APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

THIAGARAJA AND OTHERS (DEFENDANTS), APPELLANTS,

and

GIYANA SAMBANDHA PANDARA SANNADHI (PLAINTIFF), RESPONDENT.*

1887. February 15.

Right of occupancy—Permanent cultivator—Paracudi—Burden of proof—Form of suit.

The defendants' ancestors or predecessors in title were the cultivating tenants of the lands of a certain temple from a date not later than 1827, in which year they were so described in the paimáish accounts. In 1830, they executed a muchalká to the Collector, who then managed the temple, whereby they agreed among other things to pay certain dues. They were described in the muchalká as *paracudis*. In 1857, the plaintiff's predecessors took over the management of the temple from, and executed a muchalká to, the Collector, whereby he agreed among other things not to eject the raiyats as long as they paid kist. In 1882, the dues (which were payable separately,) having fallen into arrear, the manager of the temple sued to eject the defendants:

Held, (1) that the suit was not bad for misjoinder;

(2) that the burden of proving the permanent character of the tenure set up by the defendants lay on them;

(3) that there was nothing to show that the defendants were more than tenants from year to year. *Chookalinga Pillai* v. *Vythealinga Pundara Sunnady*, 6 M.H.C.R., 164, and *Krishnasámi* v. *Varadarájá*, 1 I.L.R., 5 Mad., 345, discussed and distinguished.

APPEALS against the decrees of R. Vasudeva Ráu, Subordinate Judge of Negapatam, in Original Suits Nos. 106 and 107 of 1880.

These were suits by the plaintiff as sole Ádhinam trustee of a mattam to which a certain temple was attached to eject the defendants from lands in the village of Sandaputtur belonging to the temple and to recover arrears of rent, &c. The defendants or their ancestors had been in possession of the lands in question at all events since 1827, in which year they were described as cultivating raiyats in the paimáish accounts. In 1830, they had executed a muchalká for the lands to the Government, whose rights under it were subsequently transferred to the plaintiff's predecessor.

In the muchalká, the executants, therein described as *paracudis*, agreed to cultivate the lands, no term being fixed for their holding: they further agreed to pay certain sums as kist and swamibhogam,

* Appeals Nos. 106 and 107 of 1882.

THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI.

and it was provided that attachment was to be made if the payments fell into arrear. In 1857, the plaintiff's predecessor took over the management of the temple from the Collector and executed to him a muchalká, to which neither the defendants nor their ancestors were parties, agreeing among other things not to eject the raiyats as long as they paid kist, &c. In 1882, the payment having fallen into arrear, the plaintiff brought these suits.

The Subordinate Judge of North Tanjore decreed for the plaintiff and the defendants preferred this appeal.

Mr. *Shaw* for appellants.

Rámá Ráu for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgments of the Court (Kernan and Brandt, JJ.).

KERNAN, J.—The principal question is, are the appellants (tenants of the village of Sandaputtur) entitled to a right of permanent occupancy?

The ancestors of the defendants and after them the defendants have been in possession as cultivating raiyats since, at all events, 1827—see paimáish account, 18th May 1827. In January 1830, a muchalká (exhibit A) was executed by the tenants of the village, ancestors of the defendants, agreeing to cultivate the lands, and to pay the rents as therein reserved to the Collector on behalf of the temple.

In that muchalká no term is fixed for tenure, and the persons signing the muchalká are therein called paracudis. *Primâ facie*, "paracudis" are cultivators without occupancy rights—see the description given in *Krishnasámi* v. *Varadaráju*(1).

By exhibit A, the parties signing agree to cultivate the wet and dry lands from fasli 1830 as per paimáish fasli 1826. The lands and the rates are specified and the period of payment and the whole kist and swamibhogam. It is provided "as we have thus agreed to pay, we will, as long as the lands are in our possession, pay the said instalments of kist and swamibhogam." It is provided that attachment is to be made if arrears accrue. Provision is made for higher rates on cultivation of betel, &c., and for payment of teerva on cultivated waste and for payment of swatantrams to village servants and for sending men daily and fortnightly to

(1) I.L.R., 5 Mad., 345.

festivals to carry articles, and that Government should remit on account of drought or flood.

There is nothing in that muchalká to lead to the conclusion that the cultivators were more than tenants from year to year.

