APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastriyar
(on a reference from SADASIVA AYYAR and NAPIER, JJ.).

1914. September 21 and 30 and October 30.

VENKATA PERUMAL RAJA DEVA MAHARAJULUNGARU (MINOR BY GUARDIAN W. A. VARADACHARIYAR) (DEFENDANT), APPELLANT IN ALL THE SUITS

v.

RAMUDU AND NINETEEN OTHERS (PLAINTIFFS), RESPONDENTS.*

(Madras) Estates Land Act (I of 1908), sec. 13, cl. (3), not retrospective—Improvements at tenants' sole expense—Payment of higher rent therefor for sixty years—Presumption of a binding contract to pay at a higher rate under the Rent Recovery Act—(Madras) Estates Land Act (I of 1908), sec. 28— Sadalwar *and* Mathiri Kasuvu, *not illegal cesses within section 143 of the Act.*

Held, by NAPIER and KUMARASWAMI SASTRIYAR, JJ. (SADASIVA AYYAR, J., dissenting) that —

(i) section 13, clause 3 (Madras Estates Land Act), does not enable a tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at the tenants' sole expense where the improvements had been effected before the Act came into force and where there had been a binding *contract* entered into between the landlord and the tenant before the passing of the Act for the payment of such enhanced rent,

(ii) the section applies only to contracts and improvements made after the Madras Estates Land Act came into force,

(iii) the right to levy increased assessment in consequence of improvements effected before the Act being a vested right in the landholder, the section cannot be construed so as to operate retrospectively and to defeat the same especially when there is no indication in the section that it is to operate retrospectively, and

(iv) the rule embodied in section 28 of the Act applies to the increased assessment and makes it binding between the parties.

Per SADASIVA AYYAR and NAPIER, JJ.—Where the higher rate was regularly paid for sixty years even in respect of the improvements effected at the tenants' sole expense, the Courts could presume a lawful origin for a *contract* to pay like that under the Rent Recovery Act (Madras Act VIII of 1865).

Per SADASIVA AYYAR, J.—*Sadalwar* (charge for stationery) and *Mathiri Kasuvu* (straw rent) which were being customarily paid along with the rent for a long number of years form part of the rent and are not additional illegal cesses within section 143 of the Madras Estates Land Act.

SECOND APPEALS against the decrees of L. G. MOORE, the District Judge of North Arcot, in Appeals Nos. 429 to 445, 454, 494 and

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* Second Appeals Nos. 1058 to 1077 of 1913.

495 of 1912, preferred against the decrees of A. G. LEACH, the Revenue Divisional Officer of Chendragiri, in Suits Nos. 1210, 1211, 1213 to 1219, 1221 to 1228, 1212, 1209 and 1220 of 1912.

The facts appear from the judgment of SADASIVA AYYAR, J.

The Honourable Mr. *L. A. Govindaraghava Ayyar* and *L. S. Viraraghava Ayyar* for the appellant.

S. T. Srinivasagopala Achariyar for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The appellant is the minor Raja of Karvetnagar. He was the defendant in the twenty suits out of which these twenty Second Appeals have arisen. The suits were brought under section 55 of the Madras Estates Land Act by several tenants in the estate, who are the plantiffs in the suits for obtaining pattas for fasli 1321. The Revenue Divisional Officer of Chendragiri division, in whose Court the suits were brought, passed a decree directing the defendant to grant pattas containing certain terms which that officer found to be proper and legal. The learned District Judge on appeal modified the decrees of the Court of First Instance in one important respect and confirmed the decrees in other respects. In nineteen of the twenty Second Appeals before us, the tenants (the plaintiffs) have filed Memoranda of Objections as regards the points decided against them. In the appeals by the minor Raja, the questions for decision are—

(*a*) Whether the Appellate Court's finding that the wells on the lands of the tenants were sunk at their own expense is correct?

(*b*) Whether the Zamindar is entitled to charge rent on dry lands on which garden crops are raised with the aid of the water in such wells at the higher rate claimable for lands classed as wet, that is, a rate higher than is charged per gunta on dry lands cultivated with dry crops without the aid of well water.

As regards the question (*a*) I do not see sufficient reason not to accept the concurrent findings of the lower Courts that the wells were excavated at the sole expense of the tenants. Though the direct evidence is not very satisfactory, the lower Courts were justified in finding the wells to have been dug at tenants' sole expense having regard to all the circumstances and especially seeing that the defendant in his written statement did not deny that the plaintiffs dug the wells but merely said that it was not at their sole expense that the wells were dug.

