in seven weeks upon the evidence already on record. [The second issue related to damages.]

KUTTAYAN CHETTY v. PALANIAPPA CHETTY.

A finding was duly returned and plaintiff was awarded damages.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Boddam.

RAJA PARTHASARATHI APPA ROW (PLAINTIFF), APPELLANT,

v.

CHEVENDRA CHINA SUNDARA RAMAYYA (DEFENDANT), RESPONDENT.*

1904. January 25. February 4.

Rent Recovery Act—(Madras) Act VIII of 1865, ss. 2, 76.

The fact that the patta which has been tendered was a varam patta is no objection to a suit being sustained under the Rent Recovery Act by the landlord even if it be found that the proper rates were only money rates.

Nor is an agreement to pay a money rent to be implied from the mere circumstance that rent has been paid in money for a series of years but at varying rates.

Kavipurapu Rama Rao v. *Dirisavalli Narasayya*, (I.L.R., 27 Mad., 417), approved.

Having regard to section 76 of the Rent Recovery Act, no memorandum of objections lies against the finding of the Court of First Instance in cases under that Act.

A clause in a patta requiring the tenant to be responsible for theft of crops by him or his servants is not a proper term of a tenancy under the Act, especially having regard to section 83 of the Rent Recovery Act, which provides for clandestine removal of crops.

SUIT to enforce acceptance of patta. The facts and points decided by the lower Court are sufficiently set out in the judgment. With regard to the memorandum of objections (referred to in the judgment of the High Court), the Acting District Judge said:—"What purport to be objection memoranda under section 561, Civil Procedure Code, have been put in by the respondents who ask that

* Second Appeal No. 621 of 1902, presented against the decree of J. H. Munro, District Judge of Kistna, in Appeal Suit No. 238 of 1901, presented against the decision of K. V. Sreenivasa Ayyangar, Head-quarter Deputy Collector of Kistna, in Summary Suit No. 438 of 1900.

RAJA PARTHA-SARATHI APPA ROW v. CHEVENDRA CHINA SUNDARA RAMAYYA.

the suits should be dismissed altogether. There is no provision in the Rent Recovery Act for such memoranda. Section 76 of the Act lays down that no judgment of a Collector shall be open to revision otherwise than by appeal to the Zilla Court, and under section 69 such appeal must be presented within thirty days from the date of the Collector's judgment. The respondents have not appealed and the so-called memoranda of objection cannot be considered and are dismissed with costs."

He dismissed the suit.

Plaintiff preferred this second appeal.

Mr. *J. Krishna Rau* and *V. Krishnaswami Ayyar* for appellant.

Mr. *Joseph Satya Nadar* and *P. R. Sundara Ayyar* for respondent.

JUDGMENT.—For reasons stated in *Kavipurapu Rama Rao* v. *Dirisavalli Narasayya*(1) it must be held that the fact that the patta tendered was a varam patta was no objection to a suit being sustained under the Rent Recovery Act by the landlord even if it be found that the proper rates were only money rates; nor can we agree with the lower Appellate Court that it is open to Courts to imply from the mere circumstance that rent has been paid in money for a series of years but at varying rates an agreement to pay money rent (at reasonable rates to be determined by the Courts). As to the express contract stated to have been entered into in fasli 1299 we think we should, notwithstanding some of the reasons assigned for the conclusion of the District Judge being unsatisfactory, accept his finding that no such contract has been established. On the question of the implied contract to pay a fixed rent of Rs. 5 per acre it is clear that the District Judge has proceeded on entirely wrong grounds and his finding, such as it is, cannot be accepted and must be set aside. The matter is dealt with quite shortly in paragraph 12 of the judgment. The first ground stated is;—"now in the first place the payment of a fixed money rate for nine years does not prove a contract that the rate was agreed upon as the permanent rate." Whether from such payment a contract to pay is to be implied or not depends upon the facts of each case. In certain circumstances such payment may be quite sufficient to prove such a contract, in others it may not be sufficient. Whether, having regard to the circumstances of

(1) I.L.R., 27 Mad., 417.

the present case an implied contract should be taken to have been established is a point to which the Judge has not addressed himself, as nothing more is added by him to the general proposition stated in the passage quoted above. The next ground taken by the Judge is;—"when from the past history it is evident that rents were fluctuating the mere fact that Rs. 5 was the rate for nine years does not raise any presumption that it is a permanent rate." The question for determination was having regard to what transpired in fasli 1299 when the uniform rent of Rs. 5 in respect of the whole of the lands in the village was agreed to instead of the different rates for different lands that obtained before and having regard to the fact that from that time for nine years continuously that rate was paid whether that rate should be taken as impliedly assented to as the rate to be paid, in future, and this was a question to be determined upon the evidence adduced and to which reference is made at length under the issue of express contract in the Judge's judgment. There was no question of presumption and the circumstance that *prior* to fasly 1299 rent was paid at fluctuating rates and sometimes in kind and sometimes in money was quite immaterial with reference to the determination of the said question of implied contract. As to the third and last ground stated by the Judge "again the defendants having failed to prove the express contract that Rs. 5 was agreed upon as the permanent rate cannot be allowed to put forward the plea of an implied contract to the same effect," it is difficult to understand why defendants were so precluded. These being all the reasons given for holding that there was no implied contract the finding must be treated as unwarranted by law.

