having disallowed it, we are not concerned with it in this appeal. Though S. No. 60 appears in both, the sub-divisions are different in each case. S. No. 60/2 is concerned in patta No. 27 and S. No. 60/3 is concerned in patta No. 47 it is unnecessary to refer to this fact any more. I mention it to avoid confusion. What exactly the additional facility the defendant has given was disclosed in the evidence. There is a tank called the Alathur tank named after the village. This tank is admittedly the irrigation source for certain lands in the village which were always wet lands and which did not include the suit lands. On the west of this tank the Periyar channel runs from northwest to south-east and at one spot it passes very close by the bund of the tank. Apparently the tank whenever it fills up beyond the F.T.L., the water overflows and this surplus flow gets into a water-way described as marugal by P.W. 2. I avoided the word "channel" because P.W. 2 says "It is not exactly a channel. It is only a marugal. This marugal water goes to Mulloorani kanmoi." This water runs parallel to the Periyar Channel upto some distance and at one place the Periyar water gets into it through sluice No. 18-A, though P.W. 2, seems to have committed some confusion in stating this because he says "this marugal water falls into Periyar at Sluice No. 18-A". It is water from the Periyar that falls into

the marugal. D.W. 2 says ""S. Nos. 60, 61 and 25 are fed by a channel which comes from the Alathur tank and supplemented by Periyar water

fifth branch channel through Sluice No. 18 marked in Ex. 1."" Obviously, it is the latter description that is correct as is evident from the judgments of

the Courts below. The evidence does not exactly show who the owner of this marugal is i.e., to whom it can be said to belong. Undoubtedly the

Mulloorani tank belongs to the defendant-landlord and the water from the marugal ultimately falls in the Mulloorani tank. That tank is the irrigation

source for several lands below it. But S. Nos. 25, 60 and 61 do not get water from this tank. They get water from the marugal on its way to the

tank. Dealing with these facts the Deputy Collector refers to the plaintiff's witnesses and then to D.Ws. 2 and 3 and says:

D.W. 2 (the Revenue Inspector) D.W. 3. (The village Munsif) also say that Alathur tank surplus water mixed with the Periyar channel water and

irrigated these S. Nos. 25, 60 and 61. So it is clear some water from the Alathur tank has irrigated these fields in question.

2. He then refers to the plaintiff's contention in reply to this viz., that in the mixed water, i.e., Alathur surplus plus Periyar water, the Alathur surplus

is negligible and the defendant is not entitled to call the surplus water of the tank as his water. After it overflows beyond the F.T.L. it cannot be

described as his water. In dealing with this contention of the plaintiff the Deputy Collector observes:

The contention that the water after it surpluses is not the defendant's water is not tenable; this surplus water does not go to any Government tank

or to any other stranger's tank but goes only to the defendant's tank and I consider it is still his and any one who uses that water is bound to pay

the defendant for its use.

3. Accordingly he found that the levy of the first crop charge on these three survey numbers was justified but he found that the charge on some

other survey numbers was not justified and gave a decree only for the latter portion and with reference to the illegal levy on that portion he decreed

also a penalty of Rs. 5. There was an appeal to the District Judge by the plaintiff in both the suits. The learned District Judge observed:

It is not quite clear from the evidence whether this surplus channel receives any supply at. all from the Alathur tank except at times of flood.

4. He also added ""It seems to me highly probable that the point at which the channel takes off from the tank is at or about the full tank level.

Finally he said ""in all probability the tank would not overflow into the channel except for a short period during the rains."" I accept the last statement

as a finding that except during the north-east monsoon when there may be floods for a short time there is no surplus water flowing into the channel.

He then proceeded to observe that the time of raising the second crop is not the time when surplus water flows. He therefore thought that the

imposition of any extra charge for the second crop was illegal. Strictly there was no need for discussing the second crop charge before him

because all such second crop charges were disallowed by the Deputy Collector and there was no appeal by the defendant. But as the plaintiff in

his appeal was claiming a higher penalty it may be said that there was necessity for the discussion. So, having agreed with the Deputy Collector that

the fasli jasti was illegal, he proceeded to discuss the tirvai jasti. In paragraph 5 he begins the discussion by saying. ""The position regarding tirvai

jasti is somewhat different."" Then he observes that there is no presumption that the wet crops raised on dry lands would be raised at the end of the

season. He is of course right in this. After disposing of the question of res judicata he observes that the pattas and muchilikas filed show that the

appellant agreed to pay tirvai jasti when a wet crop was raised. But under the Estates Land Act a mere agreement to pay extra charge, if otherwise

unjustified, is useless for, a contract, if otherwise not justified, is not binding on the tenant under the Estates Land Act though it would be binding on

the tenant under the prior Act (Rent Recovery Act, Section 11). The learned District Judge then observed that the evidence of the Revenue

