
(1934) 04 MAD CK 0024
In the Madras High Court

V. Raman Nair

APPELLANT

Vs

Parameswaran Nambudiri and Others

RESPONDENT

Date of Decision : 20-04-1934

Acts Referred:

Citation : AIR 1934 Mad 683 : 153 Ind. Cas. 15 : (1934) 40 LW 629

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—This second appeal arises out of a suit brought to recover from defendant 1 what is described in the plaint as "neervaratn" (loosely translated as water-cess), for three years. There is some obscurity as to the nature and basis of the claim and certain previous litigations have only added to the obscurity; but as they do not make the matter res judicata it is unnecessary to refer in detail to these litigations. The substance of the plaintiff's claim is that he is at present maintaining an artificial system of irrigation channels constructed more than fifty years ago by one Pichu Iyer at his own cost, as a result whereof a large extent of land in the possession of various people including the adiyamkulath tarwad received the benefit of supply of water drawn from a river in the Cochin State. Defendant 1 is in possession of about 831/4 paras (seed area) of lands by purchase from the Kadiyamkulath tarwad. The plaintiff says, that the arrangement under which Pichu Iyer constructed this system of irrigation channels was that the persons through whose lands the channels were taken were allowed to take water from these channels for the purpose of irrigating their lands on condition of paying neervaram" which he fixes at the rate of 11/2 paras of paddy per para seed area. The liability to maintain this irrigation system as well as the right to collect neervaram" alleged to be payable under this arrangement came to the plaintiff from Piohu Iyer as a result of Ex. A dated 1878. Defendant 1 who is the contesting defendant denied that there was any such arrangement or that he was under any liability to make any such payment and he claimed that Pichu Iyer must have agreed to allow free supply of water for the irrigation of the adjoining lands in return for his having been allowed to

take the channel through the lands of the Kadiyamkulath tarwad. This is really the main question in the case.

2. It is well established that in the case of artificial streams there are no riparian rights as such and whatever rights may be claimed by persons through whose lands the channel passes must rest on some arrangement either proved or presumed: see *Ramessur Persad Narain Singh v. Koonj Behari* (1879) 4 Cal. 633 and *Yesu Sakharam v. Ladu Nana* 1927 Bom. 251. The question therefore is what are the probable conditions under which Pichu Iyer is likely to have brought into existence this system of irrigation channels. I agree with the learned Subordinate Judge that the terms of Ex. A, though not binding as a contract upon the present defendant 1 or his predecessors-in title, afford the best evidence as to the arrangement likely to have been made at the time of the digging of the channel and the other evidence which is referred to by the learned Subordinate Judge in para. 11 of his judgment certainly goes to confirm what the provisions of Ex. A suggest in this connexion. It is clear from Ex. A and the other evidence that defendant 1's contention that the persons through whose land the channel was taken were to be allowed a free supply of water from this channel for the irrigation of their lands is hardly likely to be true. The probabilities are, as the learned Subordinate Judge finds, that they must; have agreed to pay something in return for the privilege and the most likely measure of such payment will be to fix it with reference to the area for which they take water, it being left to their option to take the water or not. I see no reason to differ from the learned Subordinate Judge on this point. No doubt one or two sentences in para. 12 of his judgment are open to exception ; for instance, he says that it is for defendant 1 to prove that there was an understanding between the Kadiyamkulath people and Piohu Iyer that the former were to have free use of the water and then adds : "The usual presumption is that they will have to pay." I am not aware of any basis for such a presumption. Again in para. 15, he says:

Whether there was a contract or not, the assignees of Pichu Iyer are entitled to collect neervaram for use and occupation of their water.

3. This is somewhat unintelligible. But having looked into the whole matter and the evidence referred to by the learned Judge, I see no reason to think that these remark of his have vitiated his judgment. His conclusion is really based upon the evidence and. probabilities of the case and hence I have no hesitation in accepting it.

