APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar.

1914. November 11 and 26.

SREEMANTHU RAJA YARLAGADDA MALLIKARJUNA NAYUDU BAHADUR, ZAMINDAR GARU OF CHELLAPALLI (PLAINTIFF), APPELLANT,

v.

RAJALAPATI SOMAYA AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

(*Madras*) *Estates Land Act* (*I of* 1908), *ss.* 3, 8 *and* 185—*Private land, conversion of ryoti, into—Proof—Proviso to section* 185, *nature of.*

Per WALLIS, C.J.—Section 8 of the Estates Land Act does not impose retrospectively an absolute prohibition of the conversion of ryoti into private land not to be found in the definition or in the section specially dealing with evidence as to what is private land.

Such a conversion should be proved by very clear and satisfactory evidence.

The acquisition of kudivaram right in certain lands by the landlord and his letting them out as *kambattam* lands on terms negativing occupancy right with a view to prevent the assertion of such right is not sufficient to convert them into private lands within the meaning of the definition.

Per SESHAGIRI AYYAR, J.—Land originally *seri* cannot become the private land of the landholder except in the one instance mentioned in the proviso to section 185 of the Act.

The proviso is not in the nature of an exception but enacts a rule of substantive law.

Mullins v. *Treasurer of Surrey* (1880) 5 Q.B.D., 173 and *Maha Prasad Singh* v. *Ramani Mohan Singh* (1914) 27 M.L.J., 459, followed.

APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Temporary Subordinate Judge of Masulipatam, in Original Suit No. 22 of 1910.

The facts of the case appear from the judgment of SESHAGIRI AYYAR, J.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *C. V. Anantakrishna Ayyar* for the appellant.

V. Ramadoss for the respondents.

WALLIS, C.J.—This case raises a question of considerable importance as to what consitutes private land under the WALLIS, C.J.

* Appeal No. 104 of 1913.

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Madras Estates Land Act, 1908. The Subordinate Judge has decided the question very largely with reference to speeches made while the Bill was passing through the Council, in which private lands were said to represent lands which were granted free of assessment by the Muhammadan Government to the zamindars as part of their remuneration for their services. However this may be, what the Court has to see is whether the land in question comes within the definition in section 3 (10) of the Act, where private land is said to mean "the domain or home farm land of a landholder by whatever designation known such as *kambattam, khas, seri* or *pannai*."

Here it may be well to note that the word "domain" in this connection is explained by Webster citing *Shemtore* as meaning "the land about the mansion-home of a lord and in his immediate occupancy." Section 185 prescribes certain rules of evidence as to whether any land is private land or not, and provides that land shall be deemed not to be private land until the contrary is shown. That it is the intention of the legislature that this should be strictly proved is also to be gathered from the provisions of section 183 as to ascertaining and recording whether any land is private land in which the Revenue Officer is directed to disregard any agreement or anything contained in any compromise, or in any decree proved to his satisfaction to have been obtained by fraud or collusion and not to register the land as private unless it is proved to be such by satisfactory evidence of the nature prescribed in section 185. Under that section regard is to be had to local custom, and to the question whether the land was before the first day of July 1898 specifically let as private land, and to any other evidence that may be produced. Then we have the proviso: "Provided that all land which is proved to have been cultivated as private land by the landholder himself by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act, shall be deemed to be the landholder's private land."

Mr. Govindaraghava Ayyar very properly relied on the fact that this provision is enacted by way of proviso to the body of the section and not by way of exception, and argued that it should not be construed as inconsistent with the body of the section, and therefore that the fact that the land had been so

cultivated by the proprietors would have been evidence that the land was private land apart from the proviso. This is no doubt a sound principle of construction and was recently applied by the Privy Council in *Maha Prasad Singh* v. *Rumani Mohan Singh*(1), but it is scarcely necessary to rely upon it, because it is expressly provided in the body of the section that the fact that the land has been let as private land is evidence of its being such, and the case of its being cultivated as such by the owner himself is of course much stronger. For the respondent, however, it is contended that once it is shown that the land in question was at one time ordinary ryoti land or seri, as it is called in the district in question, evidence that subsequently it has been dealt with as private land, though admissible under section 185, is of no avail, because by virtue of the provisions of section 8 which are retrospective, the land must be taken not to be private land, unless the conditions of the proviso to section 185 are satisfied. As to this it may be observed that, if this be so, the proviso should rather have appeared as an exception to section 8.

