PRAYAG DOSS JI VARU, MAHANT v. TIRUMALA SRIRANGACHARLAVARU.

Power should also be reserved for application being made to the High Court by the trustees or by persons interested for any modification of the scheme that may be found necessary.

It should come into force on the 1st January 1906.

Costs in these two appeals of both parties will be paid out of the funds of the temple.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1904. November 2, 3, 4, 8, 11.

GOPALASAMI CHETTIAR (DEFENDANT), APPELLANT,

v.

FISCHER (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras) VIII of 1865, s. 11—Rules for deciding disputes as to rates of rent—Improvement of land by tenant before and after passing of the Act—Right of landlord to levy enhanced rate of rent.

A landlord is not entitled to levy a tax on improvements effected by a tenant at his own expense, whether such improvements were made before or after the passing of the Rent Recovery Act, 1865, but a contract express or implied by a tenant to pay such a tax would be enforced, whether made before or after 1865, for the law does not declare such a contract to be illegal.

Where a tenant has been paying an enhanced rent in consequence of improvements made by him before the passing of the Act, there will be an inference from such payments, in the absence of anything to rebut it, that there was a contract to pay an enhanced rent, and such contract would be binding under the Act. Each tenant's contract, if any, is to be inferred from his own acts and payments rather than from those of other tenants.

SUIT to enforce acceptance of pattahs. The facts material to the case appear from the judgment of the High Court. The Deputy Collector decreed in plaintiff's favour, which decree was affirmed on appeal.

Defendant preferred this second appeal.

T. Subrahmania Ayyar for *R. Sadagopachariar* for appellant.

T. Rangachariar for respondent.

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* Second Appeal No. 762 of 1902, presented against the decree of L. C. Miller, Esq., District Judge of Salem, in Appeal Suit No. 30 of 1901, presented against the decision of M.R.Ry. T. Vijiaragava Chariar, Personal Assistant Deputy Collector of Salem, in Summary Suit No. 63 of 1900.

JUDGMENT.—This is one of a large batch of suits in which the mittahdar of Salem sued his tenants to enforce acceptance of pattahs in which he has entered a charge on account of fruit trees grown on their pattah lands, in addition to the acreage rent fixed on the lands at the time of the permanent settlement.

The mittahdar claims that, by the custom of the mittah he is entitled to make a charge for every fruit tree coming into bearing as well as for every palmyra tree whose leaves are useful for thatching, growing on the pattah land of a tenant, as soon as the tree comes into bearing, or yields useful leaves as the case may be. This charge by the same custom takes the form of a tax on each tree in addition to the rent on the field where the trees are scattered, and where the trees form a clump or tope, of an addition to the land assessment of the field of an amount equal to itself. The charge is made in all circumstances, whether the ryot raises the trees by irrigation from sources constructed by himself, or from the mittahdar's sources, whether the trees are grown upon nanjai land or upon punjai land, and whether they were planted by the ryot or by the mittahdar.

The Deputy Collector upheld the custom and found the charges proper, except in those cases where the trees were grown with the aid of water from wells sunk at the ryot's expense after 1865. In these latter cases he amended the pattahs by omitting the tree tax on the ground that the charges on account of the fruit trees were enhancements of rent and were prohibited by the proviso to section 11 of the Rent Recovery Act (VIII of 1865, Madras). On both points the District Judge concurred with the Deputy Collector and dismissed the appeals made to him. The tenants whose wells were sunk prior to 1865 have for the most part acquiesced in the decision of the Courts below. But the present appellant and a few others appeal on the ground that, even where the improvements were made prior to 1865, the mittahdar has no right to levy the so-called tree tax; and in a number of suits the mittahdar appeals on the ground that the Courts below are wrong in finding that the right was taken away by the Act of 1865 in regard to trees grown with the aid of water from wells sunk after that date at the tenant's own expense. In some of the suits a further important question was raised as to whether the mittahdar's original right, if it existed, was now lost in consequence of a contract implied from a long course of conduct between the

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mittahdar and the tenants concerned that the tax should not be levied on them.