4. Mr. Narayanaswami Iyer for the appellant contends that the very terms in Ex. A suggest that half para per one para seed area would have been the likely rate. This is a misreading of Ex A. That only provides the rate at which the assignees of the right under Ex. A are to pay the assignors. The tenor of the document clearly shows that the assignees were left to collect from the occupants of the land at the usual rates or at such other rates as they are able to procure. It was certainly not part of the arrangement to fix that rate. One thing is clear, the rate could not be half a para as contended for by Mr. Narayanaswami Ayyar, i.e., the

very rate at which the assignees had to pay the assignors. They had also paid to the assignors Bs. 570 odd for which Ex. A contemplated that they would be entitled to interest. The rate of payment by the occupants of land must therefore be determined on other materials and not with reference to anything contained in Ex. A.

5. On the question of rate Mr. Narayanaswami Iyer contends that the Subordinate Judge's discussion of it is very unsatisfactory and that I should call for a revised finding. I am unable to accept that suggestion. In the written statement of defendant 1 he neither disputed the rate claimed in the plaint nor suggested any alternative rate; nor is Mr. Narayanaswami Iyer able to point to anything in the evidence suggesting a different rate from that claimed in the plaint. Such evidence as there is on the question of rate seems to be all one way and it is certainly significant that this rate has been admitted to be the rate payable, even by defendant I's vendors. In these circumstances, I see no reason to disturb the finding of the learned Subordinate Judge on the question of rate.

6. A further point was raised by Mr. Narayanaswami Iyer, that the plaintiff is not entitled to interest prior to the date of suit. Though the plaint claims interest and in para 16 of the written statement there is a denial of the allegations in para. 11 of the plaint as to the payability of the "neervaram" on the last-day of Makaram every year and the right to claim interest as per custom; no issue was taken upon in, for reasons best known to the parties. Prima facie, this is not a case in which the plaintiff will be entitled to interest before the date of suit. When there is an allegation in the plaint and a counter allegation in the written statement, I am unable to say whose fault it was that the issue was not raised. If the parties are serious about the controversy, I can only direct the lower appellate Court to raise an issue upon that point and submit a finding thereon after receiving such evidence as the parties may tender.

7. Mr. Venkatachariar (for the respondent) raised a preliminary objection that the claim in the suit is of a small cause nature and as the plaint claim is below Bs. 500 the second appeal is not maintainable. In support of that contention he relied upon the decision in Subramania Iyer v. Stivenson 1914 Mad 48. I am unable to agree with that contention. The decision in Subramania Iyer v. Stivenson 1914 Mad 48 proceeds on the admission of the parties that the Kolavettu claim in that case is in the nature of price paid for plaintiff's water, used for irrigation by the defendant. That judgment itself refers to an earlier judgment of Miller, J., in Seetharama Iyer v. Fischer (1907) 17 M.L.J. 487 pointing out that what was referred to as Kolavettu in the earlier case was by no means outside the prohibition enacted in Article 13, Small Cause Courts Act. In view of what has been stated already as to the facts of this case, it cannot certainly be said that the water belongs to the plaintiff and that the defendants can be said to be merely in the position of persons purchasing certain quantity of water from the plaintiff. The defendant's right to take water is analogous to a riparian right in natural streams but in accordance with the course of authorities

it may be subject to conditions and liabilities proved or presumed to have been agreed to between the parties at the time that artificial channel was dug. It is therefore not possible to bring the plaint claim within the description applied in the decision in Subramania Iyer v. Stivenson 1914 Mad 48.

8. The matter having been posted to be spoken to this day. on the question of sending down an issue as to "interest" for trial, Mr. Govinda Menon for the respondent states that so far as this case is concerned, his client does not think it worth while to go into a further enquiry at this stage for the purpose of retaining the small amount awarded to him for interest. The result is that the amount decreed by the learned Subordinate Judge will be reduced by substituting Rs. 321-6-10 for Rs. 450 in para. 1(a) of the lower appellate Court's decree.

9. As the second appeal has substantially failed, it is dismissed with costs.