APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906 July 26.

ULAGAPPAN AMBALAM AND OTHERS (DEFENDANTS), APPELLANTS,

v.

CHIDAMBRAM CHETTY AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Injunction, mandatory—Discretion of Court—Landlord cannot have mandatory injunction in respect of building, if knowing of the obstruction he does not object.

Where the tenant of an agricultural holding, constructs a building of a character not suitable to such holding, with the knowledge of the landlord, such landlord is bound not only to object but to take legal steps to stop the progress of the work; and, in default of doing so, the landlord is not entitled to a mandatory injunction for the demolition of the building. The same principle will apply where the party building is not the tenant but one who does so under agreement with the owner of the kudivaram right.

Benode Coomaree Dossee v. *Soudaminey Dossee*, (I.L.R., 16 Calc., 252), followed.

Sankaralingam Chettiar v. *Stephen Augustus Ralli*, (S.A. No. 959 of 1901) (unreported), followed.

SUIT for the removal of two houses erected by the first and second defendants on punja lands forming part of the first defendant's agricultural holding and for other reliefs. The land built on was in the holding of the first defendant and one of the houses was built by the second defendant under an agreement with the first defendant. The plaintiffs are the landlords.

The first defendant stated that the houses were built with the permission of the first plaintiff and his father and that in any event, the plaintiffs were not entitled to have the houses demolished, as they had knowledge of and did not object to the construction of the house.

The lower Court found that no permission was proved. As regards the other question as to whether the plaintiffs were estopped by their knowledge, the judgment of the lower Court is as follows:—

"It is urged by defendants' pleader that the plaintiffs having stood by and allowed the buildings to be completed, they are any

* Appeal No. 148 of 1903 presented against the decree of M.R.Ry. W. Gopala Chariar, Subordinate Judge of Madura (East), in Original Suit No. 33 of 1902.

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how not entitled to a mandatory injunction and in support of this contention the decisions in *Benode Coomaree Dossee* v. *Soudaminey Dossee*(1) and *The Shamnugger Jute Factory Co., Ld.* v. *Ram Narain Chatterjee*(2) are cited. In the present case there is evidence on plaintiff's side that in May 1900, and subsequently, objection was taken by plaintiff's officials. The decisions relate to cases where easements of light and air were acquired by prescription against the owner of the adjoining site, who has naturally a right to erect any building without obtaining consent of others. In such cases it was held that a mandatory injunction which is within the discretion of the Court may not be allowed when the plaintiff had abstained from taking legal steps until completion of the building. But in cases like the present no special damage need be proved and the tenant has no natural right to erect buildings other than those compatible with the nature of the holding. The rulings in *Ramanadhon* v. *Zamindar of Ramnad*(3) which was followed in *Orr* v. *Mrithyunjaya Gurukkal*(4) govern the present case. The latter case also arose in a village of the Sivaganga zamindari and the land on which the building was built was a land held on similar terms. It was held also in *Athikarath Nanu Menon* v. *Erathanikat Komu Nayar*(5) that mere delay in bringing the suit cannot be sufficient to refuse the plaintiff his rights. I find that plaintiff did object and that he is not estopped from asking for removal of the building."

The lower Court granted a mandatory injunction for the removal of the buildings.

Defendant preferred this appeal.

S. Venkatachariar for *T. Rangachariar* for appellants.

T. Rangaramanujachariar for respondents.

JUDGMENT.—So far as the first defendant's appeal is concerned he having died and his legal representative not having applied to prosecute the appeal, it must be held to abate so far as he is concerned.

As regards the second defendant's case we are unable to agree with the conclusion of the Subordinate Judge. There is positive evidence that the second defendant was permitted by the first plaintiff and his father to construct the building now sought

(1) I.L.R. 16 Calc., 252.
(2) I.L.R. 14 Calc., 189.
(3) I.L.R. 16 Mad., 407.
(4) I.L.R., 24 Mad., 65.
(5) I.L.R., 21 Mad., 42.

to be removed, and this evidence is strongly confirmed by the permission given by the first plaintiff to this defendant to cut down trees for use in the construction of the building, exhibit H, the receipt granted for the payment made by the second defendant to the first plaintiff, corroborates the defendant's evidence on this point. Exhibit B was an application by the first defendant to the plaintiff's father for leave to construct a house on the land in question, and was made in September 1898, and the plaintiff's peishkar was at once directed to inspect and report on it. According to the plaintiffs, however, no report was made until May 1900 (exhibit C). In the meantime the construction of the building had commenced and was completed about that date. It is impossible to believe that, if permission had not been granted as stated by the defendant, the construction of the house would have been allowed to proceed for so long a time without objection on behalf of the plaintiffs. It was urged that the absence of a written consent indicated that the alleged permission was not really granted. The evidence for the defendants is that they were told by the first plaintiff that they might go on with the building and that written permission would afterwards be given. This evidence is, in our opinion, probably true, and the delay in the institution of the suit for some two years after it was intended to bring a suit as shown by the endorsement on exhibit C (assuming that that document was in existence on the date it bears, which however we have reason to doubt), supports our view. Exhibit V shows that in March 1902 serious disputes had arisen between a large body of the tenants and the first plaintiff, and the present suit was commenced in that month. We think that the first plaintiff's denial of his permission to build was probably the outcome of this ill-feeling. On this ground alone the plaintiff's suit as against this defendant would have to be dismissed. But even if we had to come to a different conclusion on the question of permission, the mandatory injunction prayed for could not, in the circumstances of this case, be properly granted. That from the commencement the landlord was aware that the house was being built is clear. Having regard to the written application made by the first defendant in September 1898, the landlord must have known that the intended building was not of a character suitable to an agricultural holding. It was therefore his duty not only to have objected