Inspector indicates that some water from the respondent's tank went into the channel from which this tirvai jasti cultivation was irrigated and it

seems to follow that the charge for tirvai jasti is proper. He accordingly confirmed the decision of the Deputy Collector as to the tirvai jasti. Finally

in dealing with the penalty he said ""I have disallowed the entire charge for fasli jasti which is one of the main items in the suit."" In this there seems to

be some misconception because the claim for fasli jasti was a very small amount and was disallowed by the Deputy Collector himself. It is true that

the District Judge's discussion of it cannot be described as irrelevant because the claim for penalty was pressed. But when he said ""I have

disallowed the entire charge"" it looks as if he was under the impression that he disallowed some more fasli jasti in addition to that disallowed by the

Deputy Collector. This is not correct. He enhanced the penalty to Rs 50 in each suit. The tenant has filed these Second Appeals.

5. In the Second Appeals we must proceed on the finding that what gets into the marugal is the surplus water of the Alathur tank and there may be

such surplus water only at flood times. This is the finding of the District Judge. There is no evidence as to the ownership of the channel and the

water ultimately gets into the Mulloorani tank which belongs to the defendant. If any land is further converted from dry into wet and it became

possible to cultivate it with wet cultivation now by reason of the larger supply from the Mulloorani tank, it may be that the landlord is entitled to

some additional rate for rent because, though the water is the Periyar water, it becomes available to the tenants' lands, which were formerly dry

lands only by reason of its being stored up in a tank which the landlord maintains and is bound to keep in good repair though. the expenses may

not be incurred annually. But, as I already observed, S. Nos. 25, 60 and 61 have nothing to do with the Mulloorani tank. Nor is this the

defendant's claim. His claim is because some water is taken from the Alathur tank therefore he is entitled to the additional charge. The Alathur tank

is of course a tank in good repair and a tank which the landlord is bound to maintain; and if he maintains the tank for the purpose of supplying

water to S. Nos. 25, 60 and 61 also in addition to the lands for which it was always recognised as the irrigation source, then the landlord is

justified in asking for additional rent apart from any question of procedure as to the manner in which he should get the amount of it settled. But in

these cases the defendant does not maintain the Alathur tank for the purpose of supplying water to S. Nos. 25, 60 and 61. It is the irrigation

source for some other lands but it happens that water escapes from it as surplus water in flood time and gets into the marugal. On account of this

surplusage it cannot be said that the landlord is maintaining this tank for the use of these lands. The principle on which the landlord can claim any

extra charge for water is simply this that he must have either constructed some work or maintained at his own expense some work for the purpose

of supplying water to the lands in question. Even if he incurs the expenses occasionally once in three or four years for maintaining the tank as a

source of water supply for the particular lands, I think he is entitled to the additional charge. Even in cases where there has been for a long time a tank belonging to the landlord and which has always been maintained from time immemorial but which is the source of supply only for certain lands but not for the disputed lands which are dry lands and afterwards the tank is also made the source of water supply for the lands in dispute and thereby the lands in dispute are converted from dry into wet, even in such cases though no additional expense is incurred by the landlord for maintaining the tank, still, as he undertakes a liability to maintain the tank not only for the sake of the old wet lands but also for the sake of the lands now converted from dry into wet, I think he is entitled to some addition to his rent for having undertaken such an obligation for the benefit of these lands also. But none of these propositions of mine help the defendant in these cases. In the cases now stated by me it can be said that he has effected some improvement for the benefit of these lands. In the present case, as I have already said, the landlord does not maintain the Alathur tank for the sake of the suit lands and there is no other work which he maintains or undertakes to maintain for the sake of the suit lands. That being so, I think he is entitled only to the dry rate and not even to the tirvai jasti. Moreover, the use of the word "surplus" implies that it is water which he cannot retain even if he wishes to. He cannot regulate the water and he has no control over it. The moment it escapes it is not Alathur tank water and from the point of view of Alathur tank it is not the landlord's water. Here I differ from the Deputy Collector. If it gets into some other reservoir which belongs to the landlord, it may then (but not till then) again become landlord's water but it does not get into any reservoir before irrigating S. Nos. 25, 60 and 61. It only flows through the marugal and no claim has been made on the ground that the marugal is the landlord's channel. But, apart from this, I doubt whether flowing water in a channel, until it is actually abstracted and appropriated, can be described as water belonging to the landlord unless perhaps evidence is given that the channel is maintained at the expense of the landlord. Now we have no evidence either as regards the ownership or maintenance of the marugal. The water in it cannot be described as the Alathur tank water, it can be so described only if the tank is so kept under the control of the landlord and the water so regulated as to let out this portion of the water at his will, i.e., there must be

sluices and regulators through which he can let out water when it is wanted and stop it when not wanted. The surplus water is water which he is

unable to stop and cannot retain even if he wishes to. Such water cannot be described to be his water.

