APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1905.
February 13.
March 9.

ARUMUGAM CHETTI (PLAINTIFF), APPELLANT,

v.

RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 562—*Limit to remand—Custom opposed to Statute, validity of—Rent Recovery Act VIII of* 1865, *s.* 11—*Cultivation by wells constructed at tenant's cost, liability to enhanced rent for—Payment of enhanced rent for a number of years, whether an implied contract to pay—Agreement and contract, difference between—Tenant with right of occupancy, right of, to construct wells without permission of landholder.*

Ryots with permanent rights of occupancy in a zamindari constructed wells at their own cost without obtaining the permission of the Zamindar, and cultivated dry lands with garden crops for periods ranging from 1 to 18 years. Suits were brought by the ryots before the Sub-Collector under section 8 of the Rent Recovery Act to compel the defendant, the Zamindar, to grant them proper pattas for fasli 1312, alleging that the pattas tendered were illegal as they charged the higher garden rate for dry lands cultivated by them with the aid of wells constructed at their own cost. The defendant pleaded that he was entitled to the enhanced rate (1) by custom, (2) by virtue of a contract to be implied from previous payments. No consideration for such a contract was however alleged.

The Sub-Collector framed two issues—one as to the existence of the custom set up by the defendant, and the other, as to whether the previous payments by the plaintiffs operated as an estoppel, or evidenced an implied contract to continue to pay the enhanced rates. The Sub-Collector did not record evidence as to custom, holding that such custom even if proved could not deprive the plaintiffs of the benefits expressly given by the Act. He also held that any such implied contract as that set up by the defendant would be illegal as opposed to the provisions of the Act. He passed a decree that the defendant should grant pattas as claimed by the plaintiffs.

On appeal the District Judge held that the payment of rent at the enhanced rate raised a presumption that there was a contract to pay such rent; and that if there was no contract express or implied, the rent must be fixed in accordance with the other provisions of section 11 of the Rent Recovery Act. He reversed the decrees of the Sub-Collector and remanded the cases for retrial under section 562 of the Code of Civil Procedure.

---

* Civil Miscellaneous Appeal No. 160 of 1904, presented against the order of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 542 of 1903, presented against the decree of E. H. Wallace, Esq., Acting Sub-Collector of Dindigul Division, in Summary Suit No. 14 of 1903.

On appeal to the High Court :

Held, per SUBRAHMANIA AYYAR, J., that the order remanding the case was not legal as all the questions raised between the parties and on which they went to trial, had been decided, and the questions so raised were purely questions of law.

A custom can be upheld only so far as it is not in conflict with statute law ; and a custom to pay enhanced rent for improvements effected by a tenant at his cost is illegal as opposed to the provisions of the Rent Recovery Act.

Fischer v. *Kamakshi Pillai*, (I.L.R., 21 Mad., 136), followed.

Gopalasami Chettiar v. *Fischer*, (I.L.R., 28 Mad., 328), referred to.

It makes no difference whether a tenant constructed wells at his cost prior to or after the passing of Act VIII of 1865. In either case no additional rent can be claimed.

Nagasami Kamia Naick v. *Iyodi Rama Goundan*, (6 Mad., R.R., 5).

Payment for a number of years of enhanced rent may be evidence of an *agreement* to pay at that rate, but it will not be binding as a contract unless supported by consideration.

Quære, whether when the enhanced rate had been paid for a large number of years, and when the lapse of time is such as to make it unfair to call on the landlord to prove consideration, a lawful origin may not be presumed.

Gann v. *Free Fisheries of Whitstable*, (11 H.L.C., 192 at p. 193), referred to.

No such presumption can be made when the payments have been only for a period extending from one to eighteen years :

Tenants with permanent rights of occupancy are entitled to construct wells without the permission of the landholder ; and a custom requiring such permission may be bad, as unreasonable, and is certainly illegal as opposed to the policy of section 11 of the Rent Recovery Act.

Venkatanarasimha Naidu v. *Dandamudi Kotayya*, (I.L.R., 20 Mad., 299), referred to.

Held, per MOORE, J., that the Sub-Collector having disposed of the case on two preliminary issues, the District Judge was right in remanding the cases under section 562 of the Code of Civil Procedure.

THE suits out of which these appeals arose were brought by the ryots of certain villages in the zamindari of Gantamanaickanur against the Zamindar to compel him to grant proper pattas for fasli 1312. The main question in dispute between the parties was whether the Zamindar was entitled to enhanced rent for garden cultivation carried on by the ryots with the aid of wells constructed by them at their own cost, and whether payment of such enhanced rent for a number of years by the ryots amounted to an implied contract by them to pay such rent.

