# PRIVY COUNCIL.*

SETURATNAM AIYER (PLAINTIFF),

*v.*

VENKATACHELA GOUNDAN AND OTHERS (DEFENDANTS).

1919, November, 18, 20, 21 and 24. December, 15.

[On appeal from the High Court of Judicature at Madras.]

*Onus of proof—Suit by Government pattadar to eject tenants—Claim by tenants to right of occupancy—Facts establishing rights of occupancy—Title of plaintiff and service of notices to quit undisputed—Onus on defendants to prove claim, how satisfied—Second appeal—Jurisdiction of High Court on second appeal to deal with facts—Civil Procedure Code*, 1908, *section* 103.

In suits brought by the appellant as Government pattadar against the respondents after due service of notice to quit, to eject them from agricultural land in a ryotwari village, the respondents pleaded that they had a permanent tenancy or right of occupancy; and the appellant's title and the notices purporting to determine the tenancy were not disputed.

*Held* that the onus was on the respondents to prove the existence of their right of permanent occupancy, but that it had been established by the evidence that they had been immemorially in possession of the lands, and that they had not been proved to have been ever let into occupation by the appellant; that they had been paying a uniform rate of rent; that the lands were reclaimed and brought under cultivation by them; that they had made great improvements and carried on the cultivation either of dry or garden crops of their own choice without any interference or objection; and that they had for a very long time been sometimes making alienations of wells and lands; and the onus of proof had been thereby satisfied.

The District Judge had passed decrees in the appellant's favour for possession of all the lands in suit. The High Court was of opinion that the District Court had omitted to determine a question of fact which was essential to the right decision of the suit on the merits, and framed issues which it asked the District Judge to decide as to whether the respondents were yearly tenants or had a permanent right of occupancy. These the District Court returned without dealing with them in a satisfactory manner. The High Court on second appeal drew an inference of the respondents' occupancy rights, and decided the appeal (dealing with it under section 103 of the Civil Procedure Code, 1908) in favour of the respondents.

*Held* that the inference not being contradictory to any finding of fact by the District Court, and there being materials from which such inference could be drawn, the High Court had jurisdiction, under the circumstances, to deal with the case under section 103 and make a decree as it had done.

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* *Present*:—Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE, Mr. AMEER ALI, and Sir LAWRENCE JENKINS.

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CONSOLIDATED APPEAL No. 158 of 1917 from three decrees (18th February 1913) passed by the High Court at Madras, which reversed three decrees (31st January 1910) of the Court of the District Judge of Trichinopoly, which modified three decrees (27th June 1908) of the Court of the District Munsif of Kulittalai.

The suits in which the above decrees were made were brought by the appellants as pattadars of the village of Karuppathur to eject the respondents, the persons in possession of the samudhayam or common land in the said village as being yearly tenants who had received due notice to quit.

The question for decision in these appeals is whether the appellants have proved any right to eject the respondents from the garden and dry lands of the village.

The facts are that the village consists of garden lands (lands with a well in them), dry lands (lands cultivated but having no well), and pasture lands (lands not brought under cultivation). The respondents have been immemorially in possession of these lands, and the appellants, the mirasidars have no evidence to show that they or their predecessors in title were ever in possession of any of these lands, or that they ever let them to the respondents. All the lands were originally waste and the respondents and their predecessors brought the garden and dry land under cultivation. The respondents and their predecessors have always paid rent at a uniform rate for the garden and dry lands. They have dug and built wells, and have made great improvements in their holdings, and they have always grown garden or dry crops of their own choice without interference or objection by the appellants. They have for more than fifty years at least sold and conveyed their garden lands either in the form of conveying the wells, or the wells and the lands, or the wells and the right to cultivate the lands. Since 1897 there has been a continuous dispute between the respondents and the appellants as to whether the respondents were yearly tenants, or had occupancy rights, and the respondents received from the appellants on 16th September 1903 six months' notice to quit and give up possession and declined to comply with the notice, and thereupon on 8th November 1904 the appellants brought the present suits, claiming that as pattadars of the village they

were entitled to eject the respondents whom they alleged to be yearly tenants, and also claiming arrears of rent (as to which there is no dispute).

The respondents filed written statements in which they denied the appellants' right to eject them, and claimed to have occupancy rights and also, if ejected, compensation for improvements made by them.

