in which the abovementioned Punganur works lie belonged probably to Punganur even before the Mysore war.

With the foregoing evidence before us we are unable to adopt Colonel Cloete's opinion which he formed mainly with reference to the natural features and the lie of the country, the distance of the boundary line from the villages of the rival claimants and the necessity of the villages on the plain for fuel and grazing grounds. In dealing with questions of property a decision must be arrived at upon the evidence on record and we cannot approve of the mode in which Colonel Cloete rejected the evidence on both sides and decided the case on considerations such as those mentioned by him. We are of opinion that the District Judge has come to a correct conclusion as to the effect of the evidence on the record and we dismiss this appeal with costs.

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## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.*

RAMASAMI AND OTHERS (PLAINTIFFS), APPELLANTS,

and

APPAVU AND OTHERS (DEFENDANTS), RESPONDENTS.*

1887. Aug. 11, 31.

*Evidence Act, ss. 13, 42—Relevancy of judgments in suits in which right asserted to collect dues for a temple.*

In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple,

*Held*, that judgments in other suits against other persons in which claims under the same right had been decreed in favor of the trustees of the temple were relevant under s. 13 of the Evidence Act as being evidence of instances in which the right claimed had been asserted:

*Held*, also that the said judgments were relevant under s. 42 of the said Act as relating to matters of a public nature.

APPEALS from the decrees of D. Irvine, District Judge of Trichinopoly, reversing the decrees of A. Kuppusami Ayyangar, District Munsif of Trichinopoly, in suits Nos. 208, 209, and 395 of 1884.

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* Second Appeals Nos. 455 to 457 of 1886.

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The facts necessary for the purpose of this report appear from the judgment of the Court (Collins, C.J., and Muttusami Ayyar, J.).

The Acting Advocate-General (Mr. *Spring Branson*) for appellants in all cases.

Mr. *Brown* for respondents in second appeals Nos. 455 and 456 of 1886.

*Parthasaradhi Ayyangar* and *Bhashyam Ayyangar* for respondents in second appeal No. 457 of 1886.

JUDGMENT.—These were suits brought on behalf of the Saptharishi pagoda at Lalgudi, in the Trichinopoly District, and the nature of the claim is thus set forth in the plaints.

An annual income called *saiykkurini* has been fixed and collected in the time of the present as well as of previous Governments for the benefit of the said devastanam for (in respect of, or upon,) the lands in the undermentioned Mangamalpuram, Konnakudi, Valuthiyur hamlets of the said village and other villages.

The obligation binding the proprietors of the lands in the said villages, &c., whoever they may be, without any reference to religion, to pay the said income to the said devastanam, has existed from time immemorial.

Out of the saiykkurini of Rs. 69-9-2 per fasli [due] to the said devastanam and fixed for the said Mangamalpuram and its hamlets, the saiykkurini per fasli is fixed at Rs. 49-1-2 for the said Mangamalpuram village, Rs. 7-8-0 for the said hamlet, Konnakudi village, and Rs. 36-8-0 for Valuthiyur village. Each raiyat of the said villages is bound to pay every fasli to the said devastanam at (the rate of) Annas 13-1 per pangu in Mangamalpuram village, Annas 12 per pangu in Konnakudi village, and Annas 9-9 per pangu in Valuthiyur village.

The defendants have owned $4\frac{9}{16}$ pungus of land in the said Mangamalpuram village from fasli 1284 last, $\frac{4}{64}$ pangus in the said hamlet Konnakudi from [a period] prior to the said fasli, and $\frac{1}{16}$ pangu of land in Valuthiyur village from a period prior to the said fasli. The saiykkurini tirva therefor at the aforesaid rate amounts to Rs. 3-12-10 per fasli for $4\frac{9}{16}$ pangus in Mangamalpuram village, Annas 7-6 per fasli for $\frac{4}{64}$ pungus in Konnakudi village, and Pies 8 per fasli in Valuthiyur village. The defendants are bound to pay [it] within the close of each fasli.

The defendants, who have been paying the said saiykkurini

tirva all along prior to fasli 1284, have allowed their payments to fall into arrears to the extent of the amount due from fasli 1284 up to date. Besides this, they deny the right (of the devasthanam) to the said income from that date.

The issues framed in original suit No. 395 of 1884, from which appeal No. 56 of 1885 was preferred to the District Court and second appeal No. 457 of 1886 is preferred to this Court were as follows :—

(1) Whether the pagoda has right to collect the saiykkurini tax ?