The suits, then, are all "suits involving disputes regarding rates of rent" and section 11 of the Rent Recovery Act (VIII of 1865, Madras) lays down the rules that are to be observed by the Courts in deciding the disputes. The Full Bench of this Court in the case of *Venkatagopal* v. *Rangappa*(1) has given a lucid exposition of the law as it stood prior to 1865 and of the circumstances which led to the legislation of that year, and has clearly explained the manner in which the provisions of section 11 are to be understood and applied. That section lays down four rules as to the rates to be charged, and these rules are to be applied consecutively. The first rule is that "all contracts for rent, express or implied, shall be enforced." The second is that if no contract, express or implied, exists, then "in districts or villages which have been surveyed by the British Government previously to 1st January 1859, and in which a money assessment has been fixed on the fields, such assessment is to be considered the proper rent." The third rule is that if neither of the two previous rules are applicable then "local usage" is to be applied. There has been a good deal of confusion in the arguments before us, and there are traces of a similar confusion in the judgments of the Courts below from not keeping these three rules, and their consecutive applicability, clearly in view. Let us see, then, what are the facts found with regard to the charge of tree tax in the mittah generally; then let us consider any special facts proved in each suit, and thereafter apply the three rules in their order and thus determine whether the pattahs tendered are correct or not.

The Salem district came into the possession of the British Government in 1792. The land was surveyed and a money assessment was fixed on each field in the years 1793–96 and this money rent is all that the mittahdar can *primâ facie* charge his tenants under section 11, clause II, in the absence of any contract express or implied, as to the rent. For the mittahdar it is argued that this fixed acreage rent was not the only money rent on the fields, but that in addition a rent or tax was imposed on all fruit trees grown on the ryots' land even when grown with the aid of wells dug at their own expense and that the real money rent of

(1) I.L.R., 7 Mad., 365.

any field within the meaning of section 11, clause II, was to be found by adding the fixed field rent and the tree tax together; and it was argued that if that view was not correct, then the mittah could not be regarded as one in which a money assessment had been fixed at all, so as to make clause II applicable, and that "local usage," the third rule, must be applied.

We do not think that this argument is sound. It is true that in addition to the fixed field rent, Captain Macleod, who was in charge of the Salem taluk, appears to have held the cultivators liable to pay certain rates of tax on fruit trees grown in their own pattah lands and with the aid of water from their own wells, though Captain Read who was the Principal Collector had previously abolished this tax on the tenant's improvements. ('Salem District Manual,' page 281.) But Captain Macleod had left the district before the Salem mittah was formed and a permanent settlement made. It was formed when Mr Cockburn was in charge (1801-03) and from the passages quoted from Mr. Orr's report at page 376 of the 'District Manual,' it would seem that, in Mr. Cockburn's settlement, fruit trees grown with the aid of ryot's water were not taxed, but that the mittahdars afterwards "arbitrarily introduced" certain rates on such trees. There is no finding by the District Judge and there is no clear evidence that fruit trees grown with water from the ryots' own wells were taxed by Government in the Salem taluk immediately before the mittah was formed, and that such a tax formed part of the assets on which the peishcush (rent) payable by the mittah to Government was fixed. No doubt the *swarnadayam* (ready money income) account (exhibit DDDDD) of 1801 includes a tax on fruit trees among the assets of the mittah, but for all that appears that may have been a tax on fruit trees on waste land, or on fruit trees watered from Government sources of irrigation. There is no dispute as to the right of the mittahdar to levy a tax on such trees. The dispute is as to his right to do so when the trees are grown with the aid of the ryots' own water and on their assessed fields. There is nothing to show that such a right was given to the mittahdar at the time of the permanent settlement, and therefore the argument that clause II of section 11 is inapplicable to this mittah fails. Even if such a right existed as an incident of the tenure when the mittah was formed, we do not think that it could be exercised after the passing of the Act of 1865 in such a way as to render the provisions of

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that Act nugatory. The meaning of clause II is plain and it would be contrary to the policy of the Act and to accepted canons of interpretation of statutes to allow its plain meaning to be negatived by evidence of customs and incidents enhancing or diminishing the fixed rent, thereby perpetuating the very uncertainty which it was the object of the section to terminate.

But the District Judge has found that ever since 1836 a considerable number of the mittah ryots have been charged with and have paid a tree-tax at various rates and in different ways on trees in their holdings. He rightly says that a custom going so far back is presumptive proof of its existence before that date if there is nothing to rebut the presumption, and he, therefore, finds it "proved that a custom of levying a tree-tax on pattah lands over and above the land rent has existed in the Salem mittah from the earliest times of which we have any evidence."

