make any special provision in Act VIII of 1865 for an appeal from an order of a Civil Court, because provision for all such cases is made in the Code of Civil Procedure. The order passed under section 27 is, in my opinion, a decree capable of execution, and being a decree of a Civil Court, the appeal is regulated by the provisions of the code.

"This petition must, therefore, be dismissed with costs."

The petitioners preferred this appeal against the above order of Wilkinson, J.

The appeal having come on for hearing before Muttusami Ayyar and Parker, JJ., their Lordships, after hearing the pleaders for the parties, delivered judgment as follows :—

JUDGMENT.—We are unable to agree with the learned Judge that an order made under section 27, Act VIII of 1865, is a decree within the meaning of the Civil Procedure Code.

Having regard to the language of section 27, we think it can only be taken to be an order in a summary proceeding, and as such cannot be said to have decided a "suit or appeal" under section 2 of the Code of Civil Procedure. The decision in *Vadamalai Thiruvana Tevar* v. *Caruppen Servai*(1) would show that the proceeding contemplated by the section is summary. We must, therefore, allow the appeal with costs, and we shall proceed to hear the civil revision petition under section 622.

[Their Lordships, holding that the petitioners had established no grounds on which the Court should interfere in revision, dismissed their petition with costs.]

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

1889. October 29.

RANGAYYA APPA RAU (PLAINTIFF), APPELLANT,

v.

KADIYALA RATNAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act, Madras—Act VIII of 1865, *ss.* 9, 10, 11—*Improper stipulations in patta—Claim of tenants to hold over land after expiry of lease.*

In summary suits brought by a landlord to enforce acceptance by his tenants of pattas tendered by him for the current *fasli*, it was pleaded that the pattas were

(1) 4 M.H.C.R., 401.

* Second Appeals Nos. 1232, &c., of 1888.

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improper in that they did not comprise certain land of which the tenants were in possession and in which they claimed permanent occupancy rights, and also in that they contained various terms which the plaintiff was not entitled to impose on the defendants, providing (*inter alia*) (1) that interest should be payable on the several instalments of rent as they became due, (2) that the defendant should not fell certain trees except for agricultural purposes, (3) that the defendants should not reap their crops without previously obtaining the plaintiff's permission, (4) that on a change made without the plaintiff's permission from dry to wet cultivation, the tenancy should be forfeited in case of default made by the defendants in paying the amount of Government assessment, and also an undetermined sum then to become payable by the defendants to the plaintiff in addition to the rent.

The defendants failed to prove the permanent occupancy rights claimed over the land not comprised in the pattas and it appeared that they had held leases from the plaintiff for the land in question for a period of three years and had held over after the expiry of the leases without the permission and contrary to the wishes of the landlord; and it further appeared that the provision as to trees did not extend to shrubs, &c., and had been an accepted term in the pattas issued for ten years. The Revenue Court modified the terms of the pattas and passed decrees that the pattas as modified be accepted, against which some only of the defendants appealed, and the District Judge on appeal introduced further modifications into the pattas:

Held (1) that the District Judge had no jurisdiction under Civil Procedure Code, s. 544, to introduce further modifications into the pattas in favor of the defendants who had not appealed according to the opinion formed by him in appeals preferred by the defendants in other suits;

(2) that the defendants were not entitled to have the pattas modified by enlarging the extent of the land comprised in them, or by the cancellation of the provisions as to interest and as to felling trees;

(3) that the defendants were entitled to have the pattas modified by the cancellation of the provision as to reaping crops and of the provision for forfeiture.

SECOND APPEALS against the decrees of G. T. Mackenzie, District Judge of Kistna, in appeal suits Nos. 187, 188, 189, &c., of 1887, modifying the decision of P. Ramachandra Rau, Head Assistant Collector of Kistna, in summary suits Nos. 190, 191, 192, &c., of 1886.

Suits by a landlord under section 9 of the Rent Recovery Act, Madras, to enforce the acceptance of pattas by his tenants. The form of the pattas tendered by the plaintiff, so far as it is material for the purposes of this report, is as follows:—

"You shall pay the kist of every year in that very year, in the order of kistbandi instalments mentioned above, in our taluk of Nuzvid without raising any objections, and obtain receipts

"On failure to pay according to the kist instalments, you shall pay together with interest at rupee 1 per cent. per mensem from the date of the expiration of the kist instalment.

"You yourself shall bear the profit or loss accruing from excess

of rain or want of it; and whether you cultivate or not, you shall pay the kist without relinquishing the lands within the term.