Now it is well settled that retrospective enactments must be strictly construed and it is therefore necessary to examine carefully the provisions of section 8 to see if they really have the result contended for. Sub-section (1) provides that whenever before or after the commencement of the Act the entire interests of the landholder and the occupancy ryot in any land in the holding have become united in the same person in the circumstances specified in the section, such person shall have no right to hold the land as a ryot but shall hold it as a landholder, and sub-section (3) further provides that such merger shall not have the effect of converting ryoti land into private land. I do not think the latter provision is of much importance as it only provides that the merger in question shall not convert ryoti land into private land, and cannot be read as enacting that such land shall not be converted into private land by being subsequently cultivated or let as such. This effect must be produced, if at all, by virtue of the provision in sub-section (1) that in such a case the owner "shall have no right to hold the land as a ryot but shall hold it as a landholder." But for this provision a landholder who had acquired the kudivaram rights in a

(1) (1914) 27 M.L.J., 459 at p. 466.

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holding could have escaped the operation of the Act by purporting to let the lands in his capacity of ryot, seeing that ryots are free to sublet their lands on what terms they please, whereas the powers of a landholder are governed by the provisions of the Act. This provision that the owner shall not hold the land as a ryot was intended to guard against this mischief, and is not in my opinion of itself sufficient, if the section be construed strictly, to prevent the owner from subsequently converting such land into private land and by cultivating, or letting it as such. We have then to see whether the further provision that after such merger, the owner shall hold the land as a landholder has that effect. Now landholder is defined in section 3 (5) as meaning a person holding an estate, and the definition of estate in section 3 (2) is such as to include both ryoti and private land; and as already pointed out, private land is defined as "the domain or home farm land of a landholder." In this state of things, and construing the sub-section strictly as we are bound to construe it, I do not think it can be said that a landholder holding land as private land is not holding it as a landholder rather than as a ryot, for that is the distinction contemplated in the section. This appears to be in accordance with the opinion expressed by SADASIVA AYYAR, J., in *Venkata Sastrulu* v. *Sitaramudu*(1).

In *Chintam Reddi Sanyasi* v. *Sri Raja Sagi Appala Narasimha Raja Garu*(2) to which I was party the provisions of section 8 are not referred to in the judgment, but as appears from a reference to the printed papers that was a case of immemorial waste being cultivated as private land, and not a case in which the interests of a landholder and an occupancy ryot had become merged in the manner specified in section 8. I have come to the conclusion that the effect of section 8 is not to impose retrospectively an absolute prohibition of the conversion of ryoti into private land not to be found in the definition, or in the section specially dealing with evidence as to what is private land: and I may say that, if the legislature had intended to exclude from the category of domain or home farm land, lands which had been cultivated as such for a century or more on the ground that such land had at some remote period been held

(1) (1914) 26 M.L.J., 585 at p. 590. (2) (1914) M.W.N., 766.

as ordinary ryoti land, it would I think have expressed its intention in clear and unambiguous language. While I feel bound to arrive at this conclusion I think that it is very necessary that an actual conversion from ryoti into private land should be proved by very clear and satisfactory evidence.

