PRIVY COUNCIL.

PARTHASARATHI APPA ROW (PLAINTIFF),

v.

CHEVANDRA VENKATA NARASAYYA (DEFENDANT) AND OTHER APPEALS CONSOLIDATED.

P.C.*
1910.
March 10.
April 27.

[On appeal from the High Court of Judicature at Madras.]

Rent Recovery Act (Madras Act VIII of 1865), s. 9—Tender of Pattas on produce sharing system—Allegation by tenants that money system prevailed —Prevalence of money rent for series of years—Alleged express contract to make prevailing rate permanent—Implied contract presumption of—Evidence in considering usage prevailing—Remand of cases for determination of proper rate when no contract exists.

The appellant, a zamindar, brought suits against the respondents, the tenants in a village on his estate, under section 9 of the Madras Rent Recovery Act (Madras Act VIII of 1865) to enforce of pattas tendered by him, and the execution of corresponding muchilkas. The pattas tendered were under the asara, or produce sharing system, which the respondents denied was in force in their village, money rates, as they alleged, being the proper form of rent. It appeared that in 1299 (1889) different rates of rent prevailed in the village, some being higher than Rs. 5, and others lower; that in that year a uniform rate of Rs. 5 per acre was introduced by mutual agreement between the appellant and respondents, and leases were exchanged on that basis for a term of 5 years. The respondents alleged that the appellant at that time expressly agreed that the rate of Rs. 5 should be permanent. The High Court did not uphold the express agreement, but found there was an implied contract to be inferred from the fact that rents at the same rate were paid and received for four years after the expiration of the term fixed by the leases of 1299 the presumption being that such rate of rent should continue the same in perpetuity:

Held, by the Judicial Committee that there was, alongside of the express contract embodied in the leases exchanged between the parties, no proof of any such collateral implied agreement relating to fixity of rent. Any understanding of the kind was denied by the appellant, and no credible explanation was given by the respondents why, if it existed, such an important arrangement was not reduced to writing.

Whilst agreeing with the High Court that it was not open to Courts to imply, from the mere circumstance that the rent had been paid in money for a series of years, an agreement to pay money rent, their Lordships saw no reason why the fact that money rent had prevailed in a particular locality for a considerable number of years might not form an element in the consideration of usage.

* *Present*: Lord MACNAGHTEN, Lord COLLINS, Sir ARTHUR WILSON and Mr. AMEER ALI.

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The real question between the parties not having been decided, namely, whether the pattas tendered by the appellant were such as he was entitled to impose on the respondents, a question which, it having been found that there was no express or implied contract, must be decided in accordance with the rules contained in clause (iii) of section 11 of Act VIII of 1865 which dealt with the mode of determining the rate when no contract exists, their Lordships remanded the cases to the proper Court in India to determine under those provisions the *rates* the appellant was entitled to receive.

CONSOLIDATED appeals from decrees (26th September 1904 and 19th January 1905) of the High Court at Madras in second appeals arising out of certain suits under the Madras Rent Recovery Act (VIII of 1865), section 9.

The suits were instituted by the zamindar, the appellant, against the respondents, who were tenants in the village of Chevandra on his estate, and the object of the suits was to obtain decrees directing the tenants respectively to accept pattas which he had tendered for the current agricultural year, and to execute on their part corresponding muchalkas. The pattas tendered required the tenants respectively to deliver to the zamindar by way of rent a specific share of certain crops grown on irrigated land comprised in their holdings, and to pay rent at the rate of Rs. 2-12-0 per acre for land on which "dry" crops were raised.

