PRIVY COUNCIL.*

RAJA OF RAMNAD (PLAINTIFF), APPELLANT,

v.

MUTHANAN SERVAI (DEFENDANT), RESPONDENT

[AND CONNECTED APPEAL].

1927, June 28.

[On appeal from the High Court at Madras.]

Landlord and tenant—Remuneration of village officers—Termination of landlord's liability for officer's remuneration—Rights against lessees—Construction of cowlenama—Madras Act II of 1894.

Out of the zamindar's share of the produce of two villages, he applied 9 per cent of the total produce to remunerating the village officers and 3 per cent to certain charities. In 1894 he leased the villages, the lessees to pay him rent and the amount of road cesses, and to be responsible for the charities. The cowlenama was silent as to the remuneration of the officers. The lessees applied 9 per cent of the produce to that purpose until 1911, when the Government, under Madras Act II of 1894, relieved the zamindar of that liability. In a suit in which the zamindar claimed from the lessees that proportion of the produce retained by them since 1911—

Held that, upon the true construction of the cowlenama, he was entitled to recover. As he alone was liable upon a default in payment of the officers, it was unlikely that it was intended to include the benefit of the 9 per cent in the lease; the lessees in so applying that part of the produce had acted as the zamindar's agents. Further, the average value of the produce to the lessees as stated in the cowlenama excluded both the 9 per cent and the 3 per cent shares.

CONSOLIDATED APPEAL (No. 31 of 1926) by special leave from the decrees of the High Court in appeals under the Letters Patent (January 6, 1922) reversing, so far as material in the present appeal, the decrees of a

* *Present*: VISCOUNT DUNEDIN, LORD SHAW, LORD SINHA, and SIR LANCELOT SANDERSON.

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Division Bench (October 22, 1920) which affirmed decrees of the Subordinate Judge of Ramnad.

The two suits giving rise to the consolidated appeals were brought by the appellant against his lessees, the respondents. Among other sums not in dispute in the present appeal, the appellant claimed the value of a 9 per cent share of the produce since 1911 of the villages leased. That share, previously to the grant of cowlenamas to the respondents, had been applied by the appellant to the payment of village officers, and the payment had been continued by the respondents until 1911 when the Government relieved the appellant of the liability.

The terms of the cowlenamas, which were identical, appear from the judgment of the Judicial Committee.

The trial Judge allowed the claims. Appeals were heard by WALLIS, C.J., and SADASIVA AYYAR, J. The learned judges differed, the learned Chief Justice being for allowing the appeal, and his learned colleague for dismissing it. The decree was accordingly affirmed. Further appeals were presented under section 15 of the Letters Patent, and were heard by SCHWABE, C.J., COUTTS TROTTER, J. and KUMARASWAMI SASTRI, J. The appeals were allowed, KUMARASWAMI SASTRI, J., dissenting. The judgments are reported—I.L.R., 46 Mad., 177.

Special leave to appeