1935 *Present:* **Dalton S.P.J. and Koch J.**

SUNTHARAM *et al. v.* SINNATAMBY *et al.*

151—C. R. Mallakam, 8,745.

Overhanging trees—Landowner's right to cut branches—Law in Jaffna—Cultivated fruit trees—Thesawalamai.

Under the *Thesawalamai* a landowner is not entitled to have the overhanging braches of a cultivated fruit tree growing on an adjoining land cut off.

CASE referred by Akbar J. to a Bench of two Judges.

Plaintiff and defendant are owners of adjoining lands in Jaffna. Branches of some jak trees in defendant's land overhang the plaintiff's land and render plaintiff's land unfit for tobacco plantations.

Plaintiff brought this action to have it declared that the overhanging branches should be cut off.

The learned Commissioner held that the case was covered by the decision *Kandasamy v. Mailvaganam*[1] and dismissed the plaintiff's action.

S. J. V. Chelvanayagam, for plaintiffs, appellants.—The case of *Kandasamy v. Mailvaganam* (*supra*) has been wrongly decided—That decision is based on paragraph 3 of section III. of the *Thesawalamai*. Paragraph 3 of section III. speaks of the rights of ownership in overhanging branches and the fruits on those branches. It is silent on the rights of the owner of the land that is overhung to cut off the branches. The right to cut the overhanging branches is independent of the right of property in the branches themselves. If the owner

[1] *3 Bal. Reports 64.*

of the land that is overhung be also the owner of the overhanging branches, then the question of his right to cut will not arise, since the owner could do what he pleases with the branches that belong to him. It is when the owner of the land that is overhung is not the owner of the overhanging branches that the question arises as to whether he could cut the overhanging branches or not. This right to cut the overhanging branches is really a right that flows from the ownership of the land underneath. The owner of land is also the owner of all the space above it. He has a right not to allow his neighbour to encroach on that space. All systems of law have considered this right from this point of view, viz., English law, the Roman-Dutch law, and the Indian law. They consider the overhanging branches as constituting a nuisance on the land over which they hang. If that be so we cannot go to the *Thesawalamai* to see what the law of nuisance in Ceylon is. It must be the same in Jaffna as elsewhere in Ceylon.

It is true that paragraph 3 of section III. of the *Thesawalamai* has a reference to the right to cut the overhanging branches of wild trees, but this is mentioned incidentally and has no connection with the subject-matter of section III. which purports to deal with rights of possession and of ownership. Moreover the mention of the right to cut the branches of wild trees does not logically lead to the inference that no right exists to cut the branches of cultivated trees.

Counsel cited *Lemon v. Webb*[1] *Joshi v. Ragunath Oka*[2].

Manicavasagar, for defendants respondents.—Paragraph 3 of section III. must be taken as a whole.

Primarily it draws a distinction between fruits of cultivated trees and fruits of uncultivated trees.

But it deals with much more than the division of produce where a tree hangs over the ground of a neighbour.

The second paragraph of section III. specifically gives the right to a neighbour to cut off the branches of uncultivated trees that overhang his ground: the relevant passage reads thus:

> "And he (*i.e.*, the neighbour) is even at liberty to cut the branches if they hinder him, and sell the same without the consent of the owner of the ground on which the trees stand."

It is not correct to argue that the *Thesawalamai* is silent on this right to cut off branches of overhanging trees.

The argument of counsel for appellant will only apply if the *Thesawalamai* had no provision in respect of the right which a neighbour has to cut branches of trees that overhang his compound.

It is correct to construe paragraph 3 of section III. as giving such a right to a neighbour in respect of uncultivated trees, but not in the case of trees cultivated with trouble and labour.

Counsel cited *Kandasamy v. Mailvaganam* (*supra*).

Cur. adv. vult.

[1] (1895) 6 *A. C., p. 1.*

[2] *43 Bombay 169.*

December 9, 1935. DALTON S.P.J.—

This appeal by the plaintiffs in the Court below was reserved by Akbar J. for the opinion of a Court of two Judges, to enable a decision of this Court by Grenier J. in *Kandasamy v. Mailvaganam*[1] decided in the year 1905 to be reconsidered, if necessary.

The plaintiffs and defendants are Jaffna Tamils and adjoining land-owners at Mallakam near Jaffna in the Northern Province. On the defendants' land are five jak trees, at least 50 years old, eight cubits from the boundary fence and inside the defendants' land. The branches of these trees overhang the plaintiffs' land, which is used for tobacco cultivation. There is no admission or evidence in the lower Court as to the extent to which the branches overhang the plaintiffs' land, but an inspection by the Commissioner, as recorded in his judgment, showed that the branches of the five trees overhang and overshadow a strip of the plaintiffs' land, about eight to ten cubits wide, all along the line of the fence, at a height of from 20 to 25 feet. There was also a claim for damages on the one side and compensation on the other, but no evidence was led on these points, the law alone being argued.

The main claim of the plaintiffs was for an order that the defendants do cut off the branches overhanging their land and be ordered to pay a sum as damages and continuing damages until they do so. It does not seem to be suggested that the plaintiffs are entitled to cut off the branches themselves. The main legal question raised for decision was whether the *Thesawalamai* or Roman-Dutch law was applicable. This question the Commissioner has answered in favour of the defendants, that the *Thesawalamai* is applicable, holding that the decision in *Kandasamy v. Mailvaganam* (*supra*) is decisive of the matter.

Section III. of the *Thesawalamai* deals with the possession of land. Paragraph 3 of that section is headed "Division of produce where fruit trees overhang the ground of another". A perusal of paragraph 3 shows, however, that it deals with more than the mere division of produce. It first of all makes a distinction between cultivated fruit bearing trees and trees which "grow of themselves without having been planted or any trouble having been taken". It is agreed in this case by all parties that jak trees are cultivated fruit bearing trees. The paragraph goes on to provide that if cultivated fruit bearing trees overhang a neighbour's property, the fruit remains the property of the planter, and the neighbour has no right to claim the fruit. In the case of other trees, however, such as tamarinds, illupai, and margosa, the fruit belongs to the person whose ground the trees overshadow, presumably when the sun is directly overhead. The first portion of this paragraph does not deal with the question of cutting down overhanging branches.

The second portion of the paragraph appears to commence by giving a reason why the fruit of trees overhanging a neighbour's land should not belong to the person on whose land the trees stand. It states that the trees have grown without labour or trouble "and he is not to be the owner of the branches and fruit which grow over his neighbour's ground, the fruit of such branches being indisputably his (*i.e.*, the neighbours) and he is even at liberty to cut the branches, if they hinder him,

[1] *3 Bal. 64.*

and sell the same for his own profit without the consent of the owner of the ground on which the trees stand". It further provides that "the owner of the branches" cannot prevent "the owner of the tree" from cutting it down, but if he does so, he must give the branches to the person over whose ground they hang.

The second portion of paragraph 3 deals with non-cultivated trees only, and would seem to be drawing a distinction between the ownership of the overhanging fruit and branches of cultivated fruit trees on the one hand and that of trees that have grown up of themselves on the other. The former remain "the entire property of the planter", and, as I read the paragraph, the neighbour has no rights in them at all. The paragraph, it is true, is not as clear and explicit as it might be, but it must be read as a whole, and I have construed it as best I can. It may appear to be to some extent unreasonable, having regard to present day numbers of population and conditions of cultivation in the Northern Province, that a neighbour should have to put up with inconvenience caused by an adjoining landowner's overhanging fruit trees, but it is not for this Court to alter the law. It may possibly be that owing to climatic reasons such difficulty seldom arises, for cases of this kind in the Courts would appear to be very few in number, although litigation generally is plentiful. No question arises here of any custom or customary law being abrogated by disuse.

It follows therefore from what I have stated that I have come to the same conclusion as Grenier J. in *Kandasamy v. Mailvaganam* (*supra*). The learned Judge there has referred to some old decisions in Muttukisna's edition of the *Thesawalamai* covering the years 1825 to 1859. In all these cases, as Grenier J. points out, a distinction seems to be carefully drawn between cultivated trees and wild and uncultivated trees. This distinction extends even to the right of ownership in overhanging branches. One old case deals, it is interesting to note, with fruit of a cultivated tree that has fallen on the neighbour's land, and with the right of the owner to go and retrieve it.

I have therefore come to the conclusion that the *Thesawalamai* applies to the matter in dispute and the Commissioner of Requests correctly so held. The appeal must therefore be dismissed with costs.

KOCH J.—I agree.

Appeal dismissed.