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The answer to question (*b*) depends upon the answers made to the following subsidiary questions :—

(*b*1) Whether under the law before the Estates Land Act came into force the condition in the patta to pay the higher wet assessment for garden crops raised on dry lands with the aid of the tenants' well water was a lawfully enforceable term ?

(*b*2) Whether after the enactment of section 13, clause (3) of the Estates Land Act, such a term in the patta would be valid ?

(*b*3) Whether section 13, clause (3), applies to a case where the improvement at his sole expense relied on by the tenant was effected before the Madras Estates Land Act came into force.

In *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(1), Mr. Justice SUBRAHMANYA AYYAR held that a custom to pay enhanced rent for lands improved by the improvements effected by a tenant at his own cost is illegal as opposed to the provisions of the Rent Recovery Act, that it made no difference whether the tenant constructed the well (at his own cost) prior to or after the passing of the Act of 1865, that in either case, a higher rent cannot be claimed by the landlord and that payment for a number of years of the enhanced rent may be *evidence* of an *agreement* to pay at that rate ; but that it will not be binding as a *contract* unless supported by consideration. The learned Judge left open the question whether if payments at the higher rents had continued to be made for a great many years, so as to make it unfair to the landlord on account of such lapse of time to be compelled to prove the existence of some consideration when the payment commenced, whether under those circumstances, the Court should not presume a lawful origin for the payment at the higher rate on the analogy of the lost grant principle availed of to support long possession and enjoyment. In that particular case, *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(1), the learned Judge found that in that suit and the connected suits, the payment at the higher rate had begun only from between 1 and 18 years before the date of the suits and that hence the passing of consideration for the agreement to pay at the higher rate cannot be presumed.

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(1) (1905) I.L.R., 28 Mad., 444.

In the case now before us, the payments at the higher rate had gone on from about 1846 for more than sixty years and I think that consideration for the agreement to pay at the higher rate can be presumed in these cases. If so, under clause (1), section 11 of the Rent Recovery Act of 1865, all contracts for rent between the landlord and the tenant should be enforced and I would answer the question (*b*1) in the affirmative.

As regards the question (*b*2), section 13, clause (3) of the Estates Land Act, begins with the words " Notwithstanding any usage or contract to the contrary " and hence under the new law even a contract (that is, an agreement supported by consideration) to pay at the higher rate for lands improved at the sole expense of the tenants cannot avail the landlord.

We have lastly the question (*b*3) whether the tenant can claim the greater protection given by the Estates Land Act in cases where the improvements had been effected before the passing of the Act.

I am free to admit that I have found it very difficult to arrive at a satisfactory answer to this last question. Section 13 of the Madras Estates Land Act contains three clauses. Under the first clause, neither the ryot nor the landlord can prevent the other party from making an improvement to the holding. Under the second clause, the ryot has ordinarily the prior right to make the improvement, but the landlord has the prior right if the improvement affects not only the holding of the ryot who wishes to make it but also the holding of another ryot. Then the third clause says " a ryot shall not, by reason of making an improvement at his sole expense, become liable to pay a higher rate of rent on account of any increase of production as a consequence of such improvement." Under the first two clauses, it may be fairly argued that the legislature has enacted those provisions in respect of improvements contemplated to be made by the landholder or the ryot after the passing of the Act as it is almost useless for the legislature to legislate about their respective rights to make the improvements which had already been made. Pursuing the same argument, it might be contended that the third clause about the ryot not being liable to pay a higher rate of rent on account of improvement effected at his sole expense also contemplates the raising of rent in future in respect of improvements to be made in future.

