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possession of the plaint lands she had not; and the plaintiff has not established that she had even joint possession with her son at the time of the gift. I therefore find that there is no proof that the third defendant, the grandmother, was in possession of the lands at the time she gifted them to her minor grandson.

This second appeal coming on for final hearing after the return of the finding called for by the order of this Court, the Court delivered the following

JUDGMENT—Accepting the finding we dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Ayling.

1910. September, 12, 13, 21.

ARUMUGAM CHETTY (PLAINTIFF), APPELLANT IN SECOND APPEAL No. 1195 OF 1908.

v.

RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA MAHARAJA AIYAR AVARGAL (DEFENDANT), RESPONDENT IN THE ABOVE.*

Rent Recovery Act (Madras) VIII of 1865, ss. 3, 11—Right of landlord to enhance rent on dry land cultivated with garden crop by wells dug at tenant's cost—No such right in the absence of a contract supported by consideration.

Dry lands liable to pay a fixed rent were cultivated with garden crops by the tenant by means of wells excavated at his cost with the consent of the landlord. The landlord claimed and the tenant for some years paid an enhanced rate of rent for the crop so raised. In a suit by the tenant to compel the landlord to grant pattas at the usual dry rate, it was contended for the landlord that a contract to pay the enhanced rate must be implied from the payment for a number of years of such rate and that such contract was supported by consideration, as the landlord had consented to the digging of wells and as he had forborne from claiming the varam rate, which he had a right to do under section 11, clause 3, of the Rent Recovery Act. There was no evidence that rent was chargeable according to the nature of the crop raised:

Held (1) that the word 'contract' in section 11 cannot be construed as a mere agreement but as an enforceable contract supported by consideration; (2) that the consent of the landlord not being necessary to entitle the tenant to sink the

*Second Appeals Nos. 1195 to 1270, 1271 to 1347 and 1349 to 1384 of 1908.

well, such consent was no legal consideration for an agreement to pay the enhanced rate; (3) that payment of a fixed rate of rent prior to the sinking of the wells was evidence of an implied contract to pay rent at that rate; and in the absence of evidence to show that the rate was fixed not on the holding but on the nature of the crop and was liable to be altered with a variation in the crop raised; that the existence of such a contract debarred the landlord's claim to varam rates under section 11, clause 3, of the Rent Recovery Act. The promise not to press such an unenforceable claim was no legal consideration.

SECOND APPEALS against the decrees of Arthur F. Pinhey, District Judge of Madura, in Appeal Suits Nos. 388, etc., of 1908, presented against the decision of A. Edgington, Sub-Collector of Dindigul Division, in Summary Suits Nos. 14, etc, of 1905.

The facts for the purpose of this case are fully set out in the judgment.

V. V. Srinivasa Ayyangar for appellants in Second Appeals Nos. 1195 to 1207 of 1908.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Ayyar*) for respondent in the above.

P. R. Srinivasa Ayyangar for appellants in Second Appeals Nos. 1271 to 1347 and 1349 to 1384 of 1908.

The Advocate-General (Hon. Mr. *P. S. Sivaswami Ayyar*) for respondent in the above.

AYLING, J.—The sole question for determination in these appeals is the right of the respondent, the Zamindar of Gantamanaickanur to charge rent at the enhanced rate of eight fanams a guli on lands originally dry, but cultivated with garden crops by means of wells sunk at the tenant's sole cost.

This right was originally based (1) on an alleged custom and (2) on an implied contract. With the former we have now nothing to do. As pointed out by SUBRAMANIA AYYAR, J., in his judgment in this case when it first came before this Court *Arumugam Chetty* v. *Raja Jagaveera Rama Venkateswara Ettappa* (1). Such a custom even if established would be unenforceable as conflicting with section 11 of Madras Act VIII of 1865; and in *Arumugam Chetti* v. *Raja Venkatewara Ettappa* (2) the judgment, in upholding the order of remand specially lays down that the question of custom could not be reopened (*vide* also *Paramasami Iyengar* v. *Pusala Tevan* (3). It has therefore only to be

(1) (1905) I. L. R., 28 Mad., 444. (2) L. P. A. Nos. 35 to 61 of 1905 (unreported).

(3) (1910) 20 M. L. J., 142.

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considered whether there is a valid and enforceable contract for the payment of the enhanced rate. The learned District Judge, reversing the decision of the Sub-Collector, has found that there was an implied contract (agreement) in every case, and that it is not void for want of consideration.

The existence of an implied agreement is deduced mainly from the payment of the enhanced rate by the litigating tenants (appellants) for a number of years varying from 2 to 40. The corroborative evidence is meagre, but I am not prepared in second appeal to set aside the District Judge's finding in this respect.