In the year 1857, the Government delivered over to the predecessor of the plaintiff all the rights to the temple and temple lands, including of course the rights under the muchalká (exhibit A). On the 7th December 1857, a muchalká was executed by plaintiff's predecessor to the Collector. In it there is a special clause that the plaintiff's predecessor should not eject any of the raiyats so long as they paid the kist properly payable by them. The plaintiffs or those whom they represent were not parties to the muchalká of 1857, and can derive no benefit from it. They could not enforce that clause.

In *Chockalinga Pillai* v. *Vythealinga Pandara Sunnady*(1) and in *Krishnasámi* v. *Varadaráyá*(2), the muchalká to the Collector contained similar clauses; yet in each case it was not considered that such clause did not operate to give the right of permanent occupancy.

The defendants' ancestors and the defendants themselves have paid swamibhogam to the temple and kist to Government from 1827.

During that period there was no large or substantial amount spent on reclamation; although it was so alleged, the evidence was insufficient to prove the allegation. No act is found to have been done in respect of the lands which would show a consciousness by the cultivators that they occupied on more than the ordinary terms of tenancy from fasli to fasli. The sale in 1880 by defendants Nos. 11 and 18 were after former suit commenced.

The tenants were bound to do service for the temple by assisting at the car procession to drag the car. But this obligation was part of their rent services.

If the cultivators were ejected by the plaintiff, they need not give their future service.

It is contended that long possession is evidence of right of occupancy. But when the right of possession or right to continue in possession is proved, as in this case, to have arisen under a written instrument which does not provide for right of permanent occupancy, then the right to possession must *primâ facie* follow

(1) 6 M.H.C.R., 168. (2) I.L.R., 5 Mad., 345.

THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI.

the terms of the instrument in the absence of any subsequent agreement.

If the defendants rely on a right of occupancy created after that instrument, then it lies on them to prove the grant, oral or written, of such right, or circumstances from which such grant could be legally presumed. There is no such grant either alleged to have been made, nor are there any circumstances proved from which such a grant or right of occupancy could be presumed.

Whenever a tenant or raiyat gets possession of land for one year and continues in possession at the expiration of that year, he is *primâ facie* held to so continue on the terms of his lease. Therefore the defendants must all be held to have continued by their ancestors or by themselves to hold each succeeding year on the terms of the muchalká of 1826. The result is that each of the cultivators is only tenant from year to year.

Krishnasámi v. *Varadaráju*(1) is in its circumstances different from this. In that case there was no muchalká proved as here. There was an order passed by the Collector to allow the particular *paracudi* into possession to cultivate. Here the muchalká of 1826 is clearly only from year to year at the outside.

In that case defendant No. 4 and all the other defendants were members of one family. The plaintiff in that suit had previously brought a suit against defendant No. 4 to eject him, and it was decided in that suit that defendant No. 4 was entitled to a permanent right of occupation. As regards defendant No. 4, therefore, the plaintiff's right was at an end, being *res judicata*.

As regards the other defendants, it was held that the adjudication in the former suit, in which their relation succeeded in respect of a right claimed by them, and the fact that there was no muchalká produced, and the deed of transfer by the Collector to the plaintiff (in terms the same as the transfer in this case) and long possession paying rent, were circumstances which created such evidence of right of occupancy as to throw on the plaintiff the *onus* of proving that such defendants, other than defendant No. 4, were not entitled to such occupancy right.

I think that the defendants are not entitled to the occupancy right which they claim; and, inasmuch as due notice to quit was given, the plaintiff is entitled to maintain the ejectment.

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(1) I.L.R., 5 Mad., 345.

The tenants of property held under a Mutt are not entitled to the protection of the Rent Act, as the plaintiff is not a land-holder within the meaning of the Act, and the defendants, however willing they may be to pay an increased rent, cannot have such rent fixed under the Rent Act.

There has been no misjoinder of defendants, as they all derived jointly under the muchalká of 1830 under which the kist and swamibhogam were reserved in fixed rates at total amounts specified.

For convenience sake each head of a family holding separate part of the demised land has had the kist and swamibhogam fixed and the amount has been paid separately by him. The tenants arranged the holding amongst themselves and there was not a separate demise of each particular lot to the separate holder.

Defendants Nos. 11, 18, 19 and 21 sold their holdings to defendants Nos. 98 and 99 respectively and should not have been made parties to this suit. As regards them, this suit should, I think, be dismissed. And inasmuch as the plaintiff insisted on retaining them as defendants after their written statements alleged that they parted with their interest, I think the plaintiff should pay their costs.