He has also found that "the custom attaches to each contract for rent a contract to pay tree-tax," but that such 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, where the improvement was made after 1865 the tenant is not bound to pay a tree-tax on trees raised in his own pattah land by means of such improvement; but that where the improvement was made prior to 1865 the tenant is liable to pay the tree-tax. The view that the tenants could not be compelled to pay an enhanced rent on improvements effected at their own expense after 1865 is undoubtedly correct, and is in accordance with the decisions of this Court in the cases of *Venkatagiri Raja* v. *Pitchana*(1) and *Fischer* v. *Kamakshi Pillai*(2). But we do not think that the District Judge was right in the distinction he makes between improvements effected before 1865 and those made after that date. No doubt if there was a contract, express or implied, by the tenant to pay such a tax, it would be enforced whether made before or after 1865 for the law does not declare such a contract to be illegal. It only by implication prevents a landlord from levying such a tax from a tenant who has not agreed to pay it. Neither of the cases quoted above proceeds on the ground that a landlord is entitled to levy a tax on a tenant's improvement, because it was made prior to 1865, though there are expressions in both judgments

(1) I.L.R., 9 Mad., 27. (2) I.L.R., 21 Mad., 136.

which seem to have led the Courts below erroneously to suppose that this was intended. In the earlier case Muttusawmy Ayyar, J., said "Nor is the tenant entitled to claim a reduction of assessment in the case of lands watered by wells constructed at his own expense prior to the date of Act VIII of 1865." As we understand it this merely means that where a tenant had been paying an enhanced rent in consequence of improvements made by him he was not entitled on the passing of the Act or in consequence of the passing of the Act to ignore the inference to be drawn from those payments and to claim a reduction in the rate of rent on account of the improvements. The inference from the payments in the absence of anything to rebut it would be that there was a contract to pay such rent and such contract would be binding under the Act.

The remark in *Fischer* v. *Kamakshi Pillai*(1) relied on by the Vakil for the mittahdar is an *obiter dictum* which was not necessary for the decision of that case, but was made with reference to an unreported case that had been cited in the argument in order to show that that case could not, in any view, affect the case then being tried.

But in both *Venkatagiri Raja* v. *Pitchana*(2) and *Fischer* v. *Kamakshi Pillai*(1) the broad rule is, as it seems to us, correctly laid down. In the former Hutchins, J., said "The proper rate of rent for the land has to be determined with reference to the several provisions of section 11 quite irrespective of the improvements" and Muttusawmy Ayyar, J., held that "The proviso to clause 4, section 11, implies that when the tenant improves the land at his own expense the landlord is not entitled to enhance the assessment on that ground." In the latter case the Court laid it down that "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", and with reference to the alleged custom relied on by the Zamindar, whereby a varying assessment was charged according to the kind of crop raised, the Court held that "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." These statements of the law

(1) I.L.R., 21 Mad., 136.

(2) I.L.R., 9 Mad., 27.

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negative the idea that the landlord is at liberty to tax improvements made before the passing of the Act, and we think that they are correct.

But if there was a contract, whether express or implied, to pay an enhanced rent on making improvements such a contract would, like any other contract as to the rates of rent, be enforced in accordance with clause I of section 11. The District Judge finds proof of an implied contract by all the tenants to pay such an enhanced rent because the evidence shows that a tree-tax of one kind or another has been very generally paid by a great many of the tenants at various rates and in different ways for a great many years past. He says that "the custom attaches to each contract for rent a contract to pay tree tax." We are unable to accept this view. It may be that a contract may in certain circumstances be inferred on proof of a general custom affecting the holdings of an estate. For instance if a man purchases the holding of a tenant, or takes up waste land in an estate without making any express contract with the landlord as to the rent to be paid and it is proved that certain rates are customarily paid by tenants in those circumstances, the Courts might fairly imply a contract by the new tenant to pay the customary rates. But we do not think that such a custom as has been proved in this case can be taken as proof of a contract that every tenant in the estate should pay tree-tax at the various rates claimed by the landlord in the present cases. All that has been proved is that in a very large number of cases the tenants have paid a tree-tax of some sort at varying rates and in different ways. The extent to which the rates varied is well stated by the Deputy Collector in these words. "As to the rates, there is plenty of evidence to show that the rates till recently varied considerably. A tamarind tree used to be charged 1 rupee, 8 annas, 4 annas, or 2 annas. A cocoanut tree used to be charged 4 annas, 2 annas, or 1 anna; a palmyra at 6 pies, 3 pies, 2 pies or 1 pie. A mango tree used to be charged 8 or 2 annas (6th D.W. in suit No. 18 whose evidence has to be used also in the general suit). A tamarind tree used to be charged 8, 10 or 12 annas (P.W. 8). Plaintiff however says that the rates in paimash—the original survey and settlement—too varied considerably. This is true as appears from pages 429 and 130 of the 'District Manual' The paimash rates are thus summed up by Mr. LeFanu 'excepting cotton and indigo, all other scattered trees paid a tree-tax at certain rates which