We have next to see whether the evidence in this case is sufficient for the purpose. In this connection it is to be borne in mind that numerous instances have come before the Courts in which subsequent to the decision of *Chockalinga Pillai* v *Vythealinga Pundara Sunnady*(1) zamindars succeeded in inserting in pattas and muchilikas terms negativing the existence of occupancy right, and that one way of effecting this purpose was to deal with the land as *kambattam* or home farm land, even though it had never been cultivated by the zamindar himself and there was no intention of so cultivating it. Now in the present case we find that the earliest accounts of the village of the year 1836 show that it contained 6 puttis or about 102 acres of savaram lands in which the suit lands were not included, and that 800 acres or more than a third of the whole acreage of the village is now classed as *kambattam*. So too the accounts of 1866—Exhibits 18 and 19 and of 1867. Exhibits 3 and 12 show only 49 acres and 54 acres under cultivation 'as *kambattam*' in these years. The evidence in the present case shows how the extension came about. The character of the suit lands was called in question in Original Suit No. 10 of 1881 in the District Court of Masulipatam when the District Judge decided that the predecessors of the present owners had executed muchilikas agreeing to hold the land as *kambattam* but did not knowingly consent to the change from *seri* to *kambattam*. The High Court in Exhibit J set aside his decree on the ground that the only defence set up by the defendants was that they had not executed the muchilikas. This was all that was decided but the learned Judges observed that the District Judge found that the zamindar was at liberty to change seri into *kambattam* on the occurrence of a vacancy and had overlooked the fact that such a vacancy had occurred in 1874 on the death of Komapati Venkanna, in whose name the lands then stood. It may fairly be inferred that no documents were then preferred in

(1) (1870) 6 M.H.C.R., 164.

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evidence in which the land was treated as *kambattam* prior to 1875, and the documents relied on in the present case are even later. In that case the learned Judges put the onus of proving that the land was seri on the defendants, and held that they had discharged it. As the law now stands, the burden is on the zamindar to show that the suit lands come within the definition in section 3 as forming part of his domain or home farm lands. There was no evidence in that case that he had ever cultivated them himself. The earliest evidence that they had been treated as *kambattam* related to 1875 shortly after the decision in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*(1) after which zamindars endeavoured to get their ryots to contract themselves in one way or another out of their occupancy rights, a process which apparently explains the extraordinary increase in the amount of land classed as *kambattam* in recent years. The evidence that the zamindar cultivated these lands in recent years is negatived by the karnam who otherwise shows himself favourable to the zamindar. He says that out of 2,300 acres in the village, 800 are classed as *kambattam* and that of these the zamindar cultivates 200 acres himself but not always the same 200 acres. It is not shown that he ever cultivated the suit lands. On the contrary the evidence is that they have always been cultivated by tenants.

Though the fact that the lands have been let as *kambattam* is evidence under section 185 that they are private lands, and though the provisions of section 183 do not apply to the Civil Courts, still, as I have already said, I think the fact that the lands really were at some time domain or home farm lands should be strictly proved. Once it is shown as here that they were a ryoti, down to a certain date the effect of section 8 is that even if the zamindar subsequently acquired the kudivaram right that would not of itself convert them into private land and we have to see whether what has happened subsequently is sufficient to convert the land into private land, that is to say, into domain or home farm land. It does not seem to me that calling the lands *kambattam* and letting them on terms which negative occupancy right with a view to prevent the assertion of such right is sufficient to convert them into private lands within the meaning of the definition.

(1) (1870) 6 M.H.C.R., 164.

The Subordinate Judge has found and I agree with him that the suit lands were never cultivated by the zamindar as part of his home farm lands, and it seems to me that his treatment of them as *kambattam* was merely colourable for the purpose of defeating the occupancy rights of the tenants. In some parts of India lands of this kind are known as sir lands, and this is one of the terms mentioned in the definition. In *Budley v. Bukhtoo*(1), it was held that sir land is land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied here, and that, as the plaintiff has failed to satisfy it, the appeal fails and must be dismissed with costs.

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SESHAGIRI AYYAR, J.—The plaintiff sues for a declaration that the lands in suit are his home farm lands. The defendants claim them as their jeroyiti. The Subordinate Judge dismissed the suit.