6. For the respondent the decision in C.V.C.T. Venkatachalam Chetty and Others Vs. Aiyamperumaul Tevan and Others, was relied on. It was

there held that a charge for taking water belonging to the landlord is "rent" and it is not enhancement of rent even if not consolidated with the rent

proper. I agree with this proposition but in applying it to the present case we must be careful to remember the facts of that case. In a case where

the water wholly comes from a tank belonging to the landlord and no question of any Government water mixing up with it arises that case may

apply because that is water belonging to the landlord. But in the present case there is no water belonging to the landlord in that sense. In some

other sense it may be so described though even this is doubtful on the facts of this case. If it is taken directly from the Alathur tank by being

regulated by the landlord, it may be described as landlord's water of the Alathur tank. But where it surpluses and it is beyond his control, one may

loosely talk of it as the Alathur tank water and once such an expression is used it may produce the impression that it is landlord's water. But I have

already shown that it is not so. Therefore that decision does not apply. There is of course the important fact in this case that this supply of water,

coming as a surplus from the Alathur tank, is very insignificant compared to the water directly taken from the Periyar channel. But I did not want to

emphasise this portion of the case in the early part of the judgment because it maybe said that, if it is landlord's water however small it is, the

landlord is entitled to impose some proportionate addition to his rent. But if it is not landlord's water in the strictest sense of the term, then no

additional charge for water can be imposed. I therefore think that the above decision does not help the respondent. Another case Chinnappan

Chetty v. The Secretary of State for India in Council I.L.R.(1918) 42 Mad. 239 : 36 M.L.J. 124 (F.B.) relied on by Mr. Patanjali Sastri the

learned Advocate who appeared in the connected cases is, in my opinion, irrelevant. That relates to river water and the question was there

discussed with reference to the ownership of the water under the Irrigation Cess Act where different considerations arise. I do not propose to

discuss it at great length. Some cases under the Rent Recovery Act have been referred to, such as *Thayammal v. Muttia* I.L.R.(1887) 10 Mad.

282 which was approved in *C.V.C.T. Venkatachalam Chetty and Others Vs. Aiyamperumaul Tevan and Others*, . In so far as there is a contract,

the basis of the Rent Recovery Act is different from the basis of the Estates Land Act. But if the case arises apart from any contract, I have no

quarrel with both the cases provided there is water which can be described as water belonging to the landlord in the strictest sense of the term. I

do not think therefore the case in *Thayammal v. Muttia* (1887) ILR 10 Mad. 282 helps the respondent. The Full Bench decision in *Doraiswami*

Gurukkal v. Subramania Gurukkal I.L.R.(1927) 51 Mad. 266 : 45 M.L.J. 361 (F.B.) does not help the respondent for in that case the landlord

does not seek any enhancement of rent at all. He simply pays water rate direct to the Government and then seeks to collect it from the tenants. The

attempt of the landlord there is not to impose an additional charge but to avoid loss by reason of the Government water supply. That case must be

confined to facts of that kind. Whether any additional categories can be conceived it is unnecessary to discuss. The case in *Paramasawmi v. Pusala*

Thevan (1919) 20 M.L.J. 142 is also a case under the Rent Recovery Act.

7. So far, I have discussed the case from the point of view of substantive law but there is a question of procedure also in the case. Even in a case

where the landlord is entitled to an addition to his rent on account of the fact that the new water supply, even though it be from a Government

source, has become available to the tenant by reason of the landlord's constructing a new work or repairing an old work or giving the benefit of an

old existing work to a land which had not the benefit of it before, it is still an enhancement of rent if the change is permanent and the landlord had to

obtain the sanction of the Collector for such enhancement. It is true that where the topographical situation has not become permanently changed,

i.e., where the landlord has not constructed any work for the sake of the lands in question or where an existing water source such as a tank has not

become attached to the land as a source of irrigation but only in a particular year the tenant asks the landlord for water from his tank and the

landlord supplies, the principle of *C.V.C.T. Venkatachalam Chetty and Others Vs. Aiyamperumaul Tevan and Others*, will apply and the addition

