APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897. August 2.

FISCHER (DEFENDANT No. 2), APPELLANT,

v.

KAMAKSHI PILLAI (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, s. 11—Enhancement of rent—Custom.

The imposition by a zamindar of garden assessment on land brought under garden cultivation by a tenant who improved the land by sinking a well after 1865 is illegal, although there might be a custom in the zamindari of charging a varying assessment according to the kind of crop raised.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in Appeal Suit No. 257 of 1895, affirming the decree of K. Krishnama Chariar, District Munsif of Madura, in Original Suit No. 539 of 1894.

The plaintiff was a tenant in the Bodinaikanur zamindari; the first defendant was the zamindarni, and the second defendant was the mortgagee in possession of the zamindari. The plaintiff sued to compel the defendants to grant him a proper patta.

The facts of the case were stated by the District Judge as follows:—

The plaintiff held lands classed as faisal punja in the zamindari. He cultivated them with punja crops and paid the faisal punja teervah on them until the end of fasli 1300. In fasli 1301, he made a well, at his own expense, and since then cultivated garden crops. Thereupon, the second defendant tendered him a patta for fasli 1302, charging a higher rate of rent in place of the faisal punja teervah rate. He refused to accept this patta and maintained that the defendants were not entitled to collect more than the faisal rate. The defendants on the other hand contended that according to a custom which prevailed in the zamindari even before the settlement, the tenants are bound to pay according to the "*thavanai*" of the crops, in other words, that the rent varies with the crop. They admitted that the land had become fit for garden cultivation only by reason of the improvements effected by the plaintiff. The District Munsif held that evidence of the

* Second Appeals Nos. 1026 to 1032 of 1896.

custom was inadmissible and that the defendants were not entitled to levy anything beyond the faisal rate, and accordingly passed a decree for the plaintiff. On appeal the District Judge found that the rate claimed for garden crops was a customary rate in the zamindari, but that the faisal accounts of the zamindari were not shown to recognize rates of rent varying with crop, and he dismissed the appeal.

Defendant No. 2 preferred this second appeal.

Tirumalasami Chetti for appellant.

Respondent was not represented.

JUDGMENT.—It is admitted that the garden crop in this case is the result of an improvement effected by the tenant in sinking a well. According to the law (section 11, Madras Act VIII of 1865) the landlord is precluded from enhancing the rent on account of improvements made by the tenant (per Muttusami Ayyar, J.—*Venkatagiri Raja* v. *Pitchana*(1)). The imposition of garden assessment is clearly an enhancement of the rent. It was, however, contended that the zamindar was, in accordance with the custom of the zamindari, entitled to the assessment claimed.

The custom relied upon appears to have been an alleged custom of charging a varying assessment according to the kind of crop raised; such a custom would, if established, be valid, but it could not derogate from the rights secured to tenants by section 11 of the Act of 1865. The custom could only be upheld in so far as it might not conflict with the Statute law. In other words, the landlord would be entitled to vary the rates according to the cultivation only in cases where the variation in the crop was not the result of improvements made by the tenant.

Our attention has been drawn to *Fischer* v. *Narayanan*(2). In that case, however, there is nothing to show that the well had been constructed after Act VIII of 1865 came into force. Prior to that Act zamindars sometimes collected an enhanced rent on garden crop raised with the aid of wells constructed by the tenants, and a usage under which a zamindar made such collection might not be unreasonable. But such a usage cannot affect the present case where the improvement was effected in 1891.

In this view the second appeal fails and is dismissed.

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(1) I.L.R., 9 Mad., 27. (2) Civil Revision Petition No. 195 of 1895 (unreported).