were not uniform, and palmyras and *illuppai* topes paid tree-tax only on the number of trees, while the areca and cocoanut topes paid double, and mango, tamarind, orange and lime topes, the highest land assessment.' It will be observed that the charge on areca and cocoanut topes is the same as the present *rettippu*. Rettippu does not seem to have been charged on mango topes in these early days (*vide* also the deposition of 16th P.W. who says that in his mittahs of Annadhanapatti and Pallapatti *rettippu* is not charged on mango trees) though it seems to have been extended by analogy later on. In any case *rettippu* is generally a lighter charge than individual tree-tax. Besides adverting to the fluctuations of rates in paimash, plaintiff dwells on the fact that since the elder Mr. Fischer took charge of the mittah in 1860, there has been a tendency towards fixity and uniformity in the rates, the present rates being given in his memorandum."

It is impossible to see how payments made at these varying and uncertain rates by some of the tenants could be regarded as proof of a contract by other tenants who had never paid at those rates or at any rate at all, that they would pay at the rates paid by the tenants who had paid or by a majority of those tenants. If a particular tenant had made any payment on account of tree tax or a series of such payments that might well be evidence of a contract by him to continue to pay such amount; and if it were also proved that the tenants generally paid a similar tax, it would, no doubt, strengthen the inference as to the contract; but it is impossible to see how an obligation to pay tree-tax could be inferred as regards a particular tenant from the mere fact that other tenants, after he had entered on his tenancy, made such payments to the landlord.

Each tenant's contract, if any, is to be inferred from his own acts and payments rather than from those of other tenants. If each tenant is to be bound by such a custom as the Judge finds in this case, we should virtually establish "local usage" under clause III as the standard of rent to be looked to in preference to "contract, express or implied" and "survey" rates, which clauses I and II of section 11 expressly provide shall be the standards, where they exist, in preference to "local usage."

In the case of *Venkatagopal* v. *Rangappa*(1) already cited the Full Bench has explained the meaning of "implied" contracts

(1) I.L.R., 7 Mad., 365.

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as used in the first clause of section 11 of the Act. They there pointed out that the term "implied" was "probably intended to signify a contract that could be inferred from the conduct of the parties in preceding years." They also pointed out that "payment of rent in a particular form or at a certain rate for a number of years is not only presumptive evidence of the existence of a contract to pay rent in that form or at that rate for those years, but it is also presumptive evidence that the parties have agreed that it is obligatory on the one party to pay and the other to receive rent in that form and at that rate, so long as the relation of landlord and tenant may continue. Either party is of course at liberty to rebut this presumption. It may be shown that the rate paid has been paid under a mistake; that it was intended rent should have been paid at the pre-settlement rate and that a higher or lower rate had been paid in error. It may be shown that rent at a certain rate or in a certain form was fixed for a certain term, on the expiry of which, the parties were at liberty to revert to their original rights, and that the term has expired; or it might be shown that there has been an increase or diminution in the extent of the holding or an addition to its value by the creation of improvements at the expense of the landlord; or that its value has diminished by reason of the deterioration of irrigation or other works which the landlord was bound to maintain. Changes of circumstances such as these would entitle the parties to the agreement to an alteration in its terms without necessarily putting an end to the relationship of landlord and tenant. But where there is no proof of any such special cause entitling the parties to an alteration in the terms heretofore subsisting between them, it must be held that so long as the tenant elects to retain the holding, he is liable to the obligations in respect of rent which it is to be inferred from his past conduct that he has accepted."