The following issues only are now material "(5) Are the defendants" (respondents) "all or any and which of them tenants from year to year? and are the plaintiffs entitled to the lands in suit themselves or are they entitled to the occupancy right in all the lands in suit? and is the plaintiff entitled only to a fixed teerwa thereon? (8) Have any and which of the defendants made any and what improvements on the lands in suit? and what is the cost thereof; is the plaintiff liable or not to pay such costs before claiming possession?"

The Munsif heard the suits and recorded the evidence, decreed the claim of the appellant to the dry and pasture lands, and rejected it as to the garden lands. He based his judgment on the principle which he deduced from certain rulings of the Madras High Court that Karuppathur being a ryotwari village, the presumption was that the appellants, the pattadars, were the owners of the entire lands, and that it lay on the respondents if they claimed occupancy rights to prove them.

Both parties appealed from the Munsif's decree, and the District Judge who heard the appeals decided that the appellants were entitled to a decree for possession of all the lands claimed by them, but remanded the case to the District Munsif for a finding on issue 8, as to compensation. He agreed with the Munsif that the onus was on the respondents as tenants in a ryotwari village to establish a right of permanent occupancy, but disagreed with his view that the appellants were equitably estopped from ejecting the respondents, and thought that the question for consideration was whether the respondents had shown that the appellants had contracted to give them any right of tenancy which could be changed into a right of permanent occupancy.

The Munsif held an inquiry and found the respondents entitled to compensation, but the District Judge on appeal made a

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decree allowing no compensation to the respondents, but giving the appellants possession of all the lands in suit.

On a second appeal by the respondents to the High Court, BENSON and SUNDARA AYYAR, JJ. held that the real point for decision by the District Judge was whether—apart from any presumption in the admitted and undoubted facts of the case and the evidence on both sides—the respondents held as tenants from year to year or as permanent occupants. They thought that the District Judge had not applied his mind to this question, and also that he was under a misapprehension as to the state of the evidence, as he had stated that there was no evidence that the respondents or their ancestors had made improvements in the lands by digging wells or ponds, whereas it was admitted on appeal that there was such evidence. They therefore were unable to accept his finding as to the respondents' rights, and they also pointed out that there were further questions of estoppel and of right to compensation in respect of improvements proved, and they called for revised findings on those points.

The District Judge returned the following findings:—(*a*) that the respondents had been in possession of the land for a very long period and at a uniform rent; (*b*) that it had not been proved that respondents had transferred their holdings by way of sale, mortgage or lease to any of the pattadars, or to other persons, with their acquiescence or knowledge; (*c*) that the wells in certain parts of the lands had been sunk by the respondents or their managers; but that the respondents had not proved that they or their ancestors had made any other improvements of considerable value in their holdings.

On the question whether the respondents had a permanent right of occupancy or were yearly tenants, and as to whether the appellants were estopped from disputing that the respondents had a permanent right of occupancy, his findings were that in the case of all the last-named wells (except one with survey number 33 A) there was an estoppel. As to all the rest of the land in question he found that the respondents were only yearly tenants, basing this finding on the principle that the onus lay on the person holding lands in a ryotwari village to prove that he had occupancy rights, and that a proof of tenancy

of long duration at a uniform rent was not sufficient to discharge this onus.

The respondents and appellants objected to these findings, and the High Court allowed the appeal and dismissed the suits as to all except the pasture lands. They expressed their opinion that the District Judge had been wrong in throwing the onus on the defendants to establish their rights, and that the criterion he had applied to the question of estoppel was "absolutely indefensible." They held that there was no reason why the ordinary rule, that a plaintiff suing in ejectment must prove that the occupant came into possession as his tenant under a contract which entitled him to eject, should not apply.

ON THIS APPEAL

*De Gruyther, K.C.* and *Kenworthy Brown*, for the appellants, contended that on the facts found by the District Judge the respondents had no right of permanent occupancy in the lands in suit; that the High Court had no jurisdiction to overrule the findings of fact by the District Judge: *Durga Chowdhrani* v. *Jewahir Singh Chowdhri*(1). The appellant is the mirasidar of the land in suit, and a pattadar under the Government in respect of it, and possesses the kudivaram interest therein, as his ancestors did before him, and in the present case, it is submitted, there was no presumption against him that the respondents have a permanent tenure. The appellant was entitled to recover possession of any of the land on which neither he nor his predecessors are proved to have created a permanent interest in favour of the respondent tenants. There is no finding or proof that the appellant or his predecessors parted with any of the lands in suit for more than a temporary interest, and the evidence in the case, it is submitted, negatives the suggestion that he or they ever did so. The onus of proof was on the respondents as is shown by the decisions of the Board in *Secretary of State for India in Council* v. *Luchmeswar Singh*(2); and *Mayandi Chettiyar* v. *Chokkalingam Pillai*(3); and they also show that proof of long occupation at a fixed rent did not satisfy the onus. The same appeared from

