APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

1919. February 26.

VENKATACHALAM CHETTY (APPELLANT), PLAINTIFF,

v.

AIYAMPERUMAL TEVAN (RESPONDENT), DEFENDANT.*

Landlord and tenant—Cesses, legal and illegal—Charge for taking landlord's water; 'Rent' within sec. 3 (11), *Estates Land Act (I of* 1908)—Res judicata—"*Competent to try such subsequent suit*" *in sec.* 11, *Civil Procedure Code (V of* 1908), *meaning of.*

The words "competent to try such subsequent suit" in section 11, Civil Procedure Code, refer to the competency of the Court which tried the previous suit to entertain the later suit *at the time of the institution of the previous suit*; and the fact that it was deprived of jurisdiction to try suits of the nature of the later suit after the institution but some time before pronouncing judgment in the previous suit does not make its decision any the less *res judicata*. Hence the decision of a Munsif's Court in a prior suit for rent operates as *res judicata* in respect of a later suit for rent though, by reason of the Estates Land Act, the Munsif's Court was deprived of jurisdiction to try such suits after the institution but some time before pronouncement of judgment in the prior suit. *Kunhiamma* v. *Raman Menon*, (1892) I.L.R., 15 Mad., 494, explained; *Gopi Nath Chobey* v. *Bhagwut Pershad*, (1884) I.L.R., 10 Calc., 697, and *Raghunath Panjah* v. *Issur Chunder Chowdhry*, (1885) I.L.R., 11 Calc., 153, followed.

A judgment does not cease to have the force of *res judicata*, simply because in other suits between the same parties the decision on the same point was different.

A charge for taking water belonging to the landlord is 'rent' within section 3 (11), Estates Land Act, and it is not an enhancement of rent even if not consolidated with the rent proper. *Thyammal* v. *Muttia*, (1887) I.L.R., 10 Mad., 282, followed.

Where such water is taken with the permission of the landlord only a suit for *rent* therefor can be brought and no suit for compensation for taking it will lie.

Where for water so taken even for dry crops the landlord was for long time levying and the tenant was paying the same rent as for water taken for paddy cultivation (*sarasari*) it is reasonable to charge rent at that rate whenever water is taken for dry crops.

A landlord is entitled to levy only such cesses as have a direct or proximate bearing on the purposes for which a land is let and mere length of payment will not give a cess which is purely voluntary or illegal a binding

* Second Appeal No. 1956, etc., of 1916 and Second Appeal No. 1327, etc., of 1917.

character, e.g., *mahimai*, a cess for payment to a village temple; *Sriparupu Ramanna* v. *Mallikarjuna Prasada Nayudu*, (1894) I.L.R., 17 Mad., 43, and *Vadamalai Thiruvanatha Sevuga Pandia Thevar* v. *Sankaramoorthi Naidu*, (1919) I.L.R., 42 Mad., 197, followed.

Cesses for purposes which are beneficial to both the landlord and tenant can be deducted out of the gross produce, such as *kulavettu* (a cess for repair of irrigation sources) and *palaswatantram* (a cess for payment to village artisans and servants).

No cess for superintending a harvest (*kanganam*) can be claimed where the landholder is entitled to get a fixed rent irrespective of the produce.

SECOND APPEALS against the decrees of the District Court of Rāmnād in Appeal No. 363 of 1915, etc., filed against the decree of the Special Deputy Collector of Rāmnād at Manamadura in Summary Suit No. 4861 of 1914, etc., and in Appeal No. 464 of 1915, etc., preferred against the decree of the Deputy Collector of Devakottai Division in Summary Suit No. 885 of 1913, etc.

These are two batches of suits for rent under section 77 of the Madras Estates Land Act by a landholder against his tenants. The principal pleas of the defendants, so far as they are material for the purpose of this report, are :—(1) that the landholder was not entitled to include under rent several cesses which he had included, (2) that all the cesses claimed were illegal, (3) that the claim for the cesses was *res judicata*, and (4) that the landholder was not entitled to charge for water taken for dry crops at the same rate (*sarasari*) as for water for paddy crop. The landholder sought to meet these pleas by stating that all the cesses and the charge of *sarasari* were legal, that they were being paid from time immemorial, that the previous decision of the District Munsif was not *res judicata* as the Munsifs' Courts were deprived of jurisdiction to try suits for rent by the Estates Land Act from 1st July 1908, i.e., after the institution of the prior suit but three months before the Munsif pronounced his judgment, and that in several of the cesses the matter was not *res judicata* as there were no previous decisions.

These two batches of suits were tried by two Deputy Collectors and two batches of appeals were filed before the District Court of Rāmnād, one of which was disposed of by Mr. MOORE and the other of which was disposed of by Mr. W. VENKATARAMAYYA. Both the District Judges held that the landholder was not entitled to levy *sarasari* rate for the water and that there was no bar of *res judicata*; but Mr. MOORE allowed all the cesses claimed in respect of two classes of lands, viz., *varapattu*

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lands (wet lands subject to division of actual produce between landlord and tenant) and *varisaipattu* lands (wet lands paying a fixed paddy rent), while Mr. VENKATARAMAYYA disallowed the cesses in the case of *varisaipattu* lands and allowed all the cesses except three (viz., *amanji*, *pakkilai* and *tayirmutti*) in the case of *varapattu* lands. The landholder filed these second appeals and the tenants filed memoranda of objections.

The charges and cesses claimed in the suit may be explained as follows:—

Sarasari is the claim by the landholder to charge the same rate of rent for water of the landholder taken by tenant for cultivation of dry crops as that which would be charged for water taken for paddy crop. *Kanganam* is a cess for the landholder's trouble in superintending the harvest. *Kulavettu* is a cess for the repair of irrigation tanks. *Palaswatantram* is a cess for payment to village artisans and servants. *Mahimai* or *Eswaran Koil Mahimai* is for contribution towards the expenses of the local temple. *Tayirmutti* is a claim for a pot of curd. *Pakkilai* is a claim for betel leaves and arecanut. *Amanji* is a cess levied in lieu of compulsory labour due to the landlord.

K. Srinivasa Ayyangar and *K. V. Krishnaswami Ayyar* for appellants.

B. Sitarama Rao and *S. R. Muttuswami Ayyar* for respondent.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.

PHILLIPS, J.—These second appeals are filed against two batches of appeals of the Rāmnād District Court which were decided by two District Judges who have not taken altogether identical views on all points. In Second Appeal there are two main points for consideration:—

(1) Whether the plaintiff is entitled to charge *sarasari* or average paddy varam for dry lands irrigated by plaintiff's water, (2) what cesses the plaintiff is entitled to charge.

On both these points, there have in the past been a number of suits between some of the same parties—one batch of suits in the Manamadura Munsif's Court, a second batch before the Special Deputy Collector of Rāmnād and the third before the Deputy Collector of Devakottai. It is contended for the appellants that the decisions in all these suits constitute *res judicata* so far as the parties and property concerned are the

same. In the Manamadura suits there was no appeal beyond the District Court except in two cases which came to the High Court, and in those two cases the High Court reversed the decision of the lower Courts. Mr. MOORE accordingly holds that the question is not *res judicata* as regards the defendants in the Manamadura suits who did not appeal, because to hold otherwise would lead to certain startling results and Mr. Venkataramayya also appears not to consider the decision as *res judicata* and regards them as of small evidentiary value in view of the contrary opinion of the High Court. It is difficult to see why questions that have once been settled between the parties should not be deemed to be *res judicata* merely on the ground that similar questions between the same parties have been decided otherwise in other litigation, and the learned vakil for the respondent does not support the finding of the District Judges on the grounds given by them, but so far as the cases decided by the Manamadura Munsif are concerned he relies on the language of section 11 of the Civil Procedure Code for holding that they are not *res judicata*. His contention is that, under section 11, the Court which decided the first suit must have been competent at the time of such decision to try the subsequent suit and relies on a ruling in *Kunhiamma* v. *Raman Menon*(1). We do not think that this case really supports his plea. No doubt the Judges said that they were of opinion that the only reasonable construction to be put upon the words

" Court of jurisdiction competent to try such subsequent suits "

must be held to refer to the jurisdiction of the Court at the time when the suit was heard and determined but that the Judges did not really mean to decide that the Court must be competent on the date of judgment and not on the date of the institution of the suit appears to be clear from the fact that they approved the view of the Calcutta High Court in *Gopi Nath Chobey* v. *Bhugwat Pershad*(2) and *Raghunath Panjah* v. *Issur Chunder Chowdhry*(3). In the former of these cases it was clearly held at page 707 as follows :

" the reasonable construction of the words 'in a Court of jurisdiction competent to try such subsequent suit' seems to us to be that it must refer to the jurisdiction of the Court at the

(1) (1892) I.L.R., 15 Mad., 494. (2) (1884) I.L.R., 10 Calc., 697.
(3) (1885) I.L.R., 11 Calc., 153.

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time when the first suit was brought, that is to say, if the Court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such Court would be conclusive under section 13, although on a subsequent date, by a rise in the value of such property or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property."

This view is followed in *Raghunath Panjah* v. *Issur Chunder Chowdhry*(1) and also *Rai Churu Ghosh* v. *Kumud Mohan Dutt Chowdhary*(2). At the date of institution of the first suit in the Manamadura Court, that Court had jurisdiction to try the subsequent suit and the fact that jurisdiction was taken away by the passing of the Estates Land Act shortly before the judgment was pronounced would not make it a Court not competent to try the subsequent suit within the meaning of section 11. We, therefore, think that the decision of the Manamadura Munsif which was not appealed against constituted *res judicata* as well as the two decisions of this Court. So far as the cases decided by the Special Deputy Collector are concerned, there was no appeal and his decision is undoubtedly *res judicata* In the third class of cases before the Deputy Collector of Devakottai no appeal was preferred in some of the suits and his decision would therefore be final in those cases. So far therefore as the previous litigations related to the same land or between the same parties, we think that the questions therein raised and decided must be held to be *res judicata*. There are, however, other cases before us to which the principle of *res judicata* will not apply and these will have to be decided on the merits. The contention of the respondent on the first of the two questions before us which was upheld by the District Judges is that the charge of *sarasari* is illegal, because it is an enhancement of rent. Rent was originally charged for dry crops on the suit dry lands and the right to levy *sarasari* now claimed is claimed on the ground that those lands have been irrigated by water taken from the landlord's tank and for this water he is entitled to a reasonable compensation. It has been held in *Thyammal* v. *Muttia*(3), *Venkoba Rao* v. *Vaithilinga Udayan*(4) and *Battina Appanna* v. *Raja Yarlagadda*(5) that a

(1) (1885) I.L.R., 11 Calc., 153.
(2) (1898) 2 C.W.N., 297.
(3) (1887) I.L.R., 10 Mad., 282.
(4) (1901) 12 M.L.J., 22.
(5) (1917) 33 M.L.J., 355.

charge for water taken by the tenant is not enhancement of rent. No doubt under section 3 (11) of the Estates Land Act, such charge, even if not consolidated with the rent, will come within the definition of 'rent'. But for that reason alone, it is not necessary to hold that the charge for water in excess of the prior dry rent is an enhancement of rent.

It is suggested that the landlord's remedy would be to sue for compensation for the use of water taken, but that, within the meaning of the Estates Land Act, would be in effect a suit for rent and would be governed by the provisions of that Act. Nor can he sue for damages for loss of water taken, when, as a matter of fact, he has consented to the tenant taking that water. It is not disputed that any water taken was taken with the permission of the landlord, and we think it is only reasonable to infer from such taking by consent a contract between the parties that the landlord shall be entitled to a reasonable compensation for the water. The question, therefore, would be whether the charge of *sarasari*, which is the average varam collected on paddy lands in the village, is a reasonable charge. It is very difficult to fix exactly the proper charge for the water, for the quantity of water taken must vary according to the season of the year and also the nature of the crop raised on the land. So far as the landlord is concerned, the most profitable use of the water would be to facilitate the cultivation of a paddy crop, as it would result in his obtaining his share of the produce in paddy and the landlord might well say that all the water taken from his tank should be utilized for such purpose. If the tenant utilized it for less remunerative crops, such as chillies and cotton as in the present case, can he be heard to say that he should pay less? It is a somewhat difficult question, but we find that *sarasari* has been levied in the past. *Sarasari* being a curious method of levying compensation, which would hardly suggest itself to a landlord in modern days, it is evident that it must be levied according to old existing custom, and this would also appear from the technical meaning which is attached to the word itself. By its levy the landlord gets no more for his water than he would get by supplying water to wet lands, and there seems to be no ground for depriving him of what he can ordinarily expect to get for his water. The tenant is not bound to take water to dry lands, and consequently

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he suffers a hardship by being asked to pay the full price for water taken by him. He has his remedy in his own hands, i.e., he can cease to take water. The landlord on the other hand has not a similar remedy, for the application of the water to paddy crops or to *vanpayir* crops lies in the tenants' hands. In these circumstances it seems to us that the levy of *sarasari* by the landlord is only a reasonable and equitable compensation for water supplied by him, and must be allowed. As there is no finding as to whether water was taken for the suit years, appellants' vakil says he will be satisfied with a mere declaration. The decree will therefore be modified accordingly.

As regards the cesses claimed Mr. MOORE allowed all the cases in respect of *varapattu* and *varisaipattu* lands. Mr. Venkataramayya disallowed the cesses in the case of *varisaipattu* lands and as regards *varapattu* lands disallowed *amanji*, *pakkilai* and *tayirmutti*. The appellant's vakil stated that he does not press *pakkilai* and *tayirmutti*.

Varapattu lands are the ordinary wet lands in respect of which the landlord and tenant divide the actual produce, while *varisaipattu* lands are lands paying a fixed paddy rent.

The Special Deputy Collector disallowed *pakkilai*, *tayirmutti* and *amanji* and allowed the other cesses claimed on the ground that "these cesses have been customarily paid by the ryots and collected by the landlord in kind as part of their rent." There can be little doubt that the cesses have been paid for a long series of years by the tenants without objection.

The karnam (plaintiff witness No. 1) deposes that on *varapattu* lands *kanganam*, *Iswaran kovil mahimai*, *kulavettu*, *kadiraruppu* (*cooly*), *karnam swatantram*, *kudivaram*, *kaipichai*, are deducted as common charges and the balance divided between the landlord and tenant. Out of these common charges some go to the landlord and some to the ryot. He states that out of the *kadiraruppu* three measures are taken out of every fourteen markals and added to the landlord's share as *amanji*. As regards *varisaipattu* lands he states that *kanganam*, *kulavettu*, *tayirmutti*, *amanji*, *Iswaran kovil mahimai*, *pakkilai*, *swatantram*, *vamadai*, *vaikkalkattu* are the cesses levied.

The plaintiff appeals against the decision of Mr. VENKATARAMAYYA disallowing the cesses claimed and the defendants have

filed a memorandum of objections against the decision of Mr. MOORE as regards the cesses allowed.

In our judgment in *Vadamalai Thiruvanantha Sevuga Pandia Thevar* v. *Sankaramoorthi Naidu*(1) we have given what in our opinion are the tests to be applied and the considerations which should weigh with the Court in allowing or disallowing cesses which have been paid for a long time without dispute and to the difference between cesses which are deducted out of the gross produce and those deducted out of the tenant's share. We observed as follows :—

"In considering whether any particular cess claimed and which has been paid for a series of years is enforceable or not the first thing to be considered is whether the cess claimed has any direct or proximate bearing on the purpose for which the land is let. If the cess is payable in respect of such purpose it will *prima facie* be one which is binding on the parties and the onus will be on the tenant to show that owing to some special circumstance it is not binding on him. When the cesses are in their nature unconnected with the object for which the land is let, they can only be claimed by the landlord under contract between him and the ryot, supported by consideration or usage for which a legal origin is either proved or presumed from the nature of the cess and long course of payment."

While on the one hand mere length of payment will not, as pointed out in *Sundaram Iyer* v. *Theetharappa Mudaliar*(2), give to a cess, which is purely voluntary, or which is on its face illegal, acquire a binding character, payment during a long course of years will be presumptive evidence that the payment of a cess had a legal origin, if the case is of such a nature that a contract to pay it may be reasonably inferred.

As regards cesses deducted out of the gross produce before division of the varam, there is nothing to prevent the parties from agreeing that certain expenses, which they consider to be beneficial to both of them, should be met by them in common, and in such cases so long as the levying of the cess is not a device by the landlord to give himself a purely personal benefit the purpose for which the cess is levied is immaterial. It will of course be open to the tenant to show that the purpose for which the cess is levied has failed or that the landlord has not been appropriating the cess to the purpose for which it is claimed and levied.

(1) (1919) I.L.R., 42 Mad., 197. (2) (1916) 40 I.C., 159.

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So far as cesses in connexion with temples are concerned, they have been held to be purely voluntary in *Siriparupu Ramanna* v. *Mallikarjuna Prasada Nayudu*(1), *Ramalingam Chettiar* v. *Ramaswami Aiyar*(2) and *Devanai* v. *Raghunatha Rao*(3). *Iswaran kovil mahimai* will therefore be disallowed.

As regards *varisaipattu* land, there is obviously no necessity for *kanganam*, which is a cess for superintending harvest; for the landlord gets a fixed paddy rent irrespective of the produce and no supervision is necessary. *Tayirmutti* and *pakkilai* have been given up. *Iswaran kovil mahimai* is for the reasons above given not enforceable. The Deputy Collector has disallowed *amanji*, and it has not been shown that the cess is one that can be enforced.

We do not see sufficient grounds to disallow the other cesses. They have been paid for several years without objections and have been found by the Deputy Collector to have been paid for a long series of years as part of the rent. The decrees of the lower Courts as regards cesses will be modified accordingly.

Appellants will get costs in second appeals Nos. 1327—1353 and 1356—1361 and will pay costs in Nos. 1956—1973 and in the memorandum of objections. Each party will bear his own costs as also in second appeals Nos. 1354–1355.

N.R.

(1) (1894) I.L.R., 17 Mad., 43. (2) (1902) 13 M.L.J., 379.
(3) (1913) M.W.N., 886.