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After the best consideration which I was able to give, however, to these three clauses, I have come to the conclusion that the third clause is intended to give a right to the tenant to claim exemption from payment of enhanced rent from the date the Act came into fr ce even in cases where the improvements had been effected by him before the Act came into force. Clauses 1 and 2 of section 13, in my opinion, merely declared the law which existed even prior to the passing of this Act. Sir S. SUBRAHMANYA AYYAR, J. says in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(1): "It is impossible to understand why the landlord's permission for the sinking of the well was necessary." "And even supposing that a custom supporting the averment can be shown, such custom must be held to be bad, if not for its unreasonableness, at least on account of its utter inconsistency with the policy of the proviso to section 11 of the Rent Recovery Act which expressly admits the tenants' unqualified right to make improvements free from any liability to make any payment to the landholder in respect of the benefit accruing therefrom." . . . "It is scarcely necessary to add that the tenant's right to relinquish the whole or any part of his holding in no way detracts from the tenant's right to make such an improvement as the sinking of a well during the subsistence of the tenancy." If then clauses 1 and 2 do not create new rights as regards the making of improvements, it is unnecessary to hold that clause 3 contemplates only the effect of future improvements on the right of the tenant to claim exemption from enhancement of rent. If Sir S. SUBRAHMANYA AYYAR, J.'s view in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(1) that whether the wells were constructed before or after the passing of the Act VIII of 1865, no additional rent can be claimed unless there was a contract is correct law, it seems to me that clause 3 of section 13 was intended only to further benefit the tenant, that is, further than even Sir S. SUBRAHMANYA AYYAR, J.'s dictum by taking away the restriction imposed by the old Rent Recovery Act that if there was a contract to pay the higher rate (as opposed to an agreement without consideration), the tenant ought to pay the higher rate. In other words, it seems to me that the opening words of

(1) (1905) I.L.R., 28 Mad., 444 at pp. 450 and 451.

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section 13, clause (3), "Notwithstanding any contract or usage to the contrary" were specifically intended to favour the tenant even further than the old law and not to take away the right already vested in him under Sir S. SUBRAHMANYA AYYAR, J.'s decision to claim exemption whether the improvements were made before or after the passing of the Act VIII of 1865, that is, it was not intended to take away his right to claim exemption from enhancement in some cases on the mere ground that the improvements had been effected before the Estates Land Act. In *The Maharajah of Venkatagiri* v. *Sheik Mohadeen*(1), it was held that the tenant was not liable to pay enhanced rent when he had improved his holding by digging a well at his own cost. It appears from the facts of that case that the wells were dug in that case and the connected cases by the tenants or their ancestors before the Estates Land Act came into force. That decision, however, is not a direct authority on the question whether section 13, clause (3), affected the improvements made before the Act came into force and it can only be said that the appellant's learned vakil in that case did not put forward any argument that section 13, clause(3), would not affect the landlord's right to enhance where the improvements had been made before the Act came into force.

It is, no doubt, hard upon the landlord that where he had been obtaining the enhanced rent on account of a contract from long before the Act came into force it should be held that notwithstanding that contract he should lose his right to the enhanced rent owing to the passing of the Act. But the Estates Land Act does favour the tenant notwithstanding "contracts to the contrary" and whether the contracts were made *before the passing of the Act or after it* in numerous other respects [see section 187, clauses (1) (*a*) to (*g*) and section 188]. When rights under contracts entered into before the passing of the Act are *not* intended to be taken away but only rights under contracts made after the passing of the Act, apt words are used to so conserve the rights created under prior contracts (see section 12). I am, therefore, of opinion that after the passing of the Act the landlord cannot claim enhanced rent on account of the enhanced outturn of the crops due to the improvements made by the ryot

(1) (1914) 1 M.L.W 592.

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whether the improvements were made before or after the passing of the Act and whether or not there was a contract to the contrary and whether such contract was made before or after the passing of the Act.

In the result, I would dismiss the appeals preferred by the landlord but under the circumstances without costs.

Coming to the memoranda of objections by the tenants, the questions raised by them are :—

(*a*) that the lower Appellate Court ought to have allowed only the lowest manavari dry rates, that is, Rs. 15-12-0 per 100 guntas and not the higher dry rate of Rs. 26-4-0 per 100 guntas ;

(*b*) that the District Judge erred in holding that the landholder was entitled to charge for second crop raised with the aid of improvements by the ryot ;

(*c*) that the District Judge ought to have held that Sadalwar and Mathiri Kasuvu are illegal cesses not payable by the ryot.

As regards contention (*a*), as the landholder is entitled to charge for the best dry crop that can be grown on a dry land there is no force in the contention.

As regards contention (*b*), I would follow the decision in *The Maharajah of Venkatagiri* v. *Sheik Mohadeen*(1) and hold that the landlord is not entitled to increase the annual assessment by the addition of a second dry crop assessment.