(1) (1891) I.L.R., 18 Calc., 23 (P.C.): L.R., 17 I.A., 122.
(2) (1889) I.L.R., 16 Calc., 223 (P.C.): L.R., 16 I.A., 6.
(3) (1904) I.L.R., 27 Mad., 291 (P.C.): L.R., 31 I.A., 83.

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a series of decisions of the High Court; see *Chidambara Pillai* v. *Thiruvengadathiengar*(1); *Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi*(2); *Cheekati Zamindar* v. *Ranasooru Dhora*(3); *Seshamma Shettati* v. *Chickaya Hegade*(4); *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar*(5), *Ponniah Nadan* v. *Deivani Ammal*(6); and *Veeranan Ambalam Peria Kampalam Ambalam* v. *Annasawmi Ayyar*(7). The Fifth Report (Madras Presidency), pages 61, 178, 489—491, 615, 790, 797, 808, was also referred to. The view taken by the High Court of the legal position of the appellant and the respondents respectively, and the presumptions of fact arising on the evidence were wrong. As to the question of custom it was raised only by the respondents and no custom was pleaded or established. The order of the High Court, dated 23rd August 1911, calling on the District Judge to submit revised findings of fact as to the position of the tenants was irregular and not authorized by the Code of Civil Procedure, 1908. On the facts shown there was no estoppel on the appellant as far as the garden lands were concerned.

*E. B. Raikes* and *Palat*, for the respondents, contended that the view taken by the District Judge was erroneous, and the High Court had jurisdiction to alter it under section 103 of the Code of Civil Procedure, 1908. The onus lay on the appellant to prove his right to eject the respondents, and they had not done so. If the onus was on the respondents, they had, it was submitted discharged it. The only fact which supported the appellant's contention was that he was a pattadar, but that by itself did not entitle him to succeed. The circumstances in which the tenants came into possession in the case of *Secretary of State for India in Council* v. *Luchmeswar Singh*(8), were known, which distinguishes that case from the present. On the facts found in *Mayandi Chettiyar* v. *Chokkalingam Pillai*(9), the tenants were rightly found to have permanent rights of occupancy; and it does not conflict with the decisions of

(1) (1897) 7 M.L.J., 1.
(2) (1899) I.L.R., 22 Mad., 264.
(3) (1900) I.L.R., 23 Mad., 318.
(4) (1902) I.L.R., 25 Mad., 507.
(5) (1918) 34 M.L.J., 234.
(6) (1919) 36 M.L.J., 463.
(7) (1911) 21 M.L.J., 845.
(8) (1889) I.L.R., 16 Calc., 223 (P.C.): L.R., 16 I.A., 6.
(9) (1904) I.L.R., 27 Mad., 291 (P.C.): L.R., 31 I.A., 83.

the High Court referred to for the appellant. It is supported by *Veeranan Ambalam Peria Kampalam Ambalam* v. *Annasawmi Ayyar*(1), and *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar*(2). Reference was also made to *Krishnasami* v. *Varadaraja*(3); *Afzal-un-nissa* v. *Abdul Karim*(4); *Suryanarayana* v. *Patanna*(5); the Trichinopoly Manual, page 178 and the Fifth Report (Madras Presidency), pages 104, 106, 489, 615, 622, 625, 750, 785. The appellant is equitably estopped from alleging that the respondents are his yearly tenants.

*De Gruyther, K.C.*, replied, contending that the right of the tenants was only to be compensated for the wells made in the garden lands.

The JUDGMENT of their Lordships was delivered by

Sir LAWRENCE JENKINS.

Sir LAWRENCE JENKINS.—These consolidated appeals are from three decrees of the High Court at Madras, dated the 18th February 1917. The decrees had modified three appellate decrees of the District Court of Trichinopoly, which in turn had modified three original decrees of the Court of the District Munsif of Kulittalai.