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I see no reason to differ from the conclusion at which the lower Court has arrived. The Subordinate Judge found that from the year 1884, the lands were treated by the plaintiff as his *kambattam* or home farm lands and that they were held as seri or jeroyiti lands from 1866 to 1883 by the defendants and their predecessors. The appellant has convinced us that in the year 1879, the lands were treated as *kambattam*. Exhibit J, the judgment of the High Court, Exhibit V, the cultivation account for 1880, and Exhibit XIII the *hissab* account for 1879, show that from the year 1879 onwards, the plaintiff dealt with the lands as his *kambattam*. The Subordinate Judge's finding must be modified to this extent. As regards the earlier period, discussed by the Subordinate Judge in paragraph 11 of his judgment, Mr. Govindaraghava Ayyar contended that the documents commented upon do not support his finding. I see no force in this argument. Exhibit X, the adangal account of 1868, is against this contention. Whenever land is mentioned as *kambattam* in this account, the zamindar is entered as owner and the person actually cultivating the field under him is entered as being the cultivator. The two entries referred to by the Subordinate Judge fully support this view. With reference to the plaint lands, the zamindar is not entered as owner. Exhibit XVIII,

(1) (1871) N.W.P., H.C.R., 203.

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the landwari account of the plots in 1866, shows the defendant's predecessor as the owner. Exhibit XIX is to the same effect. Exhibits III and XII the accounts for 1867, are of the same character as Exhibits XVIII and XIX: Exhibit XI for the year 1874 which is an account of the seri lands shows that one Korapattai Venkanna was the owner of the plaint lands. Even if we are not prepared to accept the suggestion that this Venkanna was a relation of the defendants, the entry shows that the zamindar was not the owner. The learned vakil for the appellant suggested that the entries in these documents, especially in Exhibit X, may be due to the fact that the person entered as cultivators were let in for the first time by the zamindar. There is no trace of this explanation in the evidence; on the whole, I see no reason to differ from the Subordinate Judge in his conclusion that from 1866 to 1874, the lands were held and enjoyed as seri.

On these facts, the question for determination is whether lands once enjoyed as seri with tenant right can be converted by the zamindar into his *kambattam*. The question is not free from difficulty. The sections that have a bearing upon this point are 3 (10), 6, 8, 181, and 185. Section 3 (10) defines "Private land." The meaning of the word *domain is not given* in the Act. The learned Chief Justice pointed out in the course of the argument that it was synonymous with *Demesne*. In the Encyclopædia Brittanica, volume III, it is explained as follows: *Demesne*—(Demeine, Demain, Domain, etc.), that portion of the land of a manor not granted out in the free hold tenancy, but (*a*) retained by the lord of the manor for his own use and occupation, or (*b*) let out as tenemental land to his retainers or "villani." The demense land, originally held at the will of the lord, in course of time came to acquire fixity of tenure, and developed into the modern copyhold (see Manor). It is from demesne as used in sense (*a*) that the modern restricted use of the word comes, i.e., "land immediately surrounding the mansion or dwelling house, the park or chase." I have no doubt that it is in a similar sense that the legislature has used the expression. The special incidents of such property are that it must have been an appertenance to the general holding, and should have been in the personal occupation of the zamindar. Some indication of its characteristics is to be found in the Fifth Report relating to

the Madras Presidency. In giving instructions to Collectors regarding the properties to be taken into account in making the permanent settlement with the zamindars, one of the items to be included is thus described:—"All private lands at present appropriated by the zamindars and other landholders to the subsistence of themselves and families, as well as all lands held by private servants and dependants, will be considered as forming part of the Sirkar land, and therewith responsible for the public jumma." This is practically the definition of private land. Ordinarily a private land must have possessed that character from prior to the permanent settlement, except in certain cases, to which I shall refer later on.

Prima facie a jirayati or *seri* land cannot be converted into private land. This view is strengthened by the last explanation to section 6 which lays down that an occupancy right in land is not lost by the tenant becoming the landholder. The character of the holding remains the same whatever may be the change in the position of the owner of it. Then we come to section 8; clause (1) of that section deals with the merger of occupancy right in certain cases. A great deal of argument was directed towards the clause "by transfer, succession or otherwise." I think there can be no doubt that a bare surrender will not come under the expression "otherwise," because a surrender without more does not confer a right to the property. I had to consider this question at some length in *Venkata Sastrulu* v. *Sitaramudu*(1). I adhere to the view I therein expressed that if the surrender has been accepted and acted upon, it would amount to a mode of acquisition and would come under the expression "otherwise." In that view, clause (3) of section 8 will preclude the conversion of a ryoti land the occupancy right in which had become vested in the landholder by an accepted surrender into home farm land. I cannot accede to the contention of Mr. Govindaraghava Ayyar that clauses (1) and (3) contemplate a bare merger without more and that when such a merger has been given effect to by treating the land as home farm land, it will not be obnoxious to the rule enunciated in section 8. Although it may not be competent to Courts to examine the policy underlying an enactment apart from the actual language

(1) (1914) 26 M.L.J., 585.

