It is argued before us however that the decision in *Basaweswara Swami* v. *Bellary Municipal Council*(1) entitles the Municipality under section 168 of the District Municipalities Act, to demolish the erections on the land in question. I cannot agree that the effect of the decision referred to is that any erection can be considered to be an encroachment or obstruction under section 168 of the District Municipalities Act after the land over which the erection is made has passed into the ownership of the person who has made it; and for the purposes of the question before us I see no distinction between the transfer of the ownership of the land by adverse possession and transfer in any other manner. In the case cited above the obstruction consisted of a pial (or verandah) erected over drains belonging to the Municipality and thus there was either no passing out of the ownership of the land over which the pial was erected from the Municipality to the person who had erected it, or the pial was an obstruction to the drain belonging to the Municipality in either of which cases the facts would be materially distinguishable from those with which we have to deal.

I therefore think that this appeal should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Tyabji.

1913. August 1.

SRI B. B. SARVARAYUDU GARU (FIRST PLAINTIFF), APPELLANT,

v.

K. VENKATARAJU (SECOND PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 3 (7), 6, 23, 153 and 157—'Old waste,' ejectment from—Onus of proving 'old waste' on landlord.

A landholder claiming to eject a tenant under sections 153 and 157 of Madras Estates Land Act (I of 1908) on the ground that he is a non-occupancy ryot of 'old waste' is by section 23 of the Act bound to prove that the land is 'old

(1) (1915) I.L.R., 38 Mad., 6; s.c., 23 M.L.J., 479.

* Second Appeal No. 1376 of 1912.

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waste' within the meaning of section 3, clause (7) of the Act. If neither sub-clause (1) nor the latter part of sub-clause (2) of the definition of 'old waste' would apply to the facts of the case, the first part of sub-clause (2) cannot be used to prove that the land is 'old waste' as that refers to a state of facts subsequent to the passing of the Act, and as section 6 of the Act vested in the tenant in possession occupancy right from the date of the passing of the Act in all ryoti lands not being 'old waste.'

SECOND APPEAL against the decree of Diwan Bahadur M. O. PARTHASARATHI AYYANGAR, the District Judge of Godavari at Rajahmundry, in the Appeal No. 260 of 1910, preferred against the decree of R. V. SUBBA RAO, Suits Deputy Collector of Godavari, in Summary Suit No. 829 of 1910.

This was a suit under sections 153 and 157 of the Madras Estates Land Act by a landholder against his tenants on the ground that the land was "old waste" let to the tenants on lease for a period of five years from 1904 and that the tenants refused to give up the land at the end of the period. The tenants pleaded that the land was 'ryoti land' in which they had occupancy rights and not 'old waste.' The land in question was a lanka gradually formed in the Vridhagantami river in the Godavari district. Both the Lower Courts found the land was ryoti land and not old waste and that the plaintiff had no right to eject the tenants.

The landholder thereupon preferred this Second Appeal.

The other facts appear from the judgment of TYABJI, J.

G. Venkataramayya for the appellant.

B. Narasimha Rao for the respondents Nos. 2 and 3.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Section 23 of the Madras Estates Land Act says that a land "shall be presumed to be ryoti land *other than old waste*" until the contrary is proved. The important question in issue in this case is whether the plaint land is ryoti land coming under the definition of "old waste" or "ryoti" land not coming under the definition of "old waste." For, if it was not "old waste," section 6 gives the ryot in possession on the date of the passing of the Act an occupancy right in the land; and this suit by the landlord (appellant before us) in ejectment was rightly dismissed by the Lower Courts. "Old waste" is defined in section 3, clause (7). Clause (7) contains two sub-clauses Nos. (1) and (2). The plaint land admittedly does not come under sub-clause (1). As regards sub-clause (2), there are two parts in it. The land in question does not come under the description of

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the land in the second part, that is, land in respect of which an ojectment decree against the ryot has been obtained before the coming into force of the Act. As regards the first part of sub-clause (2), it refers to a land which has remained without occupancy rights being held therein at any time within a period of not less than ten years immediately prior to a letting by the landholder after passing of the Act. To find out whether a land was "old waste" or not *at the time of the passing of the Act*, a definition which says that a land shall be considered as old waste at the time of a letting after the passing of the Act, if certain conditions are then fulfilled, cannot be resorted to, because section 6 applied at once on the passing of the Act, and when once occupancy rights are vested in ryot at the time of the passing of the Act, the land ceases to be old waste.

Hence, it seems to me that the plaint land, which was clearly ryoti land (that is, cultivable land other than private land according to the definition in section 3, clause 16) on the date of the coming into force of the Estates Land Act and which land the landlord could not then prove to be "old waste" under either of the sub-clauses of section 3, must be held to have then been ryoti land other than old waste. If so, the defendant got a right of occupancy then under section 6 and could not be ejected thereafter.

As to the argument that the addition made to section 153 by the Amendment Act of 1909, namely, "nothing shall affect the liability of a non-occupancy ryot to be ejected on the ground of the expiry of the term of a lease granted before the passing of this Act," that this addition would become useless if all non-occupancy ryots in possession got occupancy rights on the passing of the Act, there are certain kinds of non-occupancy ryots included in section 6, clauses 3, 4 and 5 of the Act who do not obtain occupancy rights even if they were in possession on the date of the coming into force of the Act. The additional clause inserted by the amending Act in section 153 would apply to such lands. On these grounds I would dismiss this Second Appeal with costs.

If the land was "old waste" section 157 of the Act as interpreted in *Atchaparaju* v. *Krishnayachendrulu*(1) will bar this suit. But it is unnecessary to base my decision on that ground, as the

(1) (1913) 24 M.L.J., 402.