The three suits thus came before the High Court in second appeal, so that the Court had no jurisdiction to interfere with any finding of fact by the District Court; its only power to determine issues of fact was that created by section 103 of the Code of Civil Procedure, 1908.

Each of the suits is for the recovery of possession of agricultural land in a ryotwari tract, and has been instituted by the plaintiff as the Government pattadar.

The number of the defendants in the several suits is 165, 103, and 30. They are not, however, in joint possession; on the contrary, they have separate holdings and should have been separately sued.

The plaintiff's title is conceded, and he alleges that the defendants are tenants under him and that their several tenancies have been determined by notice. The defendants plead in answer to his claim for possession (1) that they severally

(1) (1911) 21 M.L.J., 845. (2) (1918) 34 M.L.J., 234.
(3) (1882) I.L.R., 5 Mad., 345 (F.B.).
(4) (1919) I.L.R., 47 Calc., 1 (P.C.) : L.R., 46 I.A., 131.
(5) (1918) I.L.R., 41 Mad., 1012 (P.C.).

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have a permanent tenancy or right of occupancy, and (2) that they are protected from ejectment by the doctrine of estoppel.

The land in suit is of three classes, garden, dry, and pasture. In the Court of the Munsif it was held that the plaintiff's claim to recover the garden land was barred by the plea of estoppel, but that his claim to the rest must succeed as no right of permanent tenancy was established.

From this decision cross-appeals were preferred. At the first hearing of the appeals the District Judge disallowed the plea of estoppel, and also held that the defendants had not established their right to a permanent occupancy. It is important to observe how he dealt with this last aspect of the case:—

"The question for consideration in this case," he said, "is whether the defendants have shown that the plaintiff or his predecessor in title had contracted the right of tenancy (which) should be changed into a right of permanent occupancy."

His finding on this was as follows:—

"In these circumstances it is, I think, clear that the defendants have not established any contract on the part of the plaintiff or his predecessor in title to convey to them a right of permanent occupancy."

Ultimately he passed decrees in the plaintiff's favour for possession of all the suit lands. The defendants appealed to the High Court, and the learned Judges expressed the view that the mode in which the District Judge had dealt with the question of a permanent tenancy was not satisfactory. And after quoting the proposition as formulated by him they observe that:—

"The real point for determination before the learned Judge was whether on the admitted and undoubted facts of the cases and the evidence of both sides the defendants held the lands in their possession as tenants from year to year or as persons having a right of permanent occupancy."

The distinction between the two propositions is manifest. In the result the learned Judges asked the District Judge to return revised findings on the following questions:—

"1. Whether the appellants in these appeals are tenants from year to year, or whether they have a permanent right of occupancy in the lands in dispute?

"2. Whether the plaintiff is estopped from denying that the appellants in these appeals have a permanent right of occupancy?

"3. What compensation, if any, the appellants in these appeals are entitled to for effecting improvements on the land by digging wells and ponds?"

It has been contended that the Court acted without jurisdiction. But this proceeds on a misapprehension of what the High Court did. It did not remand under rule 23 of Order XLI of the Code of Civil Procedure, but merely framed issues and referred them for trial to the District Court as provided in rule 25, and for this reason.

In the opinion of the learned Judges of the High Court, the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits; he had failed to consider whether, apart from the particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the defendants were permanent or in the nature of occupancy rights.

It is perhaps to be regretted that the learned judges of the High Court did not give a fuller and clearer explanation of the reasons which influenced them, for the result was that the District Judge failed to grasp the true meaning of the issues framed by the High Court, and again dealt with the question in the same incomplete manner.

He treated the long duration of the tenancy and the uniform and unvarying rate of the rent as a circumstance by itself not sufficient "to raise a presumption of an implied contract that the right of tenancy should be changed into a right of permanent occupancy."

The District Court's findings were returned to the High Court, and the learned Judges pointed out that the District Judge in his order submitting his findings had, notwithstanding the caution given by the High Court again assumed that the defendants' original right was that of tenants from year to year, and that it lay on them to prove an express or implied contract by which the right of tenancy from year to year was changed into a right of permanent occupancy.

Instead of a further reference the High Court proceeded to determine this issue and, if and so far as this was an issue of fact—a point on which it is not necessary to express a definite

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opinion in the circumstances of this case—the Court had power to deal with it under section 103 of the Civil Procedure Code, 1908.

The conclusion at which it arrived was that the defendants had occupancy rights.