Up to the fasli year 1266 (1856) the tenants in the village of Chevandra collectively delivered to the zamindar by way of rent a fixed share of the produce of the land in grain under a system known as *asara*. In that year the mode of sharing the produce was changed and under a three-year lease described therein as a *veesabadi* cowle the tenants collectively paid rent in cash and in fasli 1270 (1860) that arrangement was renewed for five years at enhanced rates of rent. Subsequently, and (except in faslis 1285 and 1286) up to fasli 1299 (1889) the tenants held under separate leases and paid rent in cash in respect of the different parts of their holdings at various rates which were altered from time to time. In faslis 1285 and 1286 (1875 and 1876) the *asara* system was again followed. In fasli 1299 (1889) the zamindar visited the village and discussed the matter with the tenants, and offered them pattas for five years, the rate of rent in most of them being Rs. 5 per acre; these pattas were accepted and corresponding muchalkas were executed by the tenants. On the expiration of the five years the same terms were again offered, the tenants accepted

them, and they were in force until 1900. A dispute then arose, and on 22nd June 1900 the appellant tendered to the tenants pattas for the next fasli, stipulating (except as to land under certain named crops) for rent in kind, being a share of produce according to the original *asara* system. The tenants refused to accept those pattas and to execute corresponding muchalkas. Thereupon the suits under the Rent Recovery Act, section 9, were instituted on 15th August 1900. Of these suits two Summary suits Nos. 437 and 558 were dealt with together throughout and gave rise to two of the present appeals.

The defendants denied that the *asara* system was according to custom and in paragraphs 4 and 7 of their written statement asserted as follows :—

"4. Up to fasli 1277, joint money-rents system continued to be in force ; in fasli 1278, individual money-rents were arranged, and in fasli 1280, *taram* cists (classification cists) were charged. According to these *Taram* (classification) rates, cists were paid from fasli 1281 to fasli 1298. Afterwards, in fasli 1299, as the plaintiff came to the village of Chevandra, stayed there for one month, sent for and told the defendant and the other ryots of the village that the extent of lands bearing lower rates was very large and that the extent of lands bearing higher rates was very small and that same uniform rate for all the lands should be arranged permanently ; all the ryots approved of it, and an arrangement was entered into between both parties to the effect that a uniform rate at Rs. 5 per acre should be permanently paid in respect of all kinds of lands in the holding of individuals.

"7. Moreover, the *veesabadi* system has been in force for a long time continuously up to date, whereby cists continue to be paid in the form of money. Therefore, the intention and understanding of the parties is to pay the cists only in the form of money ; besides, it is an implied contract. Nor does the custom of paying grain rents prevail in the village. It is not disclosed in the plaint that such custom exists. For these reasons also, plaintiff has no right to give up the *mamool veesabadi* rates and to ask for grain rents."

Of the issues raised the only two now material 3 and 6 are set out in the judgment of the Judicial Committee ; and the way in which the suits were dealt with in the various courts are also there sufficiently stated.

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The High Court (SUBRAMANIA AYYAR and BODDAM, JJ.) on second appeal held that there was an implied contract between the plaintiff and the defendants respectively under which the defendants were entitled to occupy their holdings in perpetuity at the rent reserved in the leases granted to them by the plaintiff in fasli 1299 (1889); and that the pattas tendered should be so modified as to give effect to that contract, and accordingly the decrees were passed against which two of the present appeals were preferred.

During the pendency of the above suits, namely on 20th August 1902, the plaintiff tendered to the defendants pattas in the same form as before for a subsequent year and the defendants refused to execute corresponding muchilkas. The plaintiff thereupon filed the two other suits (Summary suits Nos. 18 and 113 of 1902) now on appeal. The Deputy Collector dismissed the suits on the ground that money being the proper form of rent, and the pattas tendered being not for a money rent, section 9 of the Rent Recovery Act was not applicable. Appeals to the District Court were dismissed on the same ground. On second appeals the High Court (Sir C. A. WHITE, C.J., and SUBRAMANIA AYYAR, J.) passed decree in the same terms as in the previous cases, and two of these Consolidated Appeals have been preferred against these decrees.

On these appeals which were heard ex parte.