which the landlord is entitled to claim is not an addition to the rent, for, in such a case the landlord is not bound to supply water from his tank. The tenant is not entitled to ask for the water. The tank and the land have not become mutually connected with each other. In such a case the landlord is entitled to give or refuse the water at his will and any payment which he stipulates for when he does supply water cannot be described as rent and he can make his own stipulation. This is the view of Phillips and Kumaraswami Sastri, JJ. in C.V.C.T. Venkatachalam Chetty and Others Vs. Aiyamperumaul Tevan and Others, and I agree with it. But where the change is permanent and where there is no option for the landlord to give or refuse and the tenant has got a right to ask for the water, in such a case where the construction and maintenance of the work is done by the landlord, he is undoubtedly entitled to ask for additional payment but it must be regarded as part of the rent until another permanent change comes over the situation. The theory of the Estates Land Act is that in such cases the Collector is the proper person to estimate the amount of additional rent to which the landlord is entitled. It cannot be arbitrary. It cannot be any figure which he chooses to fix. It must be something commensurate with the benefit which the tenant receives by reason of the landlord's contribution to the welfare of the tenant and it must be determined with reference to fixed principles and ascertained accordingly. In the present case I have come to the conclusion that the landlord is not even entitled to any addition because he has neither constructed any work nor does he even maintain any work for the benefit of the suit lands.

8. I am therefore of opinion that these appeals by the tenant should be allowed even in respect of the tirvai jasti. The Second Appeals are allowed with costs (Rs. 25) Advocates' fee in each case except as to the penalty of Rs. 50 claimed.

9. Then there are the memoranda of objections of the landlord. These relate only to the penalty. The Deputy Collector imposed a penalty of Rs. 5.

There was no appeal against that to the District Judge. The District Judge enhanced the penalty to Rs. 50. The landlord now appeals in respect of

the whole penalty by way of memorandum of objections. But he is not entitled to appeal in respect of the Rs. 5 because he filed no memorandum

of objections in the lower Appellate Court and can only object to the other Rs. 45. I am of opinion that this is not a case of illegal cess being

imposed but a case where the landlord seeks to levy additional rent by reason of the supply of the Periyar water through his tank. The question is

somewhat difficult and I think that the claim of the landlord was made bona fide even if we ultimately decide against him. Anyhow it cannot be

regarded as an illegal exaction.

10. I would modify the order of the District Judge as regards the penalty and restore that of the Deputy Collector. The memoranda of objections

are therefore allowed to the extent of Rs. 45.

11. Both parties will bear their costs in the memoranda of objections.

12. Now I will take S.A. No. 1319 of 1931. This Second Appeal arises out of a suit u/s 112 of the Estates Land Act to raise an attachment in

respect of the suit land taken out by the landlord. In the appeal we are concerned only with S. Nos. 12, 14, 15, 20, 23 and 25 and the question

raised in respect of them is one of theervai jasthi. No question of fasli jasthi arises, in respect of 7 as claimed as additional charge for second crop

cultivation on some Extent of wet land in S. No. 10 as no second crop has been raised. The patta tendered by the landlord is questioned as

improper on the ground that it includes a claim for second crop on wet lands and a claim for water rate on dry lands converted into wet. The facts

are that there is a kanmoi belonging to the landlord. It is really two kanmois which have become connected with each other and become one. It is

even doubtful if the character of the kanmoi as kanmoi is kept up. The allegation in respect of this in the plaint is ""Periyar channels directly irrigate

the plaintiffs" lands though now and then Periyar water also entered the so-called tanks and through even open and unregulated mud sluices therein

irrigates those lands.... The tanks themselves are not in a fit condition to hold more than five days water. The tanks have no other source of supply

and they have never been kept under repairs by the defendant in any way; nor is wet cultivation due to any improvement effected by or at the cost

of the defendant."" This allegation means that, except that the Periyar water flows through ground which was at one time a kanmoi but which has

almost ceased to be such, there is nothing that the landlord contributes to the bringing of water to the tenants" land. I do not say that he should

actually construct a new work. If he at least maintains the tank incurring such occasional expenses as the maintenance of the tank requires though

they may not be incurred every year, even then he may be entitled to some addition to the rent. But the allegation here amounts to saying that he

does not even maintain the tank. The tank has been allowed to fall into disrepair and by natural causes it is gradually losing its character as a tank

though for some time one may see traces of some old kanmoi there. Now after such an allegation in the plaint one would expect the landlord to say

that he does something to maintain the tank if really he does it. Paragraph 6 of the written statement runs thus:

The suit lands have all along been irrigated from the two kanmois, situated in the village and the suit lands from time immemorial have been

cultivated as nanja lands. The Periyar does not directly irrigate the suit lands. The allegations to the contrary in the plaint are incorrect.