This finding, however, is attacked on the ground, first, that the burden of proof was wrongly thrown on the plaintiff, and secondly that in any case the facts did not justify the inference.

To determine on whom the burden of proof lay it is necessary to ascertain with precision upon what propositions of fact or of law the parties were at variance, and how matters stood when the cases reached the High Court.

The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed. It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established then the defendants must fail, and, to adapt the language of section 101 of the Evidence Act, as the defendants were bound to prove the existence of their permanent tenancy or occupancy right, the burden of proof as to it lay on them. This view as to the incidence of the burden has been repeatedly recognized in the series of Madras decisions cited in argument and is, in their Lordships' opinion, not open to doubt.

There are passages in the High Court's final judgment which unquestionably invite the comment that the learned Judges misapprehended the proper incidence of the burden of proof. Thus the learned Judges say :—

"We hold that the mere fact of the plaintiff being pattadar does not entitle him to any presumption in his favour."

This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title but also to negative the defendants' claim to permanency, and if this is what was meant it was wrong. But the sentence that immediately follows shows a truer perception of the position. The learned Judges there say :—

"We also hold that even if that fact could be of any use to him the various circumstances proved, unrebutted by anything in the plaintiff's favour, necessarily raise a presumption that the defendants have occupancy rights."

The controversy had passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them.

In the end the learned judges drew the inference—they speak of it as a presumption—in favour of the defendants' occupancy rights, and as finally expressed their determination was unvitiated by any error as to the burden of proof.

Nor is their inference contradictory of any finding of fact by the District Court; on the contrary, it rests on the findings of that Court, and in the shape it took in the High Court it certainly had not been negatived by the District Court.

A word of explanation will make this evident. Permanence is not a universal and integral incident of an under-ryot's holding; if claimed, it must be established. This may be done by proving a custom, a contract, or a title, and possibly by other means. Custom is out of the question here; there is no suggestion of it. Contract has been decisively negatived by the finding of the District Court. Title was left untouched, and it was on title that the High Court pronounced in the defendants' favour; for the meaning of their finding is not that there was a subsequent change in the relations of the parties, but that at the inception of those relations the defendants' predecessors possessed occupancy rights.

Conflict with any finding of the District Court being eliminated, it next has to be seen whether there were materials on which the High Court could come to its conclusion. They are minutely indicated in the judgment under appeal, and, in the absence of all information as to the origin of the defendants' holdings, it cannot be said that there is no evidence to support the High Court's finding. It may be that regarded even as a finding of fact—and it has been so treated throughout—it is not conclusive, though curiously enough it would have had that character had it been pronounced by the District Judge and not by two judges of the High Court. But after due consideration of the evidence brought to their notice and of all the circumstances, their Lordships see no sufficient reason to interfere with the High Court's conclusion; nor is it in their opinion to be regretted that effect has been given to the very long possession—'immemorial' in the High Court's view—of the defendants and their predecessors

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It has been objected by the appellant that much of the evidence that has been used against him is not relevant, as the long possession, the alienations and the improvements to which it relates have not been traced to the several defendants or their predecessors in title. But the plaintiff, in disregard of the provisions of the Code, has united in the same suit not merely several causes of action, but several actions or suits against separate defendants, with the result that in effect the litigation has been conducted and treated throughout as though the defendants were a community with common interests. The plaintiff therefore cannot now be heard to object to the use of evidence to which the irregularity of his procedure has given relevance and to which he apparently took no exception when it was tendered at the trial.

The objection might have been formidable had the plaintiff sued the several defendants in separate suits, and their Lordships recognize that in view of the exceptional and irregular character of this litigation this case cannot in this respect be a satisfactory precedent in a properly constituted suit. As it is, however, the objection must fail and the High Court's finding as to the permanence of the defendant's rights in the garden and dry lands must stand.

Following on this finding the High Court, while confirming the decree for possession of the pasture land passed by the lower Courts, ordered that the plaintiff's suits so far as they sought delivery of possession of the garden and dry lands, be dismissed.

The plaintiff alone has appealed from the High Court's decree, and the present appeals are limited to the garden and dry lands. For the reasons already indicated they must fail.

Their Lordships therefore will humbly advise His Majesty that the appeals should be dismissed. The appellant must pay the costs of the appeals.

*Appeals dismissed.*

Solicitor for the appellant: *Douglas Grant.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J.V.W.