APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

1913. September 25 and 26 and October 10.

MAHABOOB SARAFARAJAWANT SRI RAJA PARTHASARATHY APPA RAO BAHADUR ZAMINDAR GARU (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE (DEFENDANT), RESPONDENT.*

Madras Regulation (XXV of 1802), sec. 4—Pre-settlement inams—Lands held on service tenure in addition to payment of quit-rent—Service to Zamindar—Service quasi-public before settlement—Its discontinuance thereafter—Resumption by Government, right of—Presumption—Onus of proof, as to exclusion prior to settlement—Evidence Act (I of 1872), ss. 106 and 114, ill. (g).

Where lands in a zamindari were pre-settlement inams granted on condition of rendering personal service to the zamindar and paying a favourable quit-rent, and the Government resumed such inams on the ground of discontinuance of such services,

Held, that as the grant was for services purely personal to the zamindar, *primâ facie* the inams formed part of the assets of the zamindari and the zamindar, and not the Government, was entitled to resume.

Held, also that where such service was rendered in addition to quit-rent, the proviso to section 4, Regulation XXV of 1802, had no application.

The onus of proving that such lands were excluded from the assets of the zamindari and that the Government had the right to resume lay on them.

Per TYABJI, J.—The Government having special means of knowledge as to exclusion or otherwise, of these lands, at the settlement, from the zamindari, the burden was upon them according to section 106 of the Evidence Act and the necessary presumption arising from the non-production of the records in their possession should be drawn against them.

SECOND APPEAL against the decree of F. A. COLERIDGE, the Acting District Judge of Kistna at Masulipatam, in Appeal No. 503 of 1911, preferred against the decree of P. R. GOVINDA RAO, the Acting District Munsif of Bezwada, in Original Suit No. 512 of 1909.

The plaintiff (a zamindar), alleged that the suit inams formed part of the plaintiff's estate and were originally granted to the ancestors of the present holders on a tenure of personal service to the Zamindar, such as following him with arms in the journeys, watching his treasury, etc. The inamdars

* Second Appeal No. 1416 of 1912.

ceased to render any service. Thereupon the Government resumed these inams in 1907 and granted pattas to persons in possession of these lands. The suit was brought by the plaintiff (the Zamindar) holding a permanent sanad, for a declaration that the reversionary right of resumption belonged to him and that the action of the Government in resuming them was illegal and void and that the Government had no right to enfranchise them. The Court of First Instance decreed the suit. The Lower Appellate Court came to the conclusion that the suit lands fell within the proviso to section 4 of Regulation XXV of 1802 and reversed the decree of the Court of First Instance.

Plaintiff preferred this Second Appeal.

S. Srinivasa Ayyangar for the appellant.

The *Government Pleader* for the respondent.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—The question for decision is whether the reversionary right in inams granted prior to the permanent settlement for services to be rendered by the inamdars to the Zamindar, in addition to the payment of quit-rent is vested in the Government or in the Zamindar. The suit is brought by the plaintiff, a Zamindar holding a permanent sanad. His case is that the lands in suit were granted in inam to the ancestors of the present holders on condition of rendering personal service to the Zamindar, such as following him with arms in the journeys, watching his treasury, etc. He alleges the inam forms part of the zamindari estate and the Government has no right to the same. According to him, the full rental value of the inams and not merely the rent which was paid thereon was included in the zamindari at the time of the permanent settlement and his contention is that no additional assessment can be imposed by the Government. The Government have resumed these inams in 1907 and granted pattas to the persons in possession of those lands. He contends that such resumption is illegal. The contention of the Secretary of State for India is that inams were pre-settlement inams and that the reversionary right in them therefore vests in the Government and, as the inamdar has ceased to render any services to the Zamindar, they were rightly resumed by the Government who assessed them and assigned them to the present holders thereof on ryotwari patta.

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There is no denial in the written statement that the lands were granted on inam for rendering services to the Zamindar as alleged by the plaintiff. The Munsif passed a decree in favour of the plaintiff. That decree has been reversed by the District Judge, and this is an appeal from his decision.