13. There is nothing in this plea which could mean that the landlord is now actively keeping the tank in its character of tank and no denial of the

allegation in the plaint that the tanks have practically ceased to be tanks and are incapable of holding more than five days water. The plea is too

general and it can only mean that the water is passing through ground which was at one time two kanmois. P.W. 1 in his evidence says:

There are two kanmois west to east. There will be only a week's water in these kanmois at present. It has been the case for 15 years past.

14. There is nothing in the cross examination bearing on this portion of the evidence. But it must be mentioned that according to the evidence there

is a channel directly from the Periyar system to the suit lands which does not go through the kanmois. All that is said is that some water also gets

into the kanmois and then out of it to the suit lands. The plaintiffs assert that they do not need this water which escapes from the kanmois. They are

willing that the landlord should stop it if he can. If he does not stop it, it is not their fault. They are content with the water which directly comes to

their lands from the Periyar channel. Under such circumstances the water from the kanmois cannot be thrust upon them against their will and

additional rate charged. On this matter the Deputy Collector says:

The fact of direct irrigation from Periyar has not been satisfactorily proved.

15. He seems to disbelieve P.W. 1. But here it must be noticed that there is no counter evidence, and P.W. 1 says that, apart from the kanmois,

the lands are irrigated from a channel called the Nallakinathu odai. The Deputy

Collector therefore dismissed the suit. In appeal the learned District

Judge records his finding thus:

It is not disputed that the lands in question are irrigated mainly, at any rate, by water from the Periyar system which to some extent at least, flows

through a tank which originally belonged to the landholder. In such circumstances it is, as a matter of fact, almost impossible for the ryot to prove

that the land is irrigated solely by Periyar water, and the mere fact that water rate is payable to Government does not, in my opinion, release the

ryot from the obligation with which he was bound prior to the advent of the Government water to pay wet rates when water is taken from the

village tank. This is of course in the absence of any contract to the contrary; but there is, in this case, no evidence of any such contract.

16. The learned Judge then refers to the fact that the appellants' predecessor did not demur to the charges such as are now claimed. He therefore

dismissed the appeal. In my opinion, as already observed, if the landlord maintains the tank for the purpose of ensuring a substantial supply of the

Periyar water to the tenant, he will be entitled to get an additional rent though the tenant pays some water rate to Government and I would agree

with the District Judge. Of course there is no such general rule such as that the tenant need not make a double payment. The substantial questions

therefore are (1) does the tenant get any substantial quantity of water through the tank and (2) is this supply ensured to him by the landlord by

anything which the landlord does for the supply being so ensured. I am afraid that both these questions should be answered in the negative. The

District Judge's finding seems to say that some portion of the water flows through the tank. This is indicated by the words "to some extent at least.

How much he does not say. The tenant appellant now says that he does not want this and the landlord may stop it if he can, provided that the

water from the main channel is not interfered with. I therefore hold that the landlord may, if he likes, stop any water coming through his kanmois.

He is at perfect liberty to do so or he may allow it to flow but he cannot charge the tenant with additional water rate. In the first place looking at the

fact that the tank can store water only for seven days according to the evidence, it does not appear that the supply through the tank is substantial.

But, even if it is substantial, the landlord can stop it if he likes. At present he is

not maintaining any tank for such a supply. The lie of the ground is such that some of the Periyar water gets into the kanmoi and flows out of them. No regulation is attempted by any human agency. There are no sluices to supply water when wanted and to stop water when not wanted. Under such circumstances the landlord is not entitled to any additional charge. Of course if the tenant requires that water should flow also through this tank and if the landlord occasionally executes some work in the tank and puts it in proper shape for storing water and for supplying it whenever needed he may then be entitled to ask for some further additional charge but he will have first to supply to the Collector u/s 30 of the Estates Land Act if such arrangement is permanent. No such thing having been done now he cannot ask for any additional rate.

17. The appeal must therefore be allowed to the extent of the new rates imposed with costs throughout.

18. I will now take S.A. Nos. 1379 to 1390 of 1929. These appeals arise out of suits by the landlord for arrears of rent u/s 77. In paragraph 2 of the appellate judgment the learned Judge says:

In each case the question at issue is whether the landlord is entitled to levy any extra charge, over and above the old assessment, in respect of the second crop on wet lands or the raising of wet crops on dry lands by the aid of Periyar water brought on to the land without any contribution from the landholder.