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correctness of that decision has been attacked in the arguments before us.

TYABJI, J.—The plaintiff prays for an order of ejectment against the defendant, his tenant; the tenant on the other hand contends that he has the right of permanent occupancy in his holding on the ground that he is a ryot, in possession of the land at the date when the Madras Estates Land Act came into operation, having been admitted by the plaintiff into the possession of the land which he alleges is ryoti land, not being old waste. The first question therefore that we have to decide is whether the land is ryoti land not being old waste. The defendant relies upon section 23 of the Madras Estates Land Act which raises the presumption that any land the nature of which it is necessary to determine, is ryoti land other than old waste, until the contrary is proved.

The onus is therefore on the plaintiff to establish that the land in question is old waste land. He seeks to do so by establishing that the land falls within the terms of section 3, sub-section (7), clause (2). That clause according to the learned pleader for the plaintiff is applicable to the facts of this case, his contention being that the land in question is old waste, because at the time of the letting of the land in 1909 by the landholder, it had remained without any occupancy rights being held therein within a continuous period of ten years, namely, from 1899 to 1909. It is admitted by the defendant that up to 1904 the land in question was not subject to any occupancy rights; and that it had been let to tenants under leases of varying terms the last of which expired in 1904. In that year the present tenant obtained a lease for five years and took possession of the land under his lease. It is also admitted that up to the time when the Act came into operation, namely, 1st July 1908, the land was not subject to any occupancy rights; but the respondent contends that on the 1st July 1908, while he was in occupation of the land in question, it became impressed with occupancy rights by the operation of the Act and he relies on section 6 for this contention. The question therefore at this stage is whether the land was impressed with occupancy rights on the 1st July 1908 by reason of the provisions of any section of the Act.

Section 6, on which reliance is placed by the defendant, does not deal directly with the modes in which occupancy rights may

be acquired in lands, that up to the coming into the operation of the Act, were not subject to occupancy rights. Nor does it say in what manner such lands as would come within the description of 'old waste' may be turned into ryoti land. But the section proceeds on the assumption that the lands to which it applies are ryoti lands not being old waste. It is, therefore, to my mind, rather unsatisfactory that when we have to determine the question whether a particular piece of land which at one time was not subject to occupancy rights became subsequently impressed with such rights, we should have to fall back upon a section referring to land that *ex hypothesi* is subject to occupancy rights. I feel constrained, however not without a great deal of hesitation, to come to the conclusion that in such a case also the person claiming that the land is old waste must affirmatively establish that the land in question comes within the definition of old waste, contained in some provision of the Act such as section 3, sub-section 7, clause 1; and as a consequence must, if necessary, prove that there are no occupancy rights in the land. I come to this conclusion on a consideration of the presumption raised under section 23 and the definition of 'ryoti land' contained in section 3, clause 16, together with the provisions of section 3, clause 7, relating to the definition of 'old waste.'

Turning then to the definition of 'old waste' in section 3 (7) and to the means which are provided in it for establishing that any land is old waste after the Act came into operation, it is admitted that the plaintiff has not obtained a final decree of a competent Civil Court establishing that the ryot has no occupancy right before the passing of the Act. It is also admitted that the land in question was not possessed by the landholder or his predecessors in title for a continuous period of not less than ten years. Nor has it continuously remained uncultivated during that time. So that the two modes expressly laid down by the Legislature in the seventh clause of section 3 for establishing that the land is old waste cannot avail the plaintiff. It follows that no facts were proved on proof of which the lower Courts were bound to hold that the plaintiff had established that the land in question was 'old waste.' As the proof that was offered by the plaintiff did not consist of either of the two modes above referred to, it was open to the Lower Courts to hold that the plaintiff had not succeeded in discharging the burden, by

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adducing the evidence that he did. Hence their decision cannot be questioned in Second Appeal.

For these reasons I agree that this appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

1913. August 6.

GOVINDAN NAIR (PULIKOTE PUTHAN VEETTIL, KARNAVAN AND MANAGER) AND EIGHTEEN OTHERS (DEFENDANTS), APPELLANTS,

v.

CHERAL *alias* KRISHNA PANDUVAL PAENGOT-PURATH TARWAD, KARNAVAN AND MANAGER (PLAINTIFF AND DEFENDANTS), RESPONDENTS.*

Interest Act (XXXII of 1839)—Debt payable in kind—Interest allowable.

A debt which is specifically expressed as payable in certain fixed measures of grain and at a specified time is a debt *certain* within the meaning of Act XXXII of 1839 and interest is allowable on the same.

Juggomohun Ghose v. *Manickchand* (1859) 7 M.I.A., 263, referred to.

Narayan v. *Nagappa* (1910) 12 Bom. L.R., 831, dissented from.

SECOND APPEAL against the decree of K. IMBICHUNNI NAIR, the Subordinate Judge of South Malabar at Calicut, in Appeals Nos. 302 and 317 of 1911, preferred against the decree of T. V. NARAYANAN NAIR, the District Munsif of Manjeri, in Original Suit No. 584 of 1909.

The facts of the case appear sufficiently from the judgment.

C. V. Anantakrishna Ayyar for the appellants.

T. R. Ramachandra Ayyar for the first respondent.

AYLING AND SADASIVA AYYAR, JJ.

JUDGMENT.—In our opinion the Subordinate Judge's findings of fact as to the plaintiff's right to redeem cannot be said not to be based on evidence and must be accepted.

The appellant's vakil argues relying on *Narayan* v. *Nagappa*(1) that the award of interest on a debt payable in kind

* Second Appeal No. 2109 of 1912.

(1) (1910) 12 Bom. L.R., 831.