On the contention (*c*), I am prepared to follow the decision in *Munisami Nayudu* v. *Irusappa Reddi*(2) and to hold that Sadalwar and Mathiri Kasuvu form part of the rent of the lands and are not additional illegal cesses. In the result, the lower Courts' decrees will be modified by disallowing the direction to enter second crop assessments in the pattas. There will be no order as to costs in these memoranda of objections.

NAPIER, J.

NAPIER, J.—I regret that I am unable to concur in the conclusion arrived at by my learned brother. I accept with some hesitation the finding that the wells were excavated at the sole expense of the tenants, though it is a little difficult to see on what evidence this finding is arrived at: and I agree with him in applying the decision in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*(3) to the facts of this case that

(1) (1914) M.L.W., 592. (2) Second Appeal No. 57 of 1896.
(3) (1905) I.L.R., 28 Mad., 444.

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consideration for the agreement to pay a higher rate should be presumed in the circumstances of this case. I differ from him, however, on the construction of clause (3) of section 13 of the Estates Land Act. I cannot apply the words "shall not, by reason of making an improvement . . . . become liable" to anything but improvements after the Act, in view of the fact that the rest of the section obviously applies to improvements after the Act. It is clear that the rate of rent was lawfully payable at the date of this Act and I cannot hold that this clause was intended to tear up contracts lawfully made and give a claim for a *reduction* by reason of words forbidding the *imposition* of a higher rate. In my opinion, section 28 applies and the rent payable at the time being lawfully payable, it should be presumed to be fair and equitable until the contrary is proved. I would therefore allow these appeals.

BY THE COURT.—Under section 98 of the Code of Civil Procedure, we refer to a third Judge for decision the question of law on which we differ, namely, whether section 13, clause (3) of the Estates Land Act enables the tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at the tenant's sole expense where the improvements had been effected before the Act came into force and where there had been a contract entered into between the landlord and the tenant before the passing of the Act for the payment of such enhanced rent.

These Second Appeals and the Memoranda of Objections coming on for hearing under section 98 of the Code of Civil Procedure, before KUMARASWAMI SASTRIYAR, J., who expressed the following

KUMARASWAMI SASTRIYAR, J.

OPINION.—The question for decision is whether section 13, clause (3) of the Estates Land Act enables the tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at the tenant's sole expense where the improvements had been effected before the Act came into force and where there had been a *contract* entered into between the landlord and the tenant before the passing of the Act for the payment of such enhanced rent.

The facts found by the learned Judges are—

(1) that the rent claimed by the zamindar has been paid by the tenants for over sixty years,

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(2) that there was a valid contract to pay the rent which was legally enforceable under the provisions of the Rent Recovery Act,

(3) that the improvements in respect of which the enhanced rent had been paid ever since 1846 were effected by the tenants. Mr. Justice SADASIVA AYYAR was of opinion that in spite of these facts the landlord was not entitled to sue for the rent at the rate paid ever since 1846 as section 13, clause (3), of the Estates Land Act was retrospective and prevented the landlord from claiming higher rent in consequence of improvements effected by the tenants even though such improvements have been effected before the passing of the Act and the rent claimed was legally recoverable under the Rent Recovery Act. Mr. Justice NAPIER took the opposite view and held that the section only applied to improvements made after the passing of the Act.

The question resolves itself into whether section 13, clause (3), has retrospective operation. There is nothing in the wording of the section to indicate that the legislature intended it to be retrospective. Clause (3) runs as follows:—"Notwithstanding any usage or contract to the contrary, a ryot shall not by reason of making an improvement at his sole expense become liable to pay a higher rate of rent on account of any increase of production or of any change in the nature of the crop raised as a consequence of such improvement."

It would require very strong grounds for holding that the legislature intended to disturb vested rights which landlords had under valid and enforceable contracts. It is no doubt true that the Madras Estates Land Act was intended in a large measure to benefit tenants, but that is no ground for construing the Act on the hypothesis that in every case tenants were to have all the rights and landlords were only to be subject to all the liabilities incident to the ownership and possession of property.

The principles guiding the interpretation of statute where retrospective effect is sought to be given to provisions so as to defeat vested rights have been clearly laid down in several decisions. In *Reid* v. *Reid*(1), BOWEN, L.J., observed as follows:—"The particular rule of construction which has been referred to, but

(1) (1886) L.R., 31 Ch.D., 402 at p. 408.

which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *Omnis nova constitutio futuris formam imponere debet nonpraeteritis*—that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant." The same rule has been expressed by LINDLEY, L.J., in *Lauri* v. *Renad*(1), where he observes as follows:—"It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary" "The same view was taken by him in *Mohammad Abdussamad* v. *Kurban Husain*(2), where their Lordships of the Privy Council held that "it was not in accordance with sound principles of interpreting statutes to give them a retrospective effect."