19. The words I have underlined bring out the essential point in all these cases. The real question in these cases is, does the landlord make his own

contribution to the work of carrying water from the Periyar system to the tenants' land? Whether the contribution takes the shape of constructing a

new work or maintaining an old tank does not matter, for, the maintenance of an old tank required some expense periodically if not annually. In

these appeals there are two sets of lands - one set of dry lands which have now been converted into wet and another set of lands which were

formerly wet lands but on which second crop is now raised with the help of the Periyar water. Now it is found that so far as the first set of lands

are concerned (and the tenants' case also is) that most of the water comes not from the plaintiff's tank in the suit village of Sithalangudi but from a

tank in another village which does not belong to the plaintiff and referred to as

Sembakulam drainage water. This is apparently what the learned

District Judge means by saying:

It is possible that in respect of some of the lands the water may pass through the plaintiff's tank but this apparently is not the case regarding the most of them.

20. If there is any exception to this general statement, the evidence has not cleared up which particular land does not get water from the tank in the

other village but gets it only from the Sithalangudi tank. Now as to the second set of lands undoubtedly water flows through the plaintiff's tank in

Sithalangudi; undoubtedly the landlord maintains this tank, but then the lands were always wet lands and the landlord was always bound to maintain

it. It is true, now that the Periyar water comes in, the tenants have been enabled to raise a second crop. But, for this coming in of the Periyar water

the ryots seem to have spent some money to construct a channel for leading the Periyar water into the tank. This is the finding of both the Courts.

Thus, the landlord has not incurred any additional expense for the bringing in of the Periyar water and as, on the other hand, the tenants themselves

have incurred expenses for that purpose, it does not appear that he is entitled to levy any additional charge for the second crop. Even if the

landlord had spent some money on the tank by winding up it or raising its bunds for storing more water now coming in the shape of Periyar water,

it looks as if such additional expense incurred by him may be set off against the additional expense incurred by the tenants. Any how if he proves

that expenses incurred by him outweigh the expenses incurred by the tenants, he may apply u/s 30 of the Act to the Collector. At present it does

not appear that he is entitled to any addition to the old wet rate now claimed.

21. In these appeals another point has been raised by the learned Advocate for the appellants. Mr. Gopalaswami Aiyangar argues that the rates

have been paid for 30 years extending back to the period to the Estates Land Act and that under such circumstances the principle of the Full

Bench decision in *Priakaruppa Mukkandan v. Raja Rajeswara Sethupathi* ILR (1918) 42 Mad. 475 : 36 M.L.J. 320, applies. I do not desire to

depart from the Full Bench decision. It is undoubtedly good law. Its effect is to lay down that the Estates Land Act cannot rip up old sores and

cannot unsettle rates of rent which had prevailed long before it and have become

lawful rates of rent under the Rent Recovery Act on the mere ground that if the whole case arose for the first time under the Estates Land Act the rates would not have been lawful. All this is true. But there are neither facts nor allegations in this batch of cases so as to bring any particular land or particular case within the scope of that ruling. It is not alleged that in respect of any particular land the present rates of rent prevailed for a long time. All that we have got in the whole case justifying the contention is a general statement in the Deputy Collector's judgment "'The payment for the last 30 years of these rates of assessment will not estop them from raising the question of illegal exaction etc.'" 30 years prior to these suits take us to 1897 which is 11 years before the Estates Land Act was passed. It is not clear that what was meant was that all the tenants paid higher rates for all these 30 years. In fact there is no evidence in the record to show when the Periyar water became available to each of the holdings in this batch of cases. All that is meant was that some time in the course of the last 30 years, as land after land began to receive the benefit of Periyar water, higher rates of second crop were willingly paid by the tenants. Perhaps there may be one case for which the 30 years is applicable and other cases happened in the course of the 30 years and there is nothing to show that the payment went on for 30 years. There is nothing in the evidence to show that for any particular holding the tenant actually paid the higher rate of rent claimed. The written statement seems to have been drafted anticipating all the possible claims of the landlord and contains no admission that any extra amount was ever paid. Possibly in some cases it was paid. Some such consciousness runs through it. But it is impossible to spell out for which land it was paid for how long it was paid and when it began. Under these circumstances this contention must be disallowed.

22. The result is these Second Appeals fail and are dismissed with costs. (Rs. 150 Vakils' fee).

Venkatasubba Rao, J.

23. The question raised in these cases is whether the ryots having since the advent of the Periyar water, raised wet crop on dry lands and a second wet crop on wet lands, they are liable to pay the additional rent claimed by the landholder. For the ryots, it is broadly contended that the water

used being that obtained from an irrigation source belonging to the Government, they are not liable to pay the extra rate claimed; the zamindar

replies that the moment the water, although from a Government source, enters his own land, it becomes as between himself and his ryot his own

water, for which he is entitled to charge water-cess, which becomes a part of the rent and can be treated as such under the Madras Estates Land

Act [Section 3(11)]. The question raised being common to the various second appeals, they have been on account of its importance, referred to a

Bench for decision.