"You shall enjoy (the produce) after obtaining Dumbalas from our Circar for permission for harvesting the produce after the season.

"At the expiration of the term, you shall not cultivate without again obtaining fresh pattas from us.

"If you irrigate the Vetha crops (*i.e.*, crops sown by the hand) by the Krishna water, you shall pay separately the tirva that may be fixed by the Queen's Circar.

"If, without obtaining our permission, you newly raise wet cultivation on dry lands, you shall not only pay the tirva that may be fixed therefor by the Queen's Circar in addition to your paying to our Circar the excess kist that may be determined by us for such wet cultivation, but also you shall thenceforth relinquish the right of cultivating those lands.

"As the fruit trees, the tax on the palmyras, the Tumma trees (Baubul trees) that are on the said lands are not included in the said kist, you shall, when required for cultivation purposes, obtain permission and cut the required Tumma trees only."

The Head Assistant Collector and (on appeals preferred by some of the defendants) the District Judge made certain modifications in the form of the patta.

The plaintiff preferred these second appeals.

Subramanya Ayyar and *Bhashyam Ayyangar* for appellant.

Mr. *deRozario* and *Ananda Charlu* for respondents.

The further facts of the case appear sufficiently for the purposes of this report from the following

JUDGMENT:—The appellant in these cases is the zamindar of Nuzvid and the respondents are his raiyats in the village of Mastabada. One of the principal questions raised in them was whether the pattas tendered by the former to the latter for fasli 1295 were proper. Both the Head Assistant Collector and the Judge considered that they required to be amended, and the zamindar appeals from their decision.

The first objection taken with reference to second appeals Nos. 1292 and 1299 is that the Judge was not entitled to alter the decision of the Court of First Instance to the appellant's prejudice. In those cases the raiyats did not appeal to the District Court, but the Judge modified the decrees of the Head Assistant Collector

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according to the opinion formed by him in appeals preferred by other raiyats in other suits. It is contended that he was not at liberty to do so, and as section 544 of the Code of Civil Procedure is not applicable, we are of opinion that the contention must prevail. The decision of the District Court so far as it modifies that of the Head Assistant Collector in the respondent's favour in second appeals Nos. 1292 and 1299 must be set aside.

The second objection which is taken for the appellant is that both the Lower Courts were in error in holding that the relinquished land should be included in the pattas. The zamindar's contention was that the land was granted to the raiyats on a lease for three years ending with 1294, that they cultivated it without his permission in 1295, that he leased it out to others in May, and that he was, therefore, not bound to include it in the pattas tendered to respondents in June 1295. In answer to this contention the raiyats urged that the relinquished land was granted to them in 1292 not on a lease for three years but in perpetuity and on the same tenure on which they hold ordinary jarayati land. The land in dispute is about 2,000 acres in extent, and it was relinquished by the raiyats together with 200 acres more in 1289 when the estate was under the management of the Court of Wards. It was rented out as pasture land in 1289, 1290 and 1291, and at the end of the last-mentioned fasli the zamindari was made over to the appellant. Early in 1292 he granted the relinquished land to the respondents on a joint lease for three years subject to an annual rent of Rs. 24-8-0 per katti, but the respondents since divided it among them and in consequence of this division the joint holding was converted into separate holdings. So far there is no dispute, the contest being as to whether the ordinary raiyatwari tenure was also substituted for the tenancy for three years when separate holdings were substituted for the joint holding. The Head Assistant Collector observed that neither party proved his case, but that as the zamindar did not tender pattas prior to June 1295 and not until long after the raiyats had cultivated the land, it was fair to direct that it should be included in the pattas. The Judge recorded no distinct finding as to whether the lease, as ultimately modified in 1292, was permanent or limited to three years, but upheld the decision of the Head Assistant Collector on the ground that it was equitable. It is argued before us, and rightly we think, that the question which

the Judge had to decide was one of legal right. If, as alleged by the zamindar, the land was let but for three years, and the raiyats held it over after the expiration of the lease without his permission and contrary to his wishes such holding over would be wrongful and it would be no valid defence in a suit to eject them. It is not alleged that the zamindar granted permission to raiyats to cultivate the relinquished land in 1295 on the same terms on which they cultivated it during the previous year. A wrongful holding over could not be treated as a continuation of the prior tenancy unless the zamindar accepted rent or by some overt act condoned the wrong. Again the appellant was entitled under the existing law to tender pattas before the end of the fasli year, and if a tenant who must be taken to know the law chose to hold over, the inference is that he is in possession by his own wrong and at his own risk. We must therefore ask the Judge to return a distinct finding as to whether the relinquished land was granted in 1292 ultimately on a lease for three years only or on a permanent tenure.