In Second Appeal No. 762 of 1902, the tenant pleads that, for the past twenty years, he has had many fruit trees which were liable to tax according to the mittahdar's contention but which, in fact, were not taxed, and he asks the Court to infer from this a contract that the trees should not be liable to tax. The Courts below have held that to prove such a contract "it must be shown that the mittahdar had personal knowledge of the state of the trees" and they have held that this has not been shown in the present case. We do not think that it is necessary to bring home such

knowledge to the mittahdar by direct evidence. We think that it is enough if such knowledge can fairly be inferred from all the facts of the case. In Second Appeal No. 762 of 1902, the facts proved are that the defendant has paid the same amount of rent for no less than fifty-six years. The amount of the rent is Rs. 46-11-4, and it is made up of Rs. 45-5-4 the fysal rate on the land, and Rs. 1-6-0 the extra sum charged in respect of fruit trees. It is also proved that for some twenty years prior to the suit the defendant had many fruit trees on his land in addition to those charged in his pattah. We know that during this long period the mittahdar was generally active in pressing his alleged rights in regard to tree-tax. He was constantly engaged in litigation on the subject. We also know that the system of annual settlements is such as to make it almost certain that the state of each holding and its liability to further taxation would come under notice each year. There is nothing to suggest that a temporary exemption or remission of the rent on account of relationship, personal friendship or other special circumstances, was granted by the mittahdar. In these circumstances we think that a contract to pay Rs. 1-6-0 for tree tax, and no more, may fairly be inferred, even though there is no evidence to show when such contract was made or the consideration for it. We think that the District Judge is wrong in supposing that the contract which it is necessary for him to find is a contract made at the beginning of the tenancy. Such a contract, no doubt, could hardly be inferred from the facts proved, but it is sufficient if the facts lead to the inference that the parties made the contract at any time.

In *Krishna* v. *Venkatasami*(1) Turner, Chief Justice, and Muttusawmy Ayyar, J., after referring to the decision of the Full Bench in *Venkatagopal* v. *Rangappa*(2) already quoted to the effect that payment of rent at a certain rate for a series of years is evidence of what the Act calls an "implied contract" and that on this ground a landlord had been held entitled to claim rates higher than the fysal rates, added that the same construction must be adopted in favour of a tenant so as to entitle him to claim the right to pay something different from the fysal rate.

We think, then, that in the present Second Appeal (No. 762) the facts lead to the reasonable inference of an implied

(1) I.L.R., 8 Mad., 164. (2) I.L.R., 7 Mad., 365.

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contract that the appellant shall pay Rs. 1-6-0 as tree-tax and no more.

The pattah will be amended accordingly and the old rent maintained.

Defendant will have his costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Sankaran Nair.

1904. October 4, 5, 6, 7, 13, 14, 20.

NARAYANAN CHETTY (FIRST DEFENDANT), APPELLANT,

v.

KANNAMMAI ACHI AND OTHERS (SECOND PLAINTIFF—DEFENDANTS NOS. 2, 3 AND 4 AND ANOTHER), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 13—Res judicata—*Findings necessary to support decree—Limitation Act XV of* 1877, *s.* 14—'*Unable to entertain suit*'—'*Other causes of a like nature*'—*Dismissal of previous suit for non-joinder—Schedule II, arts.* 142 *and* 144 *of Act XV of* 1877—*Possession under decree subsequently reversed—Act XV of* 1877, *sch. II, art.* 93.

An appellate judgment operates by way of estoppel as regards all findings of the lower Court, which though not referred to in it, are necessary to make the appellate decree possible only on such findings.

A plaintiff is not entitled under section 14 of the Limitation Act to exclude the time spent in prosecuting a previous suit when such suit was dismissed for non-joinder on findings arrived at after trial and not without trial because the Court was unable to entertain the suit.

Under article 142, schedule II of the Limitation Act, limitation runs from the date of dispossession, and no fresh starting point is given because the party dispossessed subsequently obtains possession under a decree and is ousted from possession when the decree is reversed.

Sayad Nasrudin v. *Venkatesh Prabhu*, (I.L.R., 5 Bom., 382), followed.

Degumbery Dossee v. *Rajah Annundnath Poy*, (W.R. (1864), 43), *Firingee Sahoo* v. *Sham Manjhee*, (8 W.R. Civil Rule, 373), and *Dagdu* v. *Kalu*, (I.L.R., 22 Bom., 733), referred to.

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* Second Appeals Nos. 1278 and 1279 of 1902, presented against the decrees of M.R.Ry. T. M. Rungachariar, Subordinate Judge of Madura (West), in Appeal Suits Nos. 74 and 62 of 1902, presented against the decrees of M.R.Ry. V. R. Kuppuswami Ayyar, District Munsif of Sivaganga, in Original Suits Nos. 355 and 354 of 1900, respectively.