The second point stands on a different footing. The necessity for consideration of some sort from implied contract to pay enhanced rent has been pointed out by SUBRAMANIA AYYAR, J., in the clearest manner in his judgment above referred to, and I do not understand it to be seriously disputed by the learned Advocate-General. Nothing to the contrary is contained in either of the judgments referred to by the District Judge. *Natesa Gramani* v. *Venkatarama Reddi* (1) and *Suppa Pillai* v. *Nagappasami Thumbichi Naicker* (2). The suggestion that the word 'contract' in the section is loosely used in the sense of 'agreement' cannot possibly be accepted. Of course the consideration may be of the same *implied* nature as the convenant to pay. But consideration of some kind there must be if the latter is to be treated as an enforceable contract.

Now what is the consideration in the present case? The learned District Judge says that there was "ample consideration," but it is very difficult to see from a perusal of his judgment, what form he considers it to have taken. He agrees with the Sub-Collector that the landlord's permission was not necessary for the tenant to sink a well so that such consent was not the consideration. The only consideration which I can find indicated in paragraphs 14-16 of his judgement is in the shape of an abstention on the part of the landlord from exercising his right to revert to the varam system when the tenant began to cultivate the more valuable crop with the aid of the well water. Of course, if the landlord really had such a right his abstention from resorting to it might be viewed as considration, but the District Judge appears

(1) (1907) I. L. R., 30 Mad., 511. (2) (1908) I. L. R., 31 Mad., 19.

to me to have assumed the existence of such a right without any evidence whatever.

The right in question is conferred by clause 3 of section 11 of the Rent Recovery Act and applies only to cases where there is no contract, express or implied, regulating the rates of rent. In the present suits it is admitted that prior to the construction of the wells, the tenants had always been paying at the uniform punjah rate of four fanams a guli for the suit lands, a circumstance which justifies the difference of an implied contract to continue to pay at the rate (*vide Venkatagopal* v. *Rangappa* (1)).

The learned Advocate-General, however, seeks to meet this objection by arguing that in these cases the money rents were fixed with reference to the particular crop raised, and not on the holding itself; that the payment of four fanams a guli was only for so long as a dry crop was raised; that on the tenant raising a garden crop the implied contract ceased to apply that a new rate had then to be determined, and that, in the absence of a contract regulating it, clause 3 became applicable and the landlord was entitled to claim varam; and that this abstention from so doing forms the real consideration for tenants agreement to pay the higher rent.

This is precisely the kind of case referred to as conceivable by HUTCHINS, J., in *Venkatagiri Raja* v. *Pitchana* (2), and if the existence of such a system were established the argument would be perfectly sound. But it is certainly not established here, any more than there was in the case last quoted. In *Suppa Pillai* v. *Nagayasami Thambichi Naicker* (3), there was a distinct finding in support of it, and the case of *Natesa Gramani* v. *Venkatarama Reddi* (4) simply lays down that such a system is not illegal and remands the case for evidence as to its existence.

In the present case the District Judge has certainly not found in favour of such a system: all he says in this: "Under clause 3, the local usage would have to be ascertained, *and it might very well prove* that the local usages was, as appellants originally alleged, to pay different rates according to the crops raised, and not according to the classification of the land."

And, indeed, there is absolutely no evidence in the case to support the existence of such a system. I have already referred

(1) (1884) I.L.R., 7 Mad., 365. (2) (1886) I.L.R., 9 Mad., 27.
(3) (1908) I.L.R., 31 Mad., 19. (4) (1907) I.L.R., 30 Mad., 511.

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to the fact that the tenants were admittedly, prior to the sinking of the wells, paying at a uniform dry rate as far back as can be traced. There is nothing to indicate that this charge was variable according to the crops raised and the evidence of the respondent's own manager (defendant's seventh witness) is incompatible with such a suggestion. He says not a word of any veriable charge according to the nature of the crop, but speaks of the dry lands being assessed at a uniform rate of four fanams a guli. In fact the learned Advocate-General has to rely solely on passages quoted from the 'Madura District Manual' tending to show that a system of the kind he alleges formerly prevailed in the Dindigul taluk. It is impossible to accept it as established by such means. The passages quoted are of a general nature without reference to this particular village or zamindari and while remarks in a 'District Manual' may legitimately be referred to and are of great service in corroborating or contradicting evidence recorded in any individual case, they cannot take the place of such evidence or be made the sole basis for a finding on a point of this nature.

I am therefore constrained to hold that the finding of the learned District Judge that the agreements to pay the enchanced rent were supported by consideration is unsupported by any evidence, and cannot be upheld.

There is no reason for remanding the suits for a fresh finding after taking further evidence: the question of consideration was most prominently put forward when the suits were last remanded; and if the respondent has not adduced proper evidence he has only himself to thank.

The decrees of the District Judge must therefore be set aside and those of the Sub-Collector restored. The respondent will be liable for the appellant's costs throughout.

ABDUR RAHIM, J.—I agree.