The cause of action for the second defendant to set aside the alienation made by his guardian is not identical with the cause of action for the third defendant or his representative in interest to obtain a partition of his share of family property upon a subsisting title from a third party who was in wrongful possession thereof.

When the second defendant attained majority he was not competent to give a lawful discharge of the third defendant's claim, under the circumstances found to have existed in this case.

Thus this case is distinguishable from *Doraisami Serumadan* v. *Nondisami Saluvan*(1). I agree that the appellant is entitled to succeed in respect of third defendant's undivided moiety of the suit property and that he must fail as regards the second defendant's moiety, and that costs should be awarded as stated in my learned brother's judgment.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1917, March, 6 and 7.

SIVANUPANDIA THEVAR AND TEN OTHERS (PLAINTIFFS), APPELLANTS,

v.

MEENAKSHI SUNDARA VINAYAKA VISAKAPERUMAL SETHURAYAR AVARGAL,

MINOR ZAMINDAR OF URKAD REPRESENTED BY KRISHNA RAO, MANAGER OF THE ESTATE UNDER THE COURT OF WARDS (DEFENDANT), RESPONDENT.*

Estates Land Act (Madras Act I of 1908), sec. 40, cl. (3)—'Years' in, meaning of — Swami-bhogam, whether rent or cess within section 3, clause (11) — Agreement between landlord and tenant for a consolidated grain rent, enforceability of.

In section 40, clause (3) (a) of the Madras Estates Land Act, 'preceding ten years,' means the ten years preceding the year in which the Collector

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(1) (1915) I.L.R., 38 Mad., 118.

* Second Appeals Nos. 1074 to 1084 of 1916.

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determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted; and 'year' means the year of the lease, that is, the year for which the landlord is entitled either by custom or contract to claim rent, and not the *fasli* or the calendar year.

Swami-bhogam is 'rent' within section 3, clause (11) and is not a cess.

Where a fixed grain *pattam* (rent) has been agreed to, the arrangement is binding on both the parties and it is not open to the tenant to reopen the same on the ground that certain illegal cesses were included therein.

When the Revenue Court refuses commutation, an appeal lies under Schedule A, clause 4 of the Act only to the District Collector and not to the District Court; and hence no second appeal lies to the High Court from such order of refusal.

Jeeatoollah Paramanick v. *Jugodindro Narain Roy* (1874) 22 W.R., 12, followed.

SECOND APPEALS against the decrees of A. EDGINGTON, the District Judge of Tinnevelly, in Appeals Nos. 186 to 188, 191, 195, 196, 205, 206, 210, 222 and 226 of 1915, preferred against the decrees of J. GANAPATI PILLAI, the Honorary Deputy Collector of Tinnevelly, in Summary Suits Nos. 121—123, 126, 131, 132, 141, 142, 146, 158 and 162 of 1914, respectively.

The material facts appear from the judgment.

T. R. Venkatarama Sastriar, T. R. Ramachandra Ayyar and *S. Ramaswami Ayyar* for the appellant.

V. Ramesam for the respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—These eleven second appeals have arisen out of suits brought by the tenants of the Urkad Estate to have their rents, which had been mostly paid in grain and partially in cash consolidated and commuted to a definite money rent under section 40, clause 1 of the Madras Estates Land Act. One or more or all of the following six questions arise for decision in these second appeals.

Firstly, whether the lower Courts were right in construing section 40, clause 3 (*a*) of the Estates Land Act to mean that the Collector in making the determination as to the proper money rent should have regard to the average value of the rent actually accrued due to the landholder during the ten years *preceding the year of the determination of such commuted rent* or whether the true meaning of that section is that the Collector should have regard to the average value of the rent during the ten years preceding the institution of the suit. I am clear that according to the true construction of the language of the section, it means the ten years preceding the year when the Collector

determined the amount of the commuted rent by his decision in the suit. I think that it is unreasonable to hold that an average rent of ten preceding years was intended (ordinarily) to come into force not immediately after the ten years but with a break or interval occupied by the period during which the suit was pending.

Mr. Venkatarama Sastriar mentioned some inconveniences which would be felt by the Courts (Original and Appellate) in the trial of such suit if his interpretation of the section (namely the ten years preceding the institution of the suit) was not accepted. I do not think that those inconveniences are of such a serious nature as to override what I consider to be the plain meaning of the clause. It was further to be remembered that this average of ten years is only to form one of the considerations for the fixing of the commuted rent that the Court is at liberty to take other facts also into consideration where the circumstances are peculiar (such as where some of the ten years are extraordinary years). I think that in the decision of these cases relating to commutation of rent in second appeal, we ought not to interfere with the discretion of the lower Courts except on very clear grounds as the whole question of commutation permits of and is intended by the legislature to be governed by the experience of Revenue officers and by equitable considerations (some of a rough and ready character) permitting of the use of large discretion and practical sense.

Then the second contention of the appellants is that the year mentioned in the clause means the calendar year beginning with the 1st January and not the fasli year as taken by the lower Courts. I am unable to find that this contention was raised in the lower Courts and I do not think that it is raised even in the grounds of the second appeal to this Court. However, I may shortly state that neither the calendar year nor the fasli year *as such* is intended by this clause, but the year for which the landlord according to custom or contract is entitled to claim rent in other words, the year of the lease. Section 3, clause 59 of the General Clauses Act (X of 1897) applies only as stated in the beginning of the section itself "where there is nothing repugnant in the subject or context." I think it is very clear from the subject and context of section 40 of the Madras Estates Land Act that the year

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mentioned therein means the yearly period for which rent is claimable as between the landlord and tenant and not the calendar year which would break up the year of the lease into two. In the present suits, the year of the lease happens to be the fasli year.

