

stated in his evidence that the sixth defendant made the payment from the funds of the joint shop and that the shop accounts contained an entry of the payment. The accounts not having been produced the statement as to what they contained was of course not evidence, and we are not prepared to hold on the strength of the statement of this witness that the amount was paid from the funds of the shop and that the sixth defendant was in fact authorized by the other members of the firm to make the payment so as to render them chargeable.

WHITE, C. J.,
AND ABDUR
RAHIM, J.

VALISUBRA-
MANIA
PILLAI

v.
S V R. K. M.
RAMANATHAN
CHETTIER.

The decree of the lower Appellate Court must be set aside so far as the second defendant, appellant, is concerned. The plaintiff must pay the costs of the second defendant in this Court and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Pinhey.

NYNAPPA SERVAL AND OTHERS (DEFENDANTS NOS. 1 TO 5 AND 7), 1908.
APPELLANTS, December 1,
10.

v.

VEERAN AND OTHERS (PLAINTIFFS NOS. 1 TO 1², DEFENDANTS NOS. 10 AND 11 AND SIXTH DEFENDANT'S REPRESENTATIVE), RESPONDENTS.*

Landlord and tenant—Right of melvaramdar to distribute water—The right of the ryot to the customary supply of water is proprietary

As between the melvaramdar and the owner of the kudiv ram, the right of the latter to the customary supply enjoyed by him is proprietary and not contractual. The former cannot by any agreement with third parties derogate from such right and the kudivaramdar can sue such third parties for an infringement of his right.

The right of such kudivaramdar is different from that of an ordinary Government ryot. The Crown has, unlike the melvaramdar, the right to revise the assessment and to distribute water in the interests of the general public, subject to the claim of the ryot for a supply sufficient for his requirements.

SECOND APPEAL against the decree of S. Ramasawmi Ayyangar, Subordinate Judge of Madura (East), in Appeal Suit No. 70 of 1905, presented against the decree of S. Raghava Ayyangar, District Munsif of Sivaganga, in Original Suit No. 317 of 1903.

* Second Appeal No. 290 of 1906.

SANKARAN-
NAIR AND
PINNEY, J.J.

—
NYNAPPA
SERVAI
v.
VEERAN.

The plaintiffs were the kudivaramdars of village M. of which the tenth defendant was the melvaramdar. The lands in M. have from time immemorial been irrigated by a certain tank to the exclusive use of which the plaintiffs had acquired a prescriptive right. The defendants Nos. 1 to 5 had by agreement with tenth defendant converted some lands in village N. into wet lands and dug a channel from the tank, by which they irrigated the said lands in N.

The plaintiffs sued for a permanent injunction to restrain such use by defendants Nos. 1 to 5 ; to compel them to fill the channel and for other reliefs.

The District Munsif passed a decree for plaintiffs granting the reliefs claimed.

The decree was confirmed in appeal.

Defendants Nos. 1 to 5 and 7 appealed to the High Court.

S. Srinivasa Ayyangar for appellants

S. Gopalasawami Ayyangar for first to tenth respondents.

JUDGMENT.—The plaintiffs represent the kudivaramdars of the village of Maruppanandal of which the tenth defendant as the trustee of Tirukkalakudi devasthanam is the melvaramdar. The lower Courts have held that the defendants Nos. 1 to 7 and the tenth defendant are not entitled to irrigate certain lands in the Nettandal village with the water of the tank in the plaintiffs' village.

It is found that the lands of the plaintiffs have been cultivated as wet lands from time immemorial ; that the water in the tank is hardly sufficient to irrigate them and the supply of this tank water for the irrigation of other lands must therefore necessarily cause damage to the plaintiffs. It is also found that the lands held by the defendants Nos. 1 to 7 in the Nettandal village, which under an agreement with the tenth defendant, they are attempting to irrigate with this tank water, are new lands which were not hitherto supplied with water from this tank.

It is now argued on behalf of the defendants Nos. 1 to 7, the appellants before us, that the relation between the plaintiffs and the tenth defendant is only contractual, and therefore the plaintiffs' remedy, if any, is only against him, and the decision in *Chinnappa Mudaliar v. Sikka Naikan*(1) is relied upon in support of this contention. That ruling has reference to the liability of the Crown

(1) (1901) I.L.R., 24 Mad., 36.

to supply water to a ryot. It dissents from an earlier ruling in *Ramachandra v. Narayanasami*(1) and is dissented from in a later decision by Subrahmania Ayyar, J., in *Sankaravadivelu Pillai v. Secretary of State for India*(2).

SANKARAN-
NAIR AND
PINHEY, JJ.

NYNAPPA
SERVAI
v.
VEERAN.

As between the Crown and the ryot different considerations may arise. The Crown claims the right of periodical revisions of assessment and the right to distribute the water for the benefit of the public subject only to the ryots' claim for such supply as is sufficient for his requirements and, for that purpose, to make the necessary alterations in the sources of such supply. The melvaramdar has neither the right of such revision of assessment nor was under any obligation to any other than the ryots of the plaint village for the distribution of this tank water.

Whatever might be the case therefore as between the Crown and the ryot, the right of the plaintiffs' kudivaramdars to the customary supply of water from the tank is a proprietary right appurtenant to their ownership of the lands.

In this view of the case we dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran-Nair.

VENKATAKRISHNAMA CHARLU (DEFENDANT), APPELLANT,
v.

KRISHNA RAO (PLAINTIFF), RESPONDENT.*

1909.
January 21,
22.

Civil Procedure Code—Act XIV of 1882, s. 244—Jurisdiction of Court to entertain separate suit in respect of matters falling within s. 244—Time for objecting to the maintainability of such suit.

Where matter which ought to be decided in execution under section 244 of the Code of Civil Procedure is tried in a separate suit by the Court executing the decree, such Court does not act without jurisdiction, as the section does not affect the jurisdiction of the Court but only prescribes the form of procedure.

Purmessuree Pershad Narain Singh v. Jankee Koer (1873) (19 W.R., 90).

Pasupathy Iyer v. Kothanda Rama Iyer, [(1905) (L.L.R., 28 Mad., 64)], referred to.

The objection should be taken in the original Court.

(1) (1893) L.L.R., 16 Mad., 333. (2) (1905) L.L.R., 28 Mad., 72 at p. 81.

* Second Appeal No. 435 of 1906.