(2) Whether the defendants are bound to pay and have paid such tax till fasli 1284 ?

(3) Whether the claim is in any way barred by time ?

(4) What amount the plaintiffs are entitled to recover from the defendants ?

In original suit No. 208 of 1884 [appeal No. 53 of 1885, second appeal No. 456 of 1886] the issues were :—

(1) Whether the plaintiffs have no cause of action against the defendants by reason of their being Christians ?

(2) Whether the claim is *res judicata* ?

(3) Whether the defendants are bound to pay the saiykkurini tirva mentioned in the plaint ?

In original suit No. 209 of 1884 [appeal No. 48 of 1885, second appeal No. 455 of 1886] in addition to the issues just above recorded, additional issues were framed as to whether the right to collect what is styled the tirva is barred by time or not.

The defendants disputed the plaintiffs' right to the payments claimed ; denied that such payments had been made up to fasli 1284, and, in the case of the defendants, who are Christians, pleaded that, by reason of their religion, the obligation, if any, is not binding on them.

The Court of First Instance gave decrees for the plaintiffs in each case, but the District Judge in appeal reversed those decrees and dismissed the suits with costs throughout.

Against the decrees in appeal these second appeals are preferred.

[After dealing with the plea of *res judicata* the judgment proceeded as follows.]

The District Munsif held it proved by the documentary and oral evidence that payments have been made presumably since

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1811, and that the temple authorities have a right to collect them; the objection that the origin of the right to claim payment had not been explained, and that, in the absence of such explanation, the payment must be held to be voluntary, he disposed of by saying that it was "too late in the day" for the defendants to question the right.

The District Judge says that the plaintiffs "base their right to collect" what he calls "*the tax*," "upon custom;" he also remarks that they are unable to describe the origin of the right asserted, and states that they cannot explain the meaning of the word itself or the nature of the thing claimed, and on these grounds, apparently, holds that the custom is not shown to be reasonable; and he decides that the "tax" is not certain, because "the mode of assessment is purely arbitrary." He further held that though the payments now claimed have been made under the name of saiykkurini for a long time, they have not been made without objection, and therefore the alleged custom, if made out, has not been acquiesced in.

It is desirable to clear the case of any misconception which may arise from the use of the word "tax;" no word corresponding thereto is used in the plaint; the words used "Varambadi," *i.e.*, income and "Yerpattu," *i.e.*, "settled" do not necessarily or even primarily import a power created by the sovereign authority to collect a tax. Again the fact that there have been at times disputes as to the payments claimed is no evidence that the right to claim them does not exist; payments made by parties to suits in consequence of such disputes being decided against them in Courts of Law, and by others similarly situated without recourse to law, might be, on the other hand, evidence, so far as it goes, of the continuance of a demand as matter of right and of submission thereto by reason of a corresponding obligation.

Objection is taken on the respondents' part that the judgments filed showing that certain persons holding lands in villages in which it is in evidence that these payments are claimable as of right have been compelled by decrees of Court to pay are not admissible against the appellants.

It is contended that such judgments not being "transactions" or "facts," they are not admissible under s. 13 of the Evidence Act, and that they do not relate to a matter of a public nature within the meaning of s. 42 of the same Act.

We concur with the majority of the learned Judges who decided in *Gujju Lall* v. *Fatteh Lall* (1) that a judgment of the character thereunder consideration, viz., as to whether a certain person was or was not the heir to another, is neither a transaction nor a fact in the sense in which the words are used in s. 13 of the Evidence Act, and that the judgment referred to in that case could not be given in evidence, but the judgments filed in this case are not of the character under consideration in that case; the question for determination in the previous suits was whether the payments then claimed, and which are in contest in the present suits, were claimable as of right, and in one case whether they were so claimable from a particular class of persons, viz., Christians; and it appears to us that, when a right of the character now in question is at issue, such judgments are admissible in evidence as evidence of "particular instances in which the right or custom was claimed," and "in which its exercise was disputed, asserted, or departed from," and was further adjudicated upon; and that the right was a right of the character dealt with under s. 13 of the Evidence Act. The case for the appellants is—and there is evidence in support of it in the case before us as to at least six of such villages—that from those who hold lands in a large number of villages in the vicinity of the temple (see Exhibit F) the payment claimed is demanded as of right, and that such payments have been made after suits from time to time brought and determined in reference to the liability of persons occupying lands in these villages; and this being so, we are further of opinion that the decisions in the former suits are decisions which relate to "matters of a public nature" within the meaning of s. 42 of the same Act.