In *Ramakrishna Chetty* v. *Subbaraya Aiyar*(3), it was held that the Estates Land Act had no retrospective operation so as to affect the period of limitation in respect of contracts falling under article 116 of the Limitation Act.

The result of the decisions has been well summarised by Craies in his work "Statute Law" where he observes (page 322) "and perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If

(1) (1892) L.R., 3 Ch. D., 402. (2) (1903) 31 I.A., 30.
(3) (1913) 24 M.L.J., 54.

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the enactment is expressed in language which is fairly capable of either interpretation, it should be construed as prospective only.' As observed by Maxwell the rules laid down in *Lauri* v. *Renad*(1) *Reid* v. *Reid*(2), and *West* v. *Gwynne*(3), have special operation "where the enactment would prejudicially affect vested rights or the legal character of past transactions or impair contracts."

Section 6, clause (*c*) of the General Clauses Act and section 8, clause (*d*) of Madras Act I of 1891 also provide that the repeal of an Act shall not affect any rights accrued under the enactment repealed.

Applying these well-known rules to the construction to section 13 of the Estates Land Act, it seems to me that a retrospective operation cannot be given to clause (3) of the section. Clauses (1) and (2) to the section can only refer to improvements to be effected in future and if the legislature intended clause (3) to be retrospective it would have given some indication of such intention. On the contrary the use of the words "shall not by reason of making an improvement *become* liable" indicate that only future improvements are intended.

It appears from other sections of the Act that where the legislature intended any provision to be retrospective it used words "whether before or after the commencement (or passing) of this Act." A reference to sections 8, 37, 187 and 188 makes this clear.

So far as rent is concerned section 28 provides that in all proceedings under the Act, the rent or *rate of rent* for the time being lawfully payable by the ryot shall be presumed to be fair and equitable until the contrary is proved. Under the law as it stood prior to the passing of the Estates Land Act a *contract* to pay increased rent even though improvements were made by the tenant was legally enforceable. It was therefore rent "lawfully payable by the ryot" when the Estates Land Act was passed and was to be presumed to be fair and equitable. It is difficult to see under what canons of interpretation it can be held that section 13, clause (3) should be construed as taking away such a right. It is argued by the respondents' advocate that the policy of the law has always been to give to the tenant

(1) (1892) L.R., 3 Ch.D., 402. (2) (1886) 31 Ch.D., 408.
(3) (1911) 2 Ch.D., 15.

the benefit of improvements made by him. This may be so, but the law as it stood prior to the passing of the Estates Land Act did not prevent additional rent being legally recoverable in cases where it was payable under a *contract*.

I am of opinion that the words "contract to the contrary" refer only to contracts made after the passing of the Act and that section 13, clause (3) has no retrospective operation in cases where rent claimed was payable under a contract which would have been legally enforceable under the Rent Recovery Act or any other law in force at the time of the passing of the Estates Land Act.

N.R.

APPELLATE CIVIL.

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

PERURI VISWANADHA REDDI (DEFENDANT), APPELLANT,

v.

D. T. KEYMER (PLAINTIFF), RESPONDENT.*

1914. October 23, 26 and November 6.

Foreign judgment—Defence struck out—No decision on the merits—No cause of action.

Where in a suit in a foreign Court, defence was struck out and judgment entered for plaintiff.

Held, that the judgment is not one decided on the merits and thus not being conclusive could not of itself constitute a cause of action to the suit.

APPEAL against the judgment and decree of BAKEWELL, J., in Civil Suit No. 291 of 1913.

The facts of this case appear from the judgment of the trial Judge which is as follows:—

"This is a suit upon a judgment of the High Court of Justice in England for the sum of £425-17-2. A certified copy of the judgment has been filed, and from the recitals therein contained it appears that on the 11th of February 1913, an order was made in an action in that Court between the parties to the present suit that the defendant should answer interrogatories, that he failed to comply with that order and that on the 5th of May 1913 a Judge of that Court ordered that the defendant's defence be struck out and that he be

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* Original Side Appeal No. 77 of 1914.