As regards the rent due, we are not able to say that the plaintiff satisfactorily proved how much rent is due. The books of the temple and accounts have not been sent up. Moreover, we think that when the plaintiff has for so long a period received swamibhogam from the several tenants separately, an account should be taken by the Subordinate Judge of the sum due by each tenant and that the decree should be modified by directing each tenant to pay the rent due by him.

Defendant No. 20 died before this suit was filed. He is named a defendant in error.

The defendants, except Nos. 11, 18, 19, 20 and 21, should pay the costs of this appeal.

No. 107 of 1882. This is a suit similar in its facts and circumstances to suit No. 106 to eject the tenants of the village of Keelavelu, and therefore the judgment in No. 106 applies of this suit.

The 36th and 37th defendants sold part of their lands to the 87th defendant and the rest of their holding to Nadaraja Padayachi before this suit was filed, and were not then in pos-

THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI.

session of the lands. This suit is to be dismissed as against the 36th and 37th defendants with costs.

The defendants in this Court, except the 36th and 37th defendants, are to pay the plaintiff's costs of this appeal.

BRANDT, J.—The plaintiff, as sole Adhinam trustee of the temple of Vythinatha Swami at Vathur in Sheali taluk, has brought the two suits, out of which these appeals have arisen to eject the defendants, who are cultivating raiyats from the lands of two villages, which admittedly belong to the temple; and to recover arrears of swamibhogam alleged to be due to the temple. The first suit (No. 106) relates to the lands of the village of Sandaputtur and the second suit (No. 107) relates to the lands of Keelavelu.

The defendants pleaded in the first place that the suit in each case was bad for misjoinder of many defendants, each of whom paid his swamibhogam separately, and who ought to have been separately sued.

In the first suit (No. 106), defendant No. 11 alleged that he had sold his interest to one Marimuttu Padayachi, and defendants Nos. 18, 19 and 21 stated that they had sold their interest to Munnaru Padayachi. Defendant No. 20 is said to have died. In the second suit (No. 107), defendants Nos. 36 and 37 stated that they had sold their interest to Nadaraja Padayachi and to Sornam. In each of these cases the vendees were joined as defendants to this suit. One Chinnasawmi Naik was also added as defendant to the second suit. Defendants Nos. 38 and 54 are dead and the suit was withdrawn as against some others. The defendants chiefly insisted that they had a permanent right of occupancy; that they had been in possession of the lands for a very long time and had improved them at a great expense; and they were not liable to be ejected. They further stated that very little of the swamibhogam was in arrears, and that when it was tendered, the plaintiff refused to receive it.

The judgment of the Subordinate Judge was substantially the same in both suits. In each case he found that the suit was not bad for misjoinder, because all the defendants claimed under one or two persons in each case, who had executed a muchalká in January 1830 consenting to hold the lands upon certain terms. The Subordinate Judge decided that the defendants had made no substantial improvements, and had no permanent right of occupancy, but were tenants from year to year. He therefore decreed

that the defendants should be ejected from the lands in question in each suit; that the plaintiff should be placed in possession, with mesne profits, and arrears of rent, and costs of the suit, and that such mesne profits, arrears of rent, and costs to be paid by all the defendants in the first suit, and by certain specified defendants in the second suit.

The objection of misjoinder, though mentioned at the hearing, was not one of the original grounds of appeal. It is sufficient to say that, as all the defendants in each case claim by inheritance or by purchase or otherwise under one and the same person, or under one of two persons who executed the muchalká in each case in January 1830, the plaintiff had a common cause of action against the defendants in each case and was not obliged to sue them separately. Hence the objection of misjoinder on the ground of separate payment of swamibhogam by the several defendants cannot be allowed.

The principal question raised by these appeals is, whether the defendants had a right of permanent occupancy, or whether they were merely tenants from year to year?