DeGruyther, *K. C.*, and *Kenworthy Brown* for the appellant contended that the High Court had wrongly decided that there was an implied contract in 1889 between the appellant and respondents, that the rate of rent then agreed to should be permanent. There was no evidence in law to support such a finding as that the rate of rent could not be varied at the expiry of the periods for which the leases were given. Payment of rent at a uniform rate for a certain number of years under express contracts limited to those years was no evidence in law of an implied contract that rent should be paid at that rate for ever. The High Court moreover had no jurisdiction under section 584 of the Civil Procedure Code (1882) relating to second appeals, to direct a new trial of a question of fact (on the question of implied contract) which had already been determined by the District Court in accordance with law. Reference was made to the Madras Rent Recovery Act (VIII of 1865), sections 3, 7, 9 and 11, clause (iii);

Evidence Act (I of 1872), section 91; and Wilson's 'Glossary,' page 241, as to the definition of "Jirayati Hakku" as "Occupancy rights."

27th April 1910.—The judgment of their Lordships was delivered by Mr. Ameer Ali.

These are Consolidated Appeals from certain decrees of the High Court of Madras made on the 26th of September 1904 and 19th of January 1905, respectively.

The suits, which gave rise to the appeals, were, along with a number of others, instituted by the appellant Zamindar on the 15th of August 1900 against his tenants of the village of Chevandra, in the Madras Presidency, under section 9 of the Madras Rent Recovery Act (VIII of 1865) to enforce the acceptance of pattas tendered by him and the execution of muchilkas corresponding thereto.

Although this litigation has passed through several Courts in India, the matter in controversy lies within a small compass.

Act VIII of 1865 requires landholders specified in section 3, to which category the plaintiff belongs, to enter into written engagements with their tenants; and no suit or legal proceeding to enforce the terms of a tenancy is sustainable unless pattas and muchilkas have been exchanged or "unless it is proved that the party attempting to enforce the contract had tendered such a patta or muchilka as the other party was bound to accept" (section 7). In case of a refusal to accept a patta such as the landholder is entitled to impose, he can proceed under section 9 by a summary suit before the Collector to enforce its acceptance.

Section 11, which lays down the rules to be observed in the decision of suits involving disputes regarding rates, is important.

It declares that—

"(i) All contracts for rent, express or implied, shall be "enforced.

"(ii) In Districts or villages which have been surveyed by "the British Government previous 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 when no contract "for rent, express or implied, exists.

"(iii) When no express or implied contract has been made "between the landholder and the tenant, and when no money

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"assessment has been so fixed on the fields, the rates of rent shall "be determined according to local usage, and when such usage "is not clearly ascertainable, then according to the rates estab-"lished or paid for neighbouring lands of similar description and "quality. Provided that if either party be dissatisfied with the "rates so determined, he may claim that the rent be discharged "in kind according to 'the warum,' that is, according to the "established rate of the village for dividing the crop between "the Government or the landlord and the cultivator. When 'the "warum' cannot be ascertained, such rates shall be decreed as may "appear just to the Collector after ascertaining if any increase "in the value of the produce or in the productive power of the "land has taken place otherwise than by the agency or at the "expense of the ryot."

The rest of the section is not material to the present cases.

The pattas tendered by the appellant required the tenants respectively to deliver to him by way of rent a specific share of certain crops grown on what are called "wet" or irrigated lands comprised in their holdings and certain money-rent for land on which "dry crops" were raised—his case being that the asara or sharing system was the mamool or customary mode of payment in the village of Chevandra, and that the tenants had refused to accept the asara pattas for fasli 1309; hence the suits.

The tenants denied that the asara system was in force in their village, and alleged *inter alia* that money rates had prevailed there for a considerable number of years "continuously up to date," and were the proper rates; and that by a specific arrangement entered into in fasli 1299 (1889) an uniform rate of Rs. 5 per acre had been settled in perpetuity for the lands held by them respectively. They also took exceptions to the "rules, conditions, and items" in the asara pattas as being improper and illegal.

The two material issues framed by the First Court are (3) and (6), which are as follows:—

"3. Whether the system of payments of rental in money, "or whether the system of payment of rent in grain is the proper "cist of payment?

"6. Whether there was a special contract in fasli 1299 "between the parties as to the rates and what were the terms "of the contract and whether such contract is still binding?"