The Sub-Collector decreed in favour of the plaintiffs holding that the Zamindar had no right to enhanced rent. On appeal, the District Judge reversed the decrees of the Sub-Collector and remanded the suits for disposal under section 562 of the Code of Civil Procedure on the ground that the Sub-Collector had come to

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

a wrong conclusion on the preliminary issues on which he had disposed of the cases and that a trial on the merits was necessary.

The plaintiffs appealed to the High Court.

V. Krishnaswami Ayyar and *V. V. Srinivasa Ayyangar* for appellants.

Sir *V. Bhashyam Ayyangar* and the Hon. Mr. *P. S. Sivaswami Ayyar* for respondents.

JUDGMENTS—SUBRAHMANIA AYYAR, J.—The appellants in these 27 civil miscellaneous appeals are ryots holding lands in certain villages in the zamindari of Gantamanaickanur. They brought these suits before the Sub-Collector under section 8 of the Rent Recovery Act to compel the respondent who is the Zamindar to grant them proper pattas for fasli 1312. In the plaints they stated that though they themselves had sunk wells at their own cost in certain dry lands forming part of the holdings and with the aid thereof they had been raising garden crops, the respondent insisted upon charging the garden rate of 8 fanams per guli instead of the dry rate of 4 fanams per guli, which alone he was entitled to charge in respect of such cultivation. They therefore prayed for a decree that pattas may be granted to them in which the said dry rate alone is charged.

The respondent in his written statement did not allege that the wells were sunk by himself or his predecessors in title, but in effect asserted that, even assuming that the wells were sunk by the ryots themselves, he had a right to charge the higher rate of 8 fanams on the ground first, of a local custom, and secondly, of a contract to pay at that rate to be implied from the fact of its payment by the ryots for a number of years. He did not, however, either then or subsequently, aver or suggest that any consideration passed from him or his predecessors in title which would support the alleged promise on the part of the ryots to pay at the higher rate. In a tabular statement filed by him under the orders of the Sub-Collector he simply set forth in respect of the land in each case in regard to which the question was raised, the period during which payment at the higher rate had been made. The Sub-Collector proceeded to deal with the cases on the footing that the facts were (1) the lands to which the dispute relates were dry lands chargeable with 4 fanams per guli, (2) that the wells were sunk at the cost, not of the respondent or his predecessors in title, but of the ryots themselves, and (3) that the payment at the higher rate had been

made by the ryots for the respective periods specified in the statement referred to above. Accordingly he raised the following issues :—

"(1) Is there a general custom to charge enchanced rates for garden crops when raised by plaintiff irrespective of any improvement or alteration in the land made at plaintiff's expense and is such custom, if proved, valid in law?"

"(2) If plaintiff has paid at such enhanced rates for previous several years, is he estopped from objecting now to the enhanced rates, and is there an implied contract binding him to continue to pay such rates?"

As to the existence of the custom, the Sub-Collector recorded no evidence for he held that the provisions of the Rent Recovery Act secured to the appellants the benefit of the improvement effected by them free from any liability to enhanced rent, and consequently, that the custom, even if it exists, could not in point of law disentitle the appellants to claim such benefit. As regards the question of implied contract, he was of opinion that the alleged contract was illegal as opposed to the said provisions of the statute. In the result he directed that the respondent do tender pattas charging 4 fanams per guli with reference to the lands, to the garden cultivation whereon, the dispute related. On appeal the District Judge reversed the decrees and remanded the cases for disposal on the merits, though he does not say what the merits contemplated were.

That in the lower Courts the parties throughout proceeded in all these cases on the footing that there were no facts to try except as to the existence of the alleged custom, must be clear from what has already been stated, and this is expressly pointed out by the Sub-Collector himself. After summarising the pleadings, he observes in paragraph 2 of his judgment, "Defendant in his written statement makes no plea that he sank or improved the wells, and in his pleadings admitted, that he could not assert that he had sunk or improved the wells. He practically allowed plaintiffs' contentions on this point and on that understanding certain preliminary issues were framed on objections put forward by the defendant." Statements to the same effect will also be found in paragraph 7 of the judgment and the last paragraph, but one unmistakeably shows, that in certain other suits between the ryots and the Zamindar in which, unlike here, a question of fact