It appears from the inam record, Exhibit III, that the services rendered by the inamdars consisted of guarding the revenue collected in the village by the Zamindar, accompanying the remittances to the Zamindar's residence and attending on him at his residence; and it appears that for these two latter they also received some batta. It is said in the written statement filed by Government that "as the inamdars ceased to render any service, they (the inams) were rightly resumed by Government." Now it is not explained how the failure to render the services above enumerated, and it is not alleged that there were other services to be rendered, gave the Government a right to resume the inams. Neither the Government nor any portion of the community were interested in those services. They do not suffer in any way by their non-performance. The person injured is the plaintiff, and he is entitled to take steps to have the services performed by the inamdars or to get them performed by others and get damages from them. If the inams are resumable, *primâ facie* therefore he is the person entitled to resume them; the written statement discloses no valid answer to this objection. However the lower Appellate Court has not considered this question. What was argued before the District Judge apparently was whether these were lands excluded from the permanent settlement under section 4 of Regulation XXV of 1802. In Second Appeal it is contended on behalf of the Appellant that the question is concluded by authority. In Second Appeal No. 73 of 1908, *Raja Venkatarangayya* v. *Appalaruzu*(1), the case relied on, the facts were these; the lands in question were given by the Zamindar for minstrel service in 1718. On the death of one of the service holders the Zamindar resumed these lands. In 1900 the Government imposed an assessment alleging that they were *lakhiraj* lands in 1802 at the time of the permanent settlement and therefore that he had no title thereto. The learned Judges MILLER AND MUNRO, JJ., held that on the evidence

(1) (1910) 20 M.L.J., 728.

the inam was granted by the Zamindar before the permanent settlement for private services rendered to him and on condition that they should be held so long as the services were continued to be rendered. They were of opinion no presumption arose under these circumstances that the land was *lakhiraj* or exempt from payment of public revenue and therefore excluded from the permanent settlement with the Zamindar. They referred to the observations of the Chief Justice in *Rajah Nilmoney Singh Deo* v. *The Government*(1), that, "the Government would not have allowed any portion of their Revenue in consideration of private services to be rendered to the zemindar." This observation was quoted without disapproval by the Privy Council in *Rajah Nilmoni Singh* v. *Bakranath Singh*(2), and they pointed out that holding lands free of money rent to the Zamindar did not make them exempt from the payment of 'public revenue' as used in section 4 of Regulation XXV of 1802. According to these cases, therefore, when lands were held on condition that the holders were to render certain services which were purely personal to the Zamindar and in which the Government were not interested, *i.e.*, when such services had nothing to do with police or magisterial duties, or did not concern the community or the villagers, then the Government were entitled to include in the zamindari assets for settling the peshkash the income from the lands allowed in lieu of such services which were not allowed for in the settlement; there is therefore no presumption they did not do so or treated the land as free from payment. In the case before us the Judge states that this cannot be regarded as personal service to the Zamindar in consideration of which the Government would not allow any portion of their revenue. It may be that prior to the permanent settlement these were *quasi* public duties, as it was the Zamindars who collected the revenue for the Government but from the time of the settlement they ceased to be such and it was not necessary for the Government that those services should any longer continue to be done by the Zamindars, because in the performance of those services the Government or any section of the community were not interested and there is no reason for the Government continuing any allowances for these duties.

(1) (1866) 6 W.R., 121.

(2) (1882) 9 I.A., 104 at p. 121.

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The District Judge also holds that the decision in *Raja Venkatarangayya* v. *Appalarazu*(1), does not apply to the case, presumably for the reason that in addition to rendering the services the holders of land had also to pay a rent of Rs. 6 per putti. The point for consideration in such cases is whether the Government only included the income actually received by the Zamindar from these lands in the estate of the Zamindar when they fixed the peshkash. If they included the whole income, then the Government are admittedly not entitled to enfranchise the land. If they included only Rs. 6 which was the rent then actually paid by the inamdar, then the Government would be entitled to do so. The question is purely one of fact. As pointed out by the Chief Justice in the passage above extracted, the Government would not have allowed any portion of their revenue for services to be rendered to the Zamindar, and, as a rule, the reports of the various officers when the permanent sanads were granted show that this rule was followed, and, whenever any reductions were made by the Zamindar from the total income derivable from the zamindari for payment to peons and other persons who were rendering services to the Zamindar, in the continuance of which the public were not interested, they were disallowed. The reports on which the peshkash in question was fixed are with the Government and they do not produce them. About 1860 an Inam Commissioner was appointed to enfranchise the inams in which the Government have a reversionary right, and the fact that in the course of that enquiry the Government decided not to enfranchise these inams in question on the ground that they were not entitled to a reversion is strong evidence against them. The Judge states :— "It seems to me evident that at the time of settlement, Government would have exempted all lands that were paying only a favourable rent when arriving at the total income of the zamindari ; for, if they did not, it would amount to this, that if they were taking a two-thirds share in the income of the zamindari on all such lands, if they included them in the income, they would only get one-fourth of the nominal rent, whereas the Zamindar would get his one-third of the nominal rent and all of the service to pay for which the rent had been reduced.