On behalf of the respondents here before us it was contended with reference to those cases in which the suits were decreed in the Court of First Instance that certain of the defendant's contention having been disallowed, the District Judge was wrong in refusing to entertain the memoranda of objections filed in respect thereof. *Caspersz* v. *Kishori Lal Roy Chowdhri*(1) is a clear authority against the contention that, as a matter of general law and apart from any specific statutory provision, the District Judge should have entertained the memoranda. We agree with the vakil for the appellant that having regard to section 76 of the Rent Recovery

(1) I.L.R., 23 Calc., 922.

RAJA PARTHASARATHI APPA ROW v. CHEVENDRA CHINA SUNDARA RAMAYYA.

Act no memorandum of objections lay even with reference to section 561 of the Civil Procedure Code for, assuming a judgment of a Collector under the Rent Recovery Act to be a decree within the meaning of that term in the Civil Procedure Code, effect must, with reference to section 4, paragraph 2 of the Code, be given to the provisions of section 76 as a provision laying down a special procedure in suits between landholders and their tenants notwithstanding anything to the contrary in the Code itself. Section 76 provides that in proceedings under the Act no judgment of a Collector and no order passed by him after decree and relating to execution thereof shall be open to revision otherwise than by appeal to the Zilla Court except as allowed in section 58. To allow a memorandum of objections in the circumstances relied on by the respondents would virtually involve a revision otherwise than by an appeal preferred in accordance with the provisions of the Rent Recovery Act. Now as an appeal has to be presented under that Act within thirty days, if a memorandum of objections were allowed under section 561, Civil Procedure Code, that would, of course, be, in effect allowing a revision with reference to an application made after the thirty days prescribed, since all that section 561 requires is that the memorandum should be filed in the Appellate Court within one month from the date of the service on the party filing it, or his pleader, under section 553, Civil Procedure Code, of notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may see fit to allow. In this view it is unnecessary for us to consider the decisions of this Court holding that a judgment of a Collector in a suit under the Rent Recovery Act, section 10, is a decree within the meaning of the definition of that term in the Civil Procedure Code or the decisions quoted on behalf of the appellants apparently militating against that view.

With reference to certain terms of the pattas objected to the objections as pressed before us in the argument relate to clauses 5, 7 and 9 of the patta. Clause 5 requires the tenant to be responsible for theft of crops by him or his servants. This could not in any sense be taken to be a proper term of the terms of a tenancy under the Act, considering more especially section 83 of the Rent Recovery Act which provides for cases of clandestine removal of crops. We agree therefore with the Court of First Instance that this clause should be struck out. The present patta introduces for

the first time an alteration in clause 7 which is unnecessary. We direct that in lieu thereof the following be inserted, "as the right to the palmyras and babul trees standing on the said lands belong to ourselves you have no concern with them and should not fell them;" and in lieu of clause 9 of the patta, "you should not make permanent encroachments or other works of any kind on the said land without our permission, you should not without obtaining cowle from us cultivate the land that is not included in this patta."

Before, however, we dispose of the cases finally, we must call upon the District Judge for a finding upon the evidence on record with reference to the question of implied contract to pay at the rate of Rs. 5 per acre with reference to the observations made above respecting the matter.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

MUNICIPAL COUNCIL OF MANGALORE (DEFENDANT), PETITIONER,

v.

THE CODIAL BAIL PRESS (PLAINTIFF), RESPONDENT.*

1903. November 23. December 3.

District Municipalities Act (Madras)—IV of 1884, ss. 53, 262—"Income."

The word "income" is used in schedule A of the District Municipalities Act (Madras) as meaning "net income" or profits derived from the business, and not the gross income or receipts.

By section 262 (2) of the Act, no suit shall be brought in any Court to recover any sum of money collected under the authority of the Act, provided that its provisions have been in substance and effect complied with. A municipality assessed a person under section 53 and schedule A, on his estimated gross income:

Held, that the word "income" meant "net income," and consequently the provisions of the Act had not been in substance and effect complied with, and that the Court could entertain a suit to recover the amount of tax paid under the assessment.

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* Civil Revision Petition No. 32 of 1903, presented under section 25 of Act IX of 1887 praying the High Court to revise the order of C. D. J. Pinto, District Munsif of Mangalore, in Small Cause Suit No. 430 of 1902.