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

had to be gone into, viz., whether the wells in question there had not been sunk prior to the Rent Recovery Act coming into force, the Sub-Collector reserved the trial. Thus, when the cases came before the District Court there were but two questions raised for determination, both questions of law only, viz., the effect of the custom, assuming there was one, upon the right of the appellants to raise garden crops with the aid of their own wells, and secondly, whether the naked fact of payment for a series of years at the rate of 8 fanams in respect of such cultivation warranted a finding that the appellants were bound to continue the payment as a matter of implied contract. To the first question the District Judge makes no allusion whatever in his judgment. Whether in the argument before him the point was raised and urged does not appear. Considering that the Sub-Collector's decision on it was against the respondent, and considering that if that decision were wrong it would be necessary to try whether in point of fact the custom prevailed, it should have been made clear, in reversing and remanding the cases, what was the course to be pursued by the Sub-Collector with reference to the first part of the first issue when the cases went back to him. The matter, however, to say the least is left in doubt, and it seems to me we are called upon in these appeals to remove that doubt. Now as to the point itself it is covered by authority. In *Fischer* v. *Kamakshi Pillai*(1) referred to by the Sub-Collector the very question arose and the decision was against the landholder and it was held that a custom such as that alleged could be upheld only in so far as it might not conflict with the statute law. This decision has been followed very recently in *Gopalasami Chettiar* v. *Fischer*(2). There the landholder relied on the custom of his mitta as entitling him to make a charge even in respect of trees grown by the tenant with the irrigation from wells constructed at the cost of the tenant. Though such a custom was found to prevail yet it was held by the lower Courts that the custom cannot, since the passing of Act VIII of 1865, be enforced so as to deprive a tenant of the benefit of his own improvements, and that, therefore, when the improvement was made after 1865 the tenant is not bound to pay a tax on trees grown in his own patta land by means of such improvement. In this Court not only was this view confirmed, but it was laid down that there

(1) I.L.R., 21 Mad., 136. (2) I.L.R., 28 Mad., 328.

was no distinction in the matter between improvements by the tenant effected since the passing of the said Act and those effected prior to it. See also *Nagasami Kamia Naick* v. *Iyodi Rama Goundan*(1). It follows therefore that the first ground on which the respondent based his demand of 8 fanams per guli is unsustainable.

As regards the other ground relied on by him it will be seen from what I have already said when stating the effect of the pleadings, that both the Sub-Collector and the District Judge failed to grasp the real point involved in the contention, viz., that though payment for a number of years at the rate of 8 fanams may imply an *agreement* to pay in future at that rate, yet that will not imply a *contract* between the parties, for the obvious reason that there was no consideration to support such an agreement so as to make it a binding one. To put it otherwise, the improvement having been effected by the tenant himself, there was no obligation to make an extra payment in respect of cultivation resulting from such improvement, unless a promise so to pay was made, or could be inferred to have been made, on account of some detriment to the landholder or advantage to the tenant which, in point of law, would have constituted consideration for the promise. As however none such was alleged in these cases, the agreement to be implied from the naked fact of payment at the rate of 8 fanams per guli for a longer or shorter period is *nudum pactum* and does not compel the appellants to continue to pay at the same rate any longer. It was however argued on behalf of the respondent that according to another custom in the locality the appellants were not entitled to sink the wells referred to without the permission of the landholder, and as receipt of rent at the rate of 8 fanams involved a permission on his part to the wells being sunk, such permission was consideration sufficient to support the promise on the part of the tenants to pay at that rate. No doubt, in the last paragraph of the respondent's written statement it is asserted that the tenants had no right to sink the wells without the permission of the Zamindar, but on what ground that right was denied he did not venture then to add. If custom had really been taken to be the ground for the denial as suggested for the first time here on his behalf, a reference to it would certainly not have been omitted in the paragraph. On the contrary, not only is there no specific

(1) 6 Mad., R.R., 5.

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

allusion to it in the paragraph, but the general tenour of the paragraph taken as a whole, negatives the intention to rely on custom. Paragraph 3 of the same written statement goes far to confirm this for there he expressly relies on custom in support of his claim for increased *theerva* with reference to nature of the crop raised. Now the tenure under which the appellants hold the lands in respect of which the grant of pattas is claimed, being of the permanent character described in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(1) and the cases following it, it is impossible to understand why the landholder's permission for the sinking of the well was necessary. And even supposing that a custom supporting the averment can be shown, such a custom must be held to be bad if not for its unreasonableness, at least on account of its utter inconsistency with the policy of the proviso to section 11 of the Rent Recovery Act which expressly admits the tenants' unqualified right to make improvements free from any liability to make any payment to the landholder in respect of the benefit accruing therefrom. If in cases like the present, payments at the higher rate had continued to be made for a great many years so as to make it unfair to the landholder, on account of such lapse of time, to be compelled to prove the existence of some consideration when the payment commenced, it may be a question whether the Courts should not presume a lawful origin for the payment, on the analogy of the lost grant principle availed of to support long possession and enjoyment. That even in the case of immemorial usage the doctrine of *quid pro quo* is not altogether to be ignored, will be seen from the observations of Lord Chelmsford in *Gann* v. *Free Fisheries of Whitstable*(2). Be this as it may, in the present cases, the presumption of lawful origin is quite inadmissible considering that the payments have been made, as will be seen from the note in the margin, during periods ranging between 1 and 18 years only. Moreover if in truth there was any consideration moving from the landholder in any of these cases, it would not in the circumstances have been difficult for him

No. of years for which higher theerva was paid.	No. or Nos. of the original suit or suits.
1 year	15.
2 years	14, 33.
4 ,,	29.
5 ,,	25, 31,
6 ,,	20, 24, 26, 30, 35.
7 ,,	40.
8 ,,	21, 37, 38, 39.
9 ,,	33.