At the trial before the Deputy Collector it was admitted that money-rents at varying rates had been in force in the village since fasli 1266 (1856), with the exception of two years (faslis 1285 and 1286 = 1865 and 1876), when rent in kind was paid under circumstances regarding which the parties are not agreed; that in fasli 1299 an arrangement was come to by which the varying money-rates prevailing in Chevandra were replaced by an uniform rate of Rs. 5 per acre, and pattas and muchilkas were exchanged on that basis for a term of five years, and that the same arrangement continued for the next four years; that in fasli 1309 the plaintiff, wishing to revert to the asara system, tendered to the tenants asara pattas, which they refused to accept on the grounds already stated.

On the third issue, viz., "Whether money-rent or rent in kind was the proper cist of payment," the Deputy Collector, principally on the fact that the veesabadi or cash system (as opposed to the asara) had prevailed in the village, with a short break, over more than forty years, held that payment in money was "the proper form of payment of rent."

On the question whether the rate of Rs. 5 was in 1889 fixed in perpetuity, he found, for reasons set out in his judgment, "that there was a special contract between the parties to pay and receive at the rate of Rs. 5 an acre as an unchanging rent." He accordingly directed that the pattas tendered by the plaintiff should be modified in conformity with his finding and that the defendants should execute muchilkas in accordance therewith.

On appeal by the plaintiff, the Acting District Judge agreed with the First Court that "money-rents alone were the proper mode of payment." With regard to the question whether the rates settled in 1889 were permanent, he held that the tenants had not succeeded in establishing their allegation. And he added: "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. Having found that there has been a contract that the rent has to be paid in money, but that there has been none as to how much it is to be, I hold that under section 11, clause (iii) of the Rent Recovery Act, the plaintiff is entitled to be paid rent according to the established warum of the village."

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In this view, the District Judge remanded the cases to the First Court for the purpose of finding the proper warum rates. In his judgment on remand the Deputy Collector stated that he had already found on the evidence the warum rates in force in the village when the asara last prevailed there; but as the asara system ceased many years ago, the warum rates recognised then could not be considered the proper warum rates for the present time.

On the return of the above finding the cases came before another District Judge, who was of opinion that, as money-rent had been found to be the proper form of payment, and no attempt had been made before him to disturb that finding, the tender of warum pattas was wrong, and that the suits should be dismissed on that ground.

On second appeal by the plaintiff, the learned Judges of the High Court appear to have dealt with the judgments of the lower Appellate Court both before and after the remand. In the first place, they held that, "even if it be found that the proper rates were only money rates," the tender of a warum patta was no objection to a suit being sustained under the Rent Recovery Act. Dealing with the judgment of the first District Judge, they were of opinion that it was not open to the Courts "to imply from the mere circumstance that the rent had been paid in money for a series of years, but at varying rates, an agreement to pay money-rent."

On the question of an implied contract to pay a fixed rent of Rs. 5 per acre, they considered the District Judge's finding to be unwarranted by law, and they set it aside and remanded the cases for a fresh finding, with the following observations:—

"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 fasli 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."

The matter on remand came before a third District Judge, who found in favour of the implied contract.

On the return of the cases to the High Court, the second appeals came on for final hearing on the 26th September 1904, when the learned Judges accepted the last finding of the lower Appellate Court as meaning that the rates settled in 1299 were intended to be permanent. They accordingly reversed the decrees of the Courts below, and directed that the terms of the pattas tendered by the plaintiff should be in conformity with the terms of the pattas of 1299, subject to certain corrections they had already pointed out in their previous judgment.

Other suits, under section 9, brought by the plaintiff in 1902, have been disposed of by the High Court in accordance with the above decision; and these consolidated appeals have been preferred by the plaintiff to His Majesty in Council against the several decrees of the High Court.

As the respondents do not appear, the case have been heard *ex parte*, and it has hence been necessary to refer at some length to the history of the litigation and the contentions of the parties.