24. I may mention for the sake of making the matter clear, that Re. 1-4-0 is the dry rate and Rs. 3 the wet rate in the village. The excess now

claimed is, Re. 1-12-0 termed theerva jasthi in respect of land registered dry but cultivated wet, in other words, the total rate claimed for such land

is the usual wet rate of Rs. 3; the excess claimed in respect of the second crop on wet lands is Rs. 1-8-0 termed fasli jasthi, that is to say, the total

amount claimed in respect of mamool wet lands is Rs. 4-8-0. For the use of the Periyar water, the rates paid by the ryot to the Government are

Rs. 5 per acre in respect of dry lands converted wet and Rs. 7-8-0 per acre for wet land (Rs. 5 for the first crop and Rs. 2-8-0 for the second

crop). The tenants point out that as they are paying water cess for the Periyar water to the Government, they are not liable to pay over again for

the same water to the zemindar.

25. My learned brother has fully dealt with the evidence and as with his findings of fact I agree, I do not propose to cover the same ground again; I

shall content myself with stating what I conceive to be the true legal principles applicable to the facts as found.

26. First, under the Act no enhancement can be claimed by the landlord except under the special provisions enacted in that respect and one of

them i.e., that if the landholder wished to enhance the rent, he must do so by filing a suit before the Collector (Sections 24 and 30). The facts which

determine the landlord's right to enhanced rent, are of such a character under the Act, that the Legislature has thought it proper to vest the decision

not in the Civil Court but in the Revenue Courts alone and it therefore follows that if the claim in question is within the meaning of the Act a claim to

enhanced rent, that claim must be disallowed. The point to consider then is,

Does the present claim amount to an enhancement or not? Additional rent is claimed on the ground that the land has become more productive by reason of the better irrigation facilities afforded by the landholder; this is precisely what is involved in the landholder's claim, that he is entitled to enhance the rent by reason of his water being used in the raising of the wet crop on dry land or a second crop on wet land. That such a claim amounts to an enhancement, admits, in my opinion, of no question. In *Doraiswami Gurukkal v. Subramania Gurukkal* I.L.R.(1927) 51 Mad. 266 : 45 M.L.J. 361 (F.B.) it was held that where the Government recovers an amount by way of water-cess from a landholder and the latter in turn seeks to recover it from the ryot, in such a case, the landholder's claim does not amount to an enhancement. The reason is stated to be, that the landholder is a mere collection agent for the Government and that the amount collected in truth goes to the Government and does not benefit the landlord. It is not for me to weigh the merits of the rival views put forward in that case, for, we are bound by the pronouncement of the majority of the judges; but the facts here are entirely different and the Full Bench case has no application. There is an observation in *Battina Appanna and Others Vs. Sreemanthu Raja Yarlagadda Venkataramalinga Bahadur Zemindar Garu*, to the effect, that when new circumstances come into existence which require new adjustments, there can be no question of enhancement. This observation, with great respect, is obiter and, in my opinion, remains so, notwithstanding the fact that the actual decision in that case has been approved in the Full Bench ruling referred to above by the majority of the Judges. As regards *C.V.C.T. Venkatachalam Chetty and Others Vs. Aiyamperumaul Tevan and Others*, the expression of opinion is very brief and the grounds for the decision are not set out; and I fail to see how an extra charge for water, when wet crops are raised on dry land, having regard to the implications of Section 30, does not amount to an enhancement.

27. It will be observed that there is a material difference between the present Act and the Rent Recovery Act, which it replaced. While both the Acts render the Collector's sanction necessary for any enhancement of rent by the landholder, under the old Act contracts to pay enhanced rent (express or implied) were enforceable, whereas under the present Act such

contracts cannot be given effect to (See Rent Recovery Act, Section 11(i) and (iv) proviso and the present Act Sections 24 and 30). While dealing with the cases under the Rent Recovery Act, this distinction must be borne in mind; but as regards the point under discussion, the cases under the old Act, such as *Narasimha Naidu v. Ramasami* I.L.R.(1890) 14 Mad. 44 and *Apparau v. Narasanna* I.L.R.(1891) 15 Mad. 47 held that a claim to wet rate amounted to an enhancement, when the water utilised was from a Government source (Krishna canal), and the value of these decisions remains unimpaired. In a recent judgment of mine (*Chennuri Appalanarasiah Chetty Garu Vs. Makka Chittavadu*), I pointed out after fully discussing the matter, that a claim of this sort amounts to an enhancement and I do not therefore propose to consider the point at further length. The prescribed procedure not having been followed, I must hold that the present claims to enhanced rent are unsustainable.