(1) I.L.R., 20 Mad., 299.

(2) 11 H.L.C., 192 at p. 193.

No. of years for which higher theerva was paid.	No. or Nos. of the original suit or suits.
10 years	50.
11 ,,	17, 34, 36.
12 ,,	18, 48.
13 ,,	21, 33.
14 ,,	15, 17, 48.
16 ,,	47, 49, 50, 53.
18 ,,	21, 22, 23, 34.

to state what it was, and adduce evidence to prove it, as from the very commencement the payments were in pursuance of muchilikas obtained from the tenants. Upon the only facts therefore which are before the Court,—payment at the dry rate of 4 fanams per guli prior to the sinking of the wells by the tenants, and payment at the garden rate of 8 fanams subsequent to the improvement which gave the facility for a change of cultivation—the reasonable inference to be drawn is only that the payment originated in the mistaken notion on the part of the tenant that he was bound to pay, and on the part of the landholder that he was entitled to receive the higher rate, due to the prevalence in some zamindaris of the practice of varying the assessment according to the crop raised, the restrictive operation on such practice of section 11 of the Rent Recovery Act and particularly of the proviso as regards tenants' improvements, being wholly overlooked.

It is scarcely necessary to add that the tenants' right to relinquish the whole or any part of his holding recognised by section 12 of the Act, to which also some reference was made on behalf of the respondent, in no way detracts from the tenant's right to make such an improvement as the sinking of a well during the subsistence of the tenancy.

I would therefore set aside the order of the District Judge and restore the decree of the Sub-Collector with costs here and in the lower Appellate Court.

MOORE, J.—The Sub-Collector framed two preliminary issues and when he had disposed of them, proceeded to decide the suit without framing the additional issues that arose and without taking any evidence either oral or documentary. The District Judge on appeal reversed his decree upon the preliminary point. Such being the case the District Judge was, in my opinion, right in acting under section 562, Civil Procedure Code, and remanding the suit for disposal on the merits. These appeals should, in my opinion, be dismissed with costs. I give no opinion as to the correctness or otherwise of the decision of the District Judge on the preliminary point. The proper time to consider that question will, in my opinion, be when the case comes up before us in

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

the usual manner in second appeal, in case such an appeal is eventually preferred.

Under section 575 of the Civil Procedure Code these appeals are dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

1905. January 30.

VENKATA ROW AND OTHERS (JUDGMENT-DEBTORS), APPELLANTS,

v.

VENKATACHELLA CHETTY (DECREE-HOLDER), RESPONDENT.*

Limitation Act XV of 1877, *s.* 12—*Time requisite for obtaining a copy of the decree.*

In computing the period of limitation for an appeal, a party, applying to the lower Court for a copy of the decree on the day it re-opened after the holidays, is not entitled to deduct, as time requisite for obtaining a copy of the decree, the period during which the lower Court was closed, when he could have made such application before the Court closed and when on the day he actually applied the period limited for appeal had expired.

Tukaram Gopal v. *Pandurang Sadaram*, (I.L.R., 25 Bom., 584), referred to and distinguished.

Pandharinath v. *Shankar*, (I.L.R., 25 Bom., 586) referred to and distinguished.

THE facts material for this report are set out in the judgment.

T. Pattabhiramayyar for appellant.

C. Venkatasubbaramiah for *T. Ethiraja Mudaliar* for respondent.

JUDGMENT.—In this case the date of the judgment of the District Court was January 28th, 1904. The Court closed for the vacation on April 18th and re-opened on June 20th. The appellant made no application for a copy of the judgment between January 28th and April 18th, and has given no explanation why he failed to do so.

---

* Civil Miscellaneous Second Appeal No. 68 of 1904, presented against the order of R. D. Broadfoot, Esq., District Judge of Chingleput, in Civil Miscellaneous Appeal No. 198 of 1903, or presented against the order of M.R.Ry. C. Krishnasami Row, District Munsif of Conjeeveram, in Execution Petition No. 619 of 1902 (Original Suit No. 314 of 1889).