Adverting to the finding of the Head Assistant Collector that neither party proved his contention as to the tenure on which the relinquished land was let in 1292, it is argued for the appellant that the *onus* of proof being on the respondents, the decision must be in his favour in the event of that finding being adopted. To this suggestion we are unable to accede. The *onus* of establishing a perpetual tenure, if any, is certainly on the respondents, but it is open to them to fall back upon the presumption of tenancy from year to year, which might arise from their occupation from 1292 to 1294, and to claim that the relinquished land should be included in the pattas at least for 1295, if neither a lease for the fixed term of three years nor a perpetual tenure were established. Before we dispose of these second appeals, however, we must request the Judge to return findings on the question mentioned above.

The last objection has reference to two stipulations which the Judge directed to be omitted from the pattas in all the cases on the ground that they were unreasonable. The first stipulation is this:—"In case, without obtaining our permission, you should newly cultivate dry land as wet land, you should not only pay the assessment fixed by the Government of Her Majesty and the extra assessment fixed by us for your having cultivated it as wet

land to our Circar, but should also forfeit the right of cultivating the land from that time." This provision, so far as it relates to forfeiture of the right to cultivate, is manifestly penal, and, so far as it relates to extra assessment payable to the zamindar, is arbitrary and likely to prove oppressive. We consider that it was properly disallowed by the Judge. We also concur in his opinion that the second stipulation is unreasonable. It requires the raiyat not to reap his crop without the previous permission of the zamindar. The appellant has a lien on the crop for his rent and is entitled to distrain it for arrears of rent if any. The provision is open to abuse, while it is not necessary for the protection of his interest.

The respondents object that the stipulation for payment of interest from the dates on which the several instalments of rent were payable according to the kistbundi was improperly inserted in the pattas which were tendered at the close of the year. It must here be observed that the pattas, though tendered in June 1295, were tendered as evidence of the contents of a pre-existing obligation consequent on the position of the respondent as occupancy raiyats. The tender is not the *cause* of the obligation, though it is a condition precedent to its enforcement. We see no sufficient ground for upholding this objection.

The respondents also object that the stipulation that raiyats ought not to fell fruit trees and certain other trees except for agricultural purposes is an unwarranted interference with their right to the trees which stand on their land. We observe that there was a similar stipulation in some of the previous pattas. There is, however, no distinct finding as to whether its insertion in the pattas is in accordance with the established usage of the village. On this point also we shall ask the Judge to return a distinct finding.

[The District Judge returned a finding to the effect that the defendants entered upon the relinquished lands in fasli 1292 not as tenants from year to year, but on leases for a term of three years, and that, having held over without the zamindar's consent, they could not claim future pattas at the rent which they had paid in those three years. With regard to the trees, the District Judge found that the stipulation had been comprised in the pattas for ten years, but that this period was not sufficient to constitute a usage.]

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These second appeals having come on for final hearing their Lordships accepted the finding with regard to the relinquished lands, and, with regard to the stipulation not to cut trees delivered judgment as follows:—

We are not able to support the finding of the District Judge, and it appears to us that he has put the burden on the wrong side. *Primâ facie* a tenant would not be at liberty to cut down fruit trees on his holding, and by so doing would considerably impair the value of the property. The fact that for ten years this condition in the pattas had been accepted would be evidence of a recognized custom consistent with the usual rights of a landlord and it is shown that the prohibition does not extend to shrubs and small trees which are generally at the disposal of a tenant for the purposes of his holding. With this modification the finding of the Lower Appellate Court is accepted. We direct that each party do bear his own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

1889. Nov. 11, 14.

RAINIER (PLAINTIFF),

v.

GOULD (DEFENDANT).*

Stamp Act—Act I of 1879, *sched. I, art.* 5(*a*)—*Agreement or memorandum of agreement relating to the sale of shares—Agreement by correspondence.*

Correspondence having passed between the plaintiff and defendant relating to the sale of shares in a certain company by the plaintiff to the defendant, and the sale not having been carried out, the plaintiff in a suit for damages against the defendant sought to prove an agreement for sale from the letters, none of which were stamped:

Held, the letters, though unstamped, were admissible as evidence of an agreement, since they did not constitute an agreement or a memorandum of agreement.

CASE stated under section 69 of the Presidency Small Cause Court Act by J. W. Handley, Chief Judge of the Madras Court of Small Causes, in suit No. 20399 of 1888.

The case was stated as follows:—

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* Referred Case No. 16 of 1889.