(1) (1910) 20 M.L.J., 728.

"For example in these cases if the real rent was Rs. 18 a putti and it was reduced to Rs. 6 quit-rent, Government would get only Rs. 4 as its share instead of Rs. 12 whilst the Zamindar would get the full service just as before or, in other words, Government would be paying two-thirds of his servants' wages and he only one-third though Government would be getting no benefit from the service." This begs the question in issue which is whether the Government took Rs. 18 or only Rs. 6 for settlement purposes. The presumption is they took Rs. 18. The usage of more than a century is in support of that view. Even otherwise the practice of a century is not to be set aside by a theory as to the Government procedure in 1802.

The Judge also gives another reason. I will give it in his own words:—"It has been argued that the word 'only' coming before 'favourable quit-rent' means that the lands must pay quit-rent and nothing else and as in these cases there was service rendered as well, they would not fall within the exempted lands. This is too much hair splitting to appeal to me and I need merely remark that all grants of inams on favourable quit-rent imply some service to be rendered. Also if we are to go into the very words I do not think that in 1802 when English was at its best that even a draftsman of a legal enactment would have thought of including 'rendering of services' under the word 'paying'."

The answer to this is contained in the words of the section referring to the lands. The words run thus: "Of all other lands paying only favourable quit-rents." In my opinion this obviously does not include lands which are held on condition of paying a certain rent and of rendering certain services in addition to that rent. In such a case the land is not held on a favourable quit-rent.

For these reasons I reverse the decree of the Court below and restore that of the District Munsif with costs payable by the first defendant in this and in the Lower Appellate Court.

TYABJI, J.

TYABJI, J.—The question involved in this appeal is whether the Government is entitled to resume the lands referred to in the plaint, on the ground which is thus stated in the written statement of the Secretary of State (the first defendant):—

"The inams being pre-settlement grants, the reversionary right in them vests in Government and as the inamdars ceased

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to render any service, they were rightly resumed by Government, assessed and assigned to the present enjoyers on ryotwari patta."

If the lands were included as part of the plaintiff's zamindari in the permanent assessment made in accordance with Regulation XXV of 1802, then it is admitted that the Government has no right to resume the lands.

The Government contend that the lands were not so included, having been excluded under section 4 of the said Regulation. The part of section 4 at present material is as follows :—

"4. The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads of . . . all other lands paying only favourable quit-rents —the permanent assessment of the land-tax shall be made exclusively of the said articles now recited."

It is admitted that "the suit lands were inams granted by the ancestors of the plaintiff" (see the District Judge's judgment, paragraph 2). It would therefore seem to be for the Government to establish that prior to the permanent settlement the lands had been so severed from the plaintiff's zamindari as no more to form part of it. That fact can be established by the production of the records of the permanent settlement, which would show almost conclusively whether the lands had been assessed as part of the zamindari, or had been excluded as "lands paying only favourable quit-rents" (under section 4). Those records have not been adduced in evidence by the Government. It was at one stage of the argument suggested on behalf of the Government that there might have been some difficulty in the production of those records; but that suggestion had to be abandoned, especially in view of the fact referred to by my learned brother in the course of the arguments that a considerable portion of the records has been printed as part of the records in another appeal. Under these circumstances, it seems difficult for the respondent to withstand the applicability of section 106 of the Evidence Act which lays down that "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him," and illustration (*g*) to section 114 to the effect that "The Court may presume that

evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

Notwithstanding these circumstances, the District Judge has held, "that the suit lands fall within the exempted lands mentioned in section 4 of Regulation XXV of 1802." He came to that conclusion in a carefully written judgment, but it seems to me that he erred in drawing the legal conclusions from the facts which were before him; and that consequently the error was of such a nature that we ought to interfere in second appeal.