It is clear that in 1299 different rates of rent prevailed in the village of Chevandra; some were higher than Rs. 5, others lower: in that year an uniform rate of Rs. 5 per acre was introduced by mutual agreement between the landlord and tenants, and leases were exchanged on that basis for a term of five years. The defendants allege that the plaintiff at that time expressly agreed the rate of Rs. 5 should be permanent. The Courts in India have disbelieved the story of an express agreement to that effect. An implied contract, however, has been inferred from the fact that rents at the same rate were paid and received for four years after the expiration of the term fixed by the leases of 1299. This

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circumstance is regarded as explainable only on the hypothesis of an understanding that the rate of Rs. 5 should continue for ever, and as rendering probable the existence of an implied contract.

Their Lordships are unable to concur in that view or to hold that alongside of the express contract embodied in the leases exchanged between the parties there was a collateral implied agreement relating to fixity of rent. The plaintiff denies any understanding of the kind alleged by the defendants; their explanation as to the reason why such an important arrangement was not reduced into writing or incorporated in the pattas and muchilkas of 1299 is that the plaintiff told them that perpetual leases would require to be stamped; and they therefore rested content with his verbal assurance. The Courts in India do not appear to have placed reliance on this statement, nor are their Lordships prepared to accept it.

However much they regret this protracted litigation, they do not find themselves in a position to decide the cases finally. The theory of an implied contract on which the High Court has rested its decrees is, in their Lordships' judgment, untenable; there is thus no decision on the real question between the parties, viz., whether the pattas of fasli 1309 are such as the plaintiff is entitled to impose on the tenants. Section 11 of Act VIII of 1865 lays down the rules for deciding disputes as to rates of rent Clause (iii) deals with the mode of determining the rate when no contract exists. It being found that there is no express or implied contract, the question must be decided in accordance with the rules contained in clause (iii).

Their Lordships are disposed to agree with the High Court in the view that it is not open to Courts to imply from the mere circumstance that the rent has been paid in money for a series of years an agreement to pay money-rent. But they see no reason why the fact that money-rent has prevailed in a particular locality for a considerable number of years may not form an element in the consideration of the question of usage.

On the whole their Lordships are of opinion that the judgments and decrees of the High Court should be set aside and the cases sent back in order that they may be remitted to the proper Court to determine in accordance with the provisions of clause (iii), section 11 of the Rent Recovery Act, the rates the plaintiff is

entitled to receive, and their Lordships will humbly advise His Majesty accordingly.

In the circumstances their Lordships think the appellant should bear his costs of these appeals; the costs in the Lower Courts will be in the discretion of the High Court.

Appeals allowed.

Solicitor for the appellant: *Douglas Grant.*

J. V. W.

APPELLATE CIVIL.

Before Sir Ralphi Sillery Benson, Officiating Chief Justice, and Mr. Justice Sankaran-Nair.

DESOO VENKATESA PERUMAL CHETTY (TRANSFEREE—PLAINTIFF), APPELLANT,

v.

SRINIVASA RANGA ROW AND THE OFFICIAL ASSIGNEE OF MADRAS, RESPONDENTS.*

1909. September 28. October 6.

Limitation Act XV of 1877, schedule II, art. 180—'Revival' of decree, what is—Civil Procedure Code, XIV of 1882, s. 248, notice under—No revival where notice not issued.

Where on an application for execution of a decree more than one year old, order for execution was issued without the notice to the judgment-debtor required by section 248 of the Civil Procedure Code of 1882, such order for execution does not 'revive' the judgment within the meaning of article 180 of schedule II of the Limitation Act of 1877. It is only where such notice has been issued that the judgment or decree is 'revived'.

ORIGINAL side appeal against the judgment and order of Wallis, J., dated 22nd December 1908 in Civil Suit No. 151 of 1893.

A decree was passed in favour of the plaintiff on 30th January 1894 in Original Suit No. 151 of 1893 in the High Court. The decree was transferred for execution to the District Court of North Arcot in January 1896. An application for execution was made on 15th February 1896 to the District Court and an order for attachment was made on 19th March 1896 without notice to the defendant. The decree was assigned to the appellant on 27th January 1908, who applied to the High Court for execution.

* Original Side Appeal No. 5 of 1909.