Then the third question argued related to the point whether the landlord is entitled to claim a small cash, *swami-bhogam* rent of seven fanams per kottah of lands. The word *swami-bhogam* itself implies that it is the landlord's perquisites as owner of the land (in other words profits which he is entitled to get from the tenant who occupies his land) and it clearly comes within the definition of rent found in section 3, clause (11). I do not think it is open to us to indulge in mere speculation and to infer that because the landlord gets half the net grain profits (after making certain deductions) as grain rent the cash rent or *swami-bhogam* cannot also form part of the rent, but it is a 'cess' having nothing to do with rent.

The fourth question that we have to consider is really the most important question in these cases:—namely, whether when a fixed grain pattam had been agreed upon between the landlord and the tenant in respect of the lands (in one case seven years before suit and in other cases twenty years before suit) the lower Courts ought to have made a deduction from that pattam rent in order to ascertain what may be called the real grain rent which is commuted under section 40. This deduction is claimed by the appellants on the ground that the pattam so agreed upon included some cesses and dues declared to be illegal in the case of waram lands.

I think that the very word 'pattam' clearly means 'rent' and even though the pattam might have been fixed after considering the claims of the landlord to certain dues which are not legally recoverable, we must treat the transaction under which the pattam was so fixed as due to an arrangement of compromise between the landlord and the tenant by which both parties gave up their respective claims to insist upon the actual measurement of the gross produce each year by which the landlord gave up his claim whether enforceable or not to recover certain cesses and by which both parties finally agreed that the rent shall be such and such a consolidated quantity of grain thereafter. In such a case, I think it is not only very inconvenient,

but is also not permissible to allow either party to go behind that arrangement and re-open it by contending that the rent ought to be higher or lower than the rents then fixed. I think I am fortified in this view by *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy*(1) where Mr. Justice AINSLIE says (page 13) :

"The attempt which is now made to break up the total rent into its elements and take exception to some of them on the ground that they are illegal cannot be permitted."

The present case is stronger than *Jeeatoollah Paramanick* v. *Jugodindro Narain Roy*(1) as the details by which the total fixed rent was made up seem to have been specified in the contract in that case, whereas we have had no such details in writing before us. It is complained that the Deputy Collector did not allow such details to be brought up in the evidence of witnesses. So far as I could see it seems to have been allowed by the Deputy Collector to be brought out in the evidence of prosecution witness No. 11 who prepared a statement showing those cesses so far as the waram lands are concerned. As regards defendant's witness No. 1 he said in answer to Court "In fixing the grain rent whether all items, such as kaval, kankanam, pichai, kalvaivari, which are set apart either for the landlord or the ryot or for common expenses when produce is divided were taken into consideration or not, *I do not know I was not present when the grain rent was fixed.*" He could not therefore have given any evidence as to whether the grain pattam was fixed with reference to the inadmissible cesses also or not. I think therefore that no importance could be attached to the Deputy Collector's not having allowed questions to be put to the witness about these details.

The next fifth contention in these appeals relates to the commutation prices fixed by the lower Courts at Rs. 9 per kottah. That price was based on the Taluk office reports. The objection to that price is based on the ground that the price of grain prevailing at the Zamindar's village granary was the price which ought to be considered. The lower Courts adopted the Taluk office prices as the plaintiffs did not prove that they were higher than the village prices, the Taluk office prices being based on the bazaar prices. Having regard to the evidence

(1) (1874) 22 W.R., 12.

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which shows that about 4 annas per kottah might be required to transport the grain to the bazaar from the village and also considering that it is always understood that the price at the village of the parties is invariably less than the price prevailing in the bazaar of the nearest town, I think that a deduction from the bazaar prices of at least 4 annas per kottah ought to be allowed. I would therefore allow such a deduction as regards the price.

Then the last point argued was whether the lower courts were justified in refusing to commute the rent as regards some of the lands involved in Second Appeals Nos. 1077 and 1083 of 1916 on the ground that the tenants of those lands had not got themselves recognized as pattadars by the landlord and hence those lands could not be said to be in their holdings having regard to the definition of holding in section 3, clause (3) of the Madras Estates Land Act (Section 40 allows the ryot to sue for commutation only in respect of lands in his 'holding'). Mr. Ramaswami for the respondent took a preliminary objection to our considering this point. That objection is that when the revenue court has refused commutation, an appeal lies to the Collector [see column 6 (*a*) of Schedule A to the Madras Estates Land Act against serial No. 4] and that therefore the appeals filed to the District Court on that point and the second appeals filed to this Court against the District Judge's decision on that same point are both incompetent. I think I must accept the validity of this preliminary objection and therefore express no opinion or the soundness of this (sixth) contention.

In the result subject to the modification as regards the price of grain these second appeals must stand dismissed with costs.

SPENCER, J.

SPENCER, J.—I agree. On the first point I would add that I think that if the legislature had intended that the years to be taken as a basis for the calculation of rent should be the ten years preceding the institution of the suit, it would have said so in section 40 as it did in sections 31 and 37, and that in the absence of such words the lower courts were not wrong in considering what was the rent in the years next preceding the determination of the rent. On the other points, I have nothing to add as I entirely agree with the views taken by my learned brother.

S.V.