In holding that the lands in question fall within the description of 'lands paying only favourable quit-rents' in section 4, the learned District Judge states that he "can find nothing to distinguish between quit-rent to Government and quit-rent to the Zamindar in section 4." But the answer to the question to whom such rent is payable seems to me to have an important bearing on the question whether or not the lands form part of the zamindari. When the quit-rent is favourable there must be some circumstance such as the rendering of services, or dedication to a charitable or religious object which is favoured by the Government, and the existence of which circumstance forms so to say the complement of the favourable rent: and the two together (viz., the favourable rent and the rendering of service or other circumstance of a similar nature) make up that total consideration which in ordinary cases is represented solely by rent. In cases therefore where the land is held in consideration partly of a favourable quit-rent and partly of services rendered by the holder of the land, if it is not clear whether the services are to be rendered for the benefit of the Government or of the Zamindar, it seems not unreasonable to look to the destination of the rent for discovering where the services are due. There may be cases where one of the two portions, into which the consideration proceeding from the holder of the land is so split up, becomes due to the Government and the other to the zamindar. But such cases would in the natural course of events be rare. In my view of the case, therefore, the learned District Judge erred in overlooking the significance of the fact that the rent was payable not to the Government but to the zamindar.

The learned District Judge next expresses the opinion that all lands paying a favourable quit-rent to the Zamindar in consideration of services rendered to him must have been exempted

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from the assessment; for otherwise the Government would lose the land revenue in respect of that portion of the rent which is represented by the services. This argument assumes that the assessment is based entirely on the rent received by the Zamindar, irrespective of a consideration of such circumstances as might indicate that the rent so received does not represent the full rental value of the land. For this assumption I find no warrant either in the materials before us or in the methods of assessment usually adopted by the Government. So far as the materials before us warrant any conclusion on the point, there is no reason to suppose that lands paying a favourable rent to the Zamindar, should be assessed otherwise than on their full rental value: the rental value would be determined on a consideration of circumstances some of which would have no reference to the rent paid in money to the Zamindar: compare *Rajah Nilmoney Singh Deo* v. *The Government*(1); *Rajah Nilmoni Singh* v. *Bakranath Singh* (2); *Raja Venkatarangayya* v. *Appalarazu*(3). If on the other hand such lands are burdened with services due to the Government and not to the Zamindar in his personal capacity, then the zamindari would presumably be taxed only in respect of its interest in the lands, viz., the favourable rent.

Finally the District Judge has come to the conclusion that the services due from the lands were quasi-public duties, and not such private services due to the Zamindar as the Court had to deal with in *Raja Venkatarangayya* v. *Appalarazu*(3). This decision is opposed to the view expressed by the Inam Commissioners in 1859. If these services were due to the Government, some explanation ought to have been forthcoming of the circumstance that for over a century these lands were allowed by the Government to be held on a favourable quit-rent, though the services that were due from them were no more required by Government. The District Judge says that prior to the permanent settlement the Zamindars were collectors of revenue, and that the services due from the holders of the lands in the present case were in respect of collection of revenue and they fell into abeyance when the Government itself began to collect revenue. Had this been so then, the case would have been

(1) (1866) 6 W.R., 121. (2) (1882) 9 I.A., 104 at p. 121.
(3) (1910) 20 M.L.J., 728.

parallel to that contemplated in section 6 of Regulation XXV of 1802 which provides for the resumption of lands held on condition of performing police duties. The fifth report to the Circuit Committee to which the District Judge refers was not relied upon before us. On the materials before us I see no ground for supporting the conclusion that the services were of a public nature.

It seems to me, therefore, with every respect to the learned District Judge, that he has proceeded on entirely erroneous assumptions and that the conclusions drawn by him from the documents before him were opposed to law. The appeal must therefore, in my opinion, be allowed and the decree of the District Munsif restored with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Spencer.

1913. October, 10.

R. V. R. P. CHINNATHAMBIAR AVARGAL, ZAMINDAR OF SIVAGIRI (DEFENDANT, APPELLANT IN ALL),

v.

MICHAEL *alias* SANKARALINGAM AND FOUR OTHERS (PLAINTIFFS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 54 and 78, cl. (2)—Tender of patta by a landlord to his tenant at his house—Tenant, refusal by—Subsequent affixture of patta to the tenant's house, not to his land—Tender, validity of—Methods of tender under the Act—Delivery of patta, meaning of—Essentials of a valid tender under the Act.

Where a patta was offered by a landlord to his tenant at his house but the tenant refused to receive it, and thereupon the patta was affixed to the tenant's house but not to the land in his holding;

Held, that there was no valid tender of patta to the tenant as required sections 54 and 78, clause (2) of the Madras Estates Land Act (I of 1908).

An offer of a patta to the ryot is not delivery to him. When once an offer of patta is made and refused, the tender by delivery cannot be effected, and it then becomes necessary to affix the patta to the land in the ryot's holding. If this is not done, there is no valid tender of patta.

Meaning of 'tender' and 'deliver' considered.

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* Second Appeals Nos. 2280 to 2284 of 1912.