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to its construction but also to have taken legal proceedings to stop the progress of the work. He did nothing of the kind but allowed the building to be completed, and after completion he waited for two years before filing this suit asking for its demolition. The case of *Benode Comaree Dossee* v. *Soudaminey Dossee*(1) is a direct authority that in such circumstances a mandatory injunction should be refused. That case was recently followed in *Sankaralingam Chettiar* v. *Stephen Augustus Ralli*(2).

It was further urged before us that the second defendant not being himself the tenant, he was in the position of a wrong doer. We are unable to accept this contention. The first defendant was admittedly the holder of the *kudivaram* right and the second defendant had entered into an agreement with him, whereby the second defendant was allowed to build on the land.

We therefore reverse the decree so far as the second defendant and defendants Nos. 3 to 6 who claim through him are concerned and dismiss the suit as against them with costs throughout.

The memorandum of objections is dismissed with costs.

Note (Judgment by SUBRAHMANIA AYYAR and BASHYAM AYYANGAR, JJ., in *Sankaralingam Chettiar* v. *Stephen Augustus Ralli* referred to above).—So far as the prayer for a mandatory injunction to pull down the buildings which had been completed before the institution of the suit is concerned, we consider that it is not a fit case in which, in the exercise of our discretion, such an injunction should be granted.

Assuming that the suit is within the period of limitation prescribed by article 32 of the Limitation Act and that under that article the period of limitation will not commence to run until the building is practically completed in the sense that it becomes fit for being utilised for some purpose other than an agricultural purpose connected with the holding, it is undoubted that in this lease the plaintiff had full knowledge and also notice of the commencement and progress of the building as a cotton ginning factory about October 1894 and that though he could have taken steps to restrain the defendants from proceeding with the building, he waited for more than a year after the completion of the building at a cost of about a lakh of rupees and then brought this suit for a mandatory injunction and also for a permanent injunction to restrain the defendants from erecting additional buildings on the holding without the plaintiff's consent.

Following the decision in *Benode Coomaree Dossee* v. *Soudaminey Dossee*(1) and the principle of the English cases therein cited and followed, we hold that the mandatory injunction applied for should be refused.

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(1) I.L.R., 16 Calc., 252.

(2) S.A. Nos. 959 of 1901 and 64 of 1902 (unreported).

The mere fact that the Indian Limitation Act unlike the English law prescribes a period of limitation even in respect of suits for obtaining equitable relief does not entitle the plaintiff to obtain the relief, because the suit itself is not barred by limitation if his conduct in the matter otherwise is such as to make it inequitable for the Court in the exercise of its discretion to grant to him a mandatory injunction. On this ground we uphold the decree of the lower Court so far as the mandatory injunction prayed for was refused. As regards the prayer for an injunction in respect of future additional buildings on the holding we think that the plaintiff is entitled to such relief. It is however represented that there is every likelihood of the parties coming to an agreement to the effect that the defendants are to pay an enhanced rent, six times the existing rate, from the date of plaint for the entire holding and to be at liberty to erect further buildings. If the matter is thus adjusted and intimation thereof given to this Court within three weeks from this date, there will be a declaratory decree in accordance with such adjustment and the appeal will stand otherwise dismissed. If no such adjustment be made and the matter communicated to the Court as aforesaid, the decree appealed against will be modified by issuing a permanent injunction restraining the defendants from commencing and erecting any additional buildings on the holding and the decree confirmed in other respects.

In either case each party will bear his costs throughout.

APPELLATE CIVIL.

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

VYTHILINGAM PILLAI AND OTHERS (SECOND DEFENDANT AND LEGAL REPRESENTATIVES OF THE SECOND DEFENDANT), APPELLANTS,

v.

KUTHIRAVATTAH NAIR AND OTHERS (PLAINTIFF AND DEFENDANTS NOS 1, 3 TO 7), RESPONDENTS.*

1906 March 19, 20, 28.

Malabar Law—'Anubhavam' grants, meaning of—Whether the use of the word creates an irredeemable tenure depends on the particular instrument in each case—Limitation Act XV of 1877, art. 134—Applies only when absolute property sold.

A stipulation in a kanom deed that a certain amount in grain or money is granted to the mortgagee as anubhavam does not necessarily create an irredeemable tenure. The word 'Anubhavam' will create an irredeemable tenure only when used with reference to the tenure itself but when used with reference to the allowance such allowance will be perpetual but not the tenure.

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* Second Appeal No. 3056, of 1903, presented against the decree of M.R.Ry. S. Raghunataiya, Subordinate Judge of Palghat, in Appeal Suit No. 877 of 1902, presented against the decree of P. J. Itteyerah, Esq., District Munsif of Palghat in Original Suit No. 408 of 1901.