Defendants rely very much on their possession of the lands by themselves, or by those under whom they claim from the 1st of January 1830, if not from a still earlier date. But mere length of tenure for any period will not give a right of permanent occupancy to a raiyat, who has been let in as a tenant from year to year. Sir Colley Scotland in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*(1) admitted that the decision in *Venkataramanier* v. *Ananda Chetty*(2) had gone too far in laying down too broadly a pattadar's right of occupation, and it was admitted by Turner, C.J., in *Krishnasámi* v. *Varadaráju*(3) that the period of occupation, which should confer upon the raiyat a permanent tenure, could only be settled by legislation. In the case of *Krishnasámi* v. *Varadaráju*(4) there were other circumstances, besides mere length of tenure, which justified the Court in throwing the burden of proof upon the plaintiff, and among other circumstances was a decision of the Sudr Court in 1861 recognizing a permanent title in defendant No. 4, to whom all the other defendants were related. In the present case no such circumstances are found, and it may

(1) 6 M.H.C.R., 171.
(2) 5 M.H.C.R., 120.
(3) I.L.R., 5 Mad., 357.
(4) I.L.R., 5 Mad., 345.

THIAGARAJA v. GIYANA SAMBANDHA PANDARA SANNADHI.

be observed that no custom in the defendant's favor has either been alleged or proved.

The muchalká of the 1st January 1830 does not tend to show that the title of those who executed them was permanent. On the contrary, there are some expressions which favor a contrary supposition; and if there are expressions which indicate an intention that the occupation should be for more than one fasli, they are (as Sir Colley Scotland said of similar expressions in a muchalká in *Chockalinga Pillai's* case)(1) indefinite as to any period of time except that of the fasli, and clearly therefore did not bind the will of either party beyond the currency of each fasli while the tenancy remained undetermined. The defendants say that their tenancy was not created by this muchalká, but that it existed before that as a right of permanent occupancy. The defendants' predecessors in title may have been in possession before 1830. But if they had a permanent right of occupancy, they would probably have taken care to have that right expressly recognized in the muchalkás of 1830. At present the permanency of their title before 1830 has not been proved.

In the muchalká executed in favor of Government by the plaintiff's predecessor on the 7th December 1857, he promised to respect the rights and privileges of the paracudis according to the customs of the respective villages, and of the country; and that, as long as they should pay the kist properly, he would not eject them. But he did not thereby admit that the raiyats had any permanent right in the soil, or that the swamibhogam was to be the same for all ages. The passage in question amounts to little more than an engagement to respect the rights of the raiyats, whatever those rights might be.

In the result it appears to me that the defendants have not shewn that they had any higher title than that of cultivating tenants from year to year. That being their tenure, the plaintiff was at liberty (as decided in *Chockalinga Pillai's* case)(2) to enhance the rent and after due notice to eject the defendants at the end of the fasli for non-payment. Notice has now been given, and the decision of the Subordinate Judge as to the ejectment of the defendants must be upheld.

I agree that the evidence as to the alleged improvements is

(1) 6 M.H.C.R., 168. (2) 6 M.H.C.R., 171.

unsatisfactory, and nothing can be allowed to the defendants on that account.

I agree that suit No. 106 as against the defendants Nos. 11 and 18, and his son and brother, defendants Nos. 19 and 21, who had sold their lands, should be dismissed with costs. I would make the same order as to the defendants Nos. 36 and 37 in suit No. 107.

I agree also that the Subordinate Judge should be directed to inquire how much is due from each of the defendants, and that on receipt of his return the decree should direct each tenant to pay the swamibhogam due by him.

The defendants, except those as to whom the suit has been dismissed or withdrawn, or who have died, must pay all the plaintiff's costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

SUPPU AND OTHERS (DEFENDANTS NOS. 3 TO 6), APPELLANTS,

and

GOVINDACHARYÁR (PLAINTIFF), RESPONDENT.*

1887. July 16.

Civil Procedure Code, ss. 514, 521, 522—Award, appeal against decree in terms of—Extension of time for presenting award—Evidence.

Where a decree purports to have been made in terms of an award under s. 522 of the Code of Civil Procedure, an appeal lies against it if there was no award in fact or in law.

An order extending the time for the presentation of an award upon an application presented within time is not bad in law by reason of its having been made after the expiry of the term which it purports to extend.

It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence.

APPEAL against the order of K. R. Krishna Menon, Subordinate Judge of Tinnevelly.

Original Suit No. 62 of 1884, on the file of the Subordinate Court at Tinnevelly, was at the instance of both parties referred to arbitration. On the 10th October 1885, after the expiry of the time fixed for making the award, an application for the extension

* Appeal No. 123 of 1886.