28. Secondly. - Even apart from the question of procedure, I am satisfied that the landholders' claim is not well-founded. The landlord's right to rent must be determined solely with reference to the sections of the Estates Land Act and arguments based upon the abstract notions as to supposed ownership of water have, in my opinion, no bearing on the point. There is no provision in the Act that a charge or cess is payable for the use of the landlord's water as such. If a landlord desires to enhance the rent, he must bring himself within the terms of Section 30, and it is noticeable that the bare fact that the landlord's water has been used, is not mentioned there among the grounds justifying the enhancement. Grant that the landlord's water has been used; but that does not of itself furnish a ground for claiming higher rent, for, what under the section he is bound to show is, that the productive powers of the land have been increased by an "improvement" effected by him or at his expense. It will be seen that the word "improvement" is defined by the Act and it means, any work which materially adds to the value of the holding and which "if not executed on the holding, is either executed directly for its benefit or after execution is made directly beneficial to it" and includes (the words that follow are important)(1) "the construction of tanks, wells, water channels and other works for the storage, supply or distribution of water for agricultural purposes" and (2) "the renewal or reconstruction of any of the foregoing works

or alterations therein or additions thereto". What then is the effect of Section 30 read with Section 3(iv)? The landlord must show that the productive power of the land has increased by some positive improvement effected by his agency or at his expense and the Act gives no countenance to the argument that the landlord can claim enhanced rent merely and solely on the ground that his water has been used. And as already observed, the word "improvement" is defined as including the constructing and maintaining of tanks, water channels...or other similar works which shows, that the prerequisites for the demand of higher rent is not use of the landlord's water merely but such water as has been taken or supplied from a tank or channel or other work constructed or effectively maintained by him. Nothing, again, is an improvement unless it materially adds to the value of the holding [Section 4(xi)], and the Act lays down as to what matters the Collector shall have regard in assessing the benefit which a landlord may claim to have conferred upon his ryot, one such matter being the increase in the productive powers of the land caused or likely to be caused by the improvement." (Section 32.) The provisions of the Act thus make it clear that when the landholder claims enhanced rent when his water has been used, he can make good his claim only by showing a direct connection between the water so used and the improvement he has effected. For the landlord, some cases decided under the old Act (Rent Recovery Act) have been cited such as *Thayammal v. Muttia* I.L.R.(1887) 10 Mad. 282 *Sattappa Pillai v. Raman Chetti* I.L.R.(1892) 17 Mad. 1 and *Venkata Rao v. Vaithilinga Udayan* (1901) 12 M.L.J. 22 but they do not support his contention. In each of these cases, it is clearly mentioned that extra water was taken from "the landlord's tank" - which implies that the tank was maintained as an irrigation source by the agency of the landlord; the question now raised is altogether different, whether by the mere flow of the water over the land belonging to the landholder, he can claim the extra rate. *Sree Sanakarachari Swamiar v. Varada Pillai* I.L.R.(1903) 27 Mad. 332 another case relied on by the landlord's counsel, merely follows *Sattappa Pillai v. Raman Chetti* I.L.R.(1892) 17 Mad. 1 already cited. While therefore these cases apart from the fact that they were decided under the old Act, do not support the landlord's claim, the Krishna canal cases to which I have referred *Narasimha Naidu v.*

Ramaswami I.L.R.(1890) 14 Mad. 332 and Apparau v. Narasanna I.L.R.(1891) 15 Mad. 47 clearly negative his right, and what is more

important, those cases indicate that the true test is, whether the Zamindar has contributed to the cost of the improvement [See Narasimha Naidu v.

Ramaswami I.L.R.(1890) 14 Mad. 44 where the words occur ""Taking it that he (the Zamindar) has been at some expense for the minor

distribution channels"" and the judgment of Parker, J., in Apparau v. Narasanna I.L.R.(1891) 15 Mad. 47 where the learned Judge observes "" Nor

is it found that he has contributed to the cost of the improvements"".]

29. Lastly, there is another principle that remains to be considered and that is implied in the definition of the word ""rent"", which under the Act

includes ""whatever is payable on account of the use and enjoyment of water supplied or taken for cultivation of land."" The water under this

definition must be ""supplied"" or ""taken"" and from that it follows, that it is not sufficient to show that some water which the landlord could not

prevent from overflowing or the tenant had no option of refusing, was used by the ryot. I must also in this connection repel the argument that the

Act so defines the word ""rent"" as to create a liability on the ryot's part to pay for the water used, for, the definition, naturally enough, does not

purport to define or create rights; all that it does is to refer to ""whatever is payable"", leaving undetermined when and in what circumstances any

amount becomes payable.

30. Applying these principles to the facts as found by my learned brother, the landlord's claim to enhanced rent in the several cases cannot be

sustained and I therefore agree with the orders proposed in the judgment just delivered by him.