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employed in the sections it is our duty to give effect to such a policy when they appear clearly from the language employed. The definition section and section 8 leave no doubt in my mind that the legislature demands the strictest proof of a land being *kambattam*. This is made clearer still by section 181 which while enacting that a landholder can allow his private land to be converted into ryoti land makes no provision for the converse case.

The only other section that has to be considered is section 185. There can be no doubt, as pointed out by Mr. Govindaraghava Ayyar that the proviso to that section is not in the nature of an exception. *Mullins* v. *Treasurer of Surrey*(1) lays down that a proviso is in the nature of a substantive rule and should not be treated as an exception to the proposition stated in a section. See also *Maha Prasad Singh* v. *Ramani Mohan Singh*(2). Accepting this position, I think that the first part of section 185 deals with the determination of the question whether a particular field is ryoti or *kambattam*, where nothing is known about its origin. If it was originally ryoti the rule of evidence contained in the first part of section 185 can have no application, because that would practically abrogate the principle enunciated in section 8, clauses (1) and (3). The proviso to the section 185 is really an exception to section 8, clause (3). The object of the proviso is to enable the landlord to say that although the land was seri, he has by his own servants, or by hired labour cultivated the land for 12 years preceding the Act and that consequently it should be regarded as his home farm land. An irrebuttable presumption should be drawn from such a conduct. If one remembers that a home farm land is that which has been ordinarily cultivated personally by the landlord at the outset, the meaning of such a reservation in favour of the landholder will be apparent. This conclusion carries out the scheme of the legislature which seems to be opposed to the augmentation of the private land of landholders, except in the special instance mentioned in the proviso to section 185.

This view receives support from the observations of the learned Judges who decided *Cheekati Zamindar* v. *Ranasooru Dhora*(3). The object of the Estates Act is to prevent the

(1) (1880) 5 Q.B.D., 173. (2) (1914) 27 M.L.J., 459.
(3) (1900) I.L.R., 23 Mad., 318.

conversion of ryoti land into *kambattam* land which process had been adopted largely since the decision in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*(1). My conclusion is in accordance with the decision of Mr. Justice AYLING and myself in *Markapulli Reddiar* v. *Thandava Kone*(2); *Narayanasawmi Naidu* v. *Venkatrayudu*(3) decided by SADASIVA AYYAR and NAPIER, JJ., is also to the same effect. The decision of the learned Cheif Justice and Mr. Justice AYLING in *Chintam Reddi Sanyasi* v. *Sri Raja Sagi Appala Narasimha Raja Garu*(4) is not opposed to this conclusion. The land in that case was never ryoti land. It only laid down that private land can come into existence even after the permanent settlement. The proviso to section 185 is intended to enact such a rule.

The decision of the Subordinate Judge is therefore right and this appeal must be dismissed with costs.

S.V.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Ayyar.

1914. November 4 and 5 and December 2

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF MALABAR (DEFENDANT), APPELLANT,

v.

A. COCKCRAFT AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Torts—Negligence of servants of the Public Works Department—Suit against the Secretary of State for India in Council for damages, if maintainable—Stacking of gravel on a military road—Making and maintenance of roads—Governmental or sovereign function, nature of—Non-liability of East India Company and Secretary of State for India, for acts done in exercise of sovereign powers—Exceptions—English and American Laws.

Plaintiff sued the Secretary of State for India in Council for damages in respect of injuries sustained by him in a carriage accident which was alleged to have been due to the negligent stacking of gravel on a road which was stated in the plaint to be a military road maintained by the Public Works Department

(1) (1870) 6 M.H.C.R., 164. (2) Second Appeal No. 275 of 1913.
(3) Second Appeal No. 1402 of 1912. (4) (1914) M.W.N., 766.

* Appeals Nos. 58 and 59 of 1912.