The question for determination before us is not dissimilar in principle from that reported in *Naranji Bhikabhai* v. *Dipa Umed* (2). The right now claimed appears to us to be as much a right of the character indicated in s. 13 of the Evidence Act as the right to a fishery, and the judgments go far to support the finding of the District Judge as to the payments claimed having been customarily made. The assumption that the appellants based their claim upon an alleged custom only appears to us to be unwarranted. The allegations in the plaint appear perfectly

(1) I.L.R., 6 Cal., 171. (2) I.L.R., 3 Bom., 3.

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compatible with the case that the appellants base their claim upon a right; the origin of that right is not clearly defined, but from evidence of custom, in the sense of payments extending over a long series of years, the existence of a right may, in connection with other circumstances, possibly be inferred; and the dismissal of the appellants' suits for the reasons stated affords good grounds for second appeal. The word "custom" is not used in the plaints.

On the facts then as found by the Courts below, such payments have been ordinarly made, and, as would appear from Exhibit C, not only from the year 1830 and subsequently, but, as certified in that report, there was evidence of such payments from 1801.

No doubt it is also stated that no *collections* were made from 1801 to 1822; there were, however, as recited in C, agreements to pay taken from the mahajanams in 1813 in a lease for 10 years, and the fact of nothing having been collected is explained, viz., that the people had been suffering much and unable even to pay the Government dues; it further appears that in 1828 "the mahajanams of the Lalgudi country" voluntarily gave an agreement to the Tahsildar in which "they admitted the right of the said temple to 7½ mercals for sayikkurini which was allowed *from the beginning*" (or as we should say from time out of mind), excused themselves for not having paid it, and agreed to pay it in future in money at a commutation rate to be fixed by Government.

There is moreover a reference to an excuse said to have been made by the raiyats from which it would appear that these payments were made in the time of the Mussalman rule also.

As to the objection that the claim is bad by reason of the nature and amount of the payments being indefinite, the word itself indicates (payment of) a "Kuruni" or mercal for every cheyyi of land, a well-known measure; and from Exhibit C it seems that the raiyats' share of produce from such area was estimated at 40 kalams of grain, and indeed there appears to have been no contest whatever as to the rate claimed, viz., 7½ mercals for every 40 kalams or the equivalent after the charge was commuted into a money payment.

As to antiquity in the case of a right no less than of a custom; usage for a number of years, such as is proved in this case, certainly raises a presumption that such right or custom has existed beyond the time of legal memory.

The question is whether a legal origin is to be assigned to the plaintiffs' claim. The evidence to which we have above referred is hardly consistent with the payments having been of voluntary character; it is also to be observed that when the temple was under the management of Government, the sums now claimed were collected in addition to the revenue and credited to the temple; while the suit in 1861, in which the defendants were Christians, is of importance not only as bearing on the question whether the obligation to pay exists, but also whether, if it exists, it constitutes a charge on the land; that suit was carried up to the High Court in appeal, and among the contentions raised throughout was one that whatever the case might be as regarded other persons, there could be no obligation to pay binding upon persons professing the Christian religion; but the second appeal was dismissed, from which it would appear that the obligation must have been held to be something more than a mere personal obligation, and that the payment was not a mere voluntary payment.

A grant from the sovereign power need not necessarily be presumed; the customary payment may be accounted for as a payment charged upon the cultivator's interest in the land (subject to payment of the landlord's share) and created in favor of the temple by the then owners of that interest, in which case the charge would be binding on them and on their successors and on purchasers for value from them.

We have not, however, been referred to any evidence showing that, notwithstanding devolution of these lands from generation to generation and transfers to strangers for value, the demand has been ordinarily made and submitted to by heirs and by purchasers and by persons of different religious persuasions not being worshippers in the temple. Evidence as to this would be of great value in assisting us to determine whether the obligation is one which has run with the land, or, in other words, whether the sums claimed constitute a charge on the lands, and as the matter is obviously one of considerable importance, seeing that in the list F there are some 65 villages in the neighbourhood described as villages "from which in 1861 saiykkurini was collected" and the effect of our decision in this case may affect holders of land in all such villages, we shall desire the District Judge to take such evidence on this point also as the parties may adduce, and to

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return a finding within two months from the date of receipt of this order, when ten days will be allowed for filing objections.

On receipt of the findings of the District Court, these appeals came on for hearing on the 28th February 1888, and judgment was reserved. On the 25th April judgment was delivered as follows:—

These second appeals came on for disposal with reference to the findings on the questions referred for retrial on the 31st August last. Two questions were referred, viz., whether the claim is *res judicata*, and whether the payment claimed to be recovered is voluntary. The finding is that the claim is not *res judicata*, because the present defendants are not shown to be connected with or claim under defendants in the previous suits. As regards the defendant Appavu, however, the District Judge observes that the decision in Original Suit No. 51 would bind him in respect of the land at Seshamangalam.

On the merits the Judge is of opinion that the payment is voluntary and cannot be treated as a charge on the land. It is objected that the finding should not be accepted.

The Judge's opinion that a revised finding was required from him on the general issue of liability is correct. The special question which he was required to consider by the last paragraph of this Court's order of August last was referred to him as a subsidiary question in order that a correct decision might be arrived at as to the character of the payment. The effect of the evidence is summarized by the Judge in paragraph 24 of his return in the following terms:—

"What appears to me to be the inference to be drawn from the whole evidence is that the Government collected this rate for the benefit of the temple not as a rate or charge on land belonging to the temple, but as an additional charge imposed of its own authority to enable it to make an allowance to the temple, to be continued or discontinued at its own will or pleasure, and to which the temple had no independent title; that when the Government ceased to collect it, the people continued to make the payments generally either because they were willing to do so or because they were bound to do so; that for many years past many persons have refused to make any payments, denying their liability to do so; that the temple authorities have got decrees in many cases without dispute, and in two cases against Christians who

denied their liability; that in spite of such enforcement in individual cases large numbers of persons have been left unmolested in their refusal to pay. In short, I think that ever since the Government have ceased to collect the rate, the people have held that it was a voluntary payment, and the temple, it was compulsory, and that the temple has never been sure of its ground to try to enforce the claim generally against those who resisted, but has rather been trying to build up a case for itself by degrees, and practically no one was likely to be made to pay if he was determined that he would not pay unless he was compelled to do so."

The Judge refers to exhibits C, E, F, and, adverting to the facts that the collection was made because the mahajans were willing to pay, that the fees were classed with devadayam, brahmadayam and others which are charitable fees, that arrears were remitted without reference to the gurukkals of the temple who are considered to be entitled to them, he comes to the conclusion that there was no grant from Government of a charge on land, and that the fee was collected as a payment voluntarily made to a religious institution. It was in evidence that from 1801 to 1822 no collections were made on the ground that the people were suffering much. It was also in evidence that in 1813 agreements to pay were taken from the mahajans when a lease for 10 years was taken in connection with the Government demand; that in 1828 the mahajans voluntarily gave agreements admitting the right of the temple; and that there was an allusion that such payments were made in the time of the Mussulman rule also. Having regard to the foregoing evidence, we cannot say that it is not consistent with the view taken of it by the Judge that the payments were made along with other charitable fees; that they were not made when the raiyats could not afford to do so; that promises were obtained from time to time from the mahajans to continue the payments; that the Government enforced their collection on the basis of those promises; and that they were remitted without reference to the gurukkals who were said to be entitled to the collections when the raiyats could not afford to pay.

We may note here that the raiyats accustomed to worship in the temple would ordinarily continue a payment, such as the one in dispute, as an act of piety, and that there is no evidence of grant of a charge on land or of its confirmation by the British

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Government. In this connection we may draw attention to the evidence which shows that the owners of 24 out of 28 pangus in the village of Sattamangalam, who are Vishnuvites, pay the fee to the Vishnu temple though, as observed by the Judge, saiyakurini was originally claimed on all the 80 pangus on behalf of the temple in suit which is a Siva temple. It is also worthy of remark that though decrees were obtained, many were not enforced, and that though a pretty large number of raiyats refused payment, legal proceedings were not instituted to enforce payment. We are unable to say upon the whole evidence that the Judge has not come to a correct finding.

As to those cases in which decrees have been obtained and a plea of *res judicata* can be founded upon them, it may be that a fresh inquiry into the merits is precluded. But the decision in each of those cases must depend on the special circumstances of that case in relation to the question of *res judicata*. Among the defendants before us, the Judge has come to the conclusion that the decree in Original Suit No. 51 is binding upon the defendant Appavu in respect of his land in Seshasamudram. We accept the finding of the District Judge and dismiss the second appeals except in respect of the land in Seshasamudram held by the defendant Appavu. We set aside the decree of the District Judge and restore that of the District Munsif as regards defendant Appavu in respect of the land belonging to him in the village of Seshasamudram in second appeal No. 455 of 1886.

We direct each party to bear their own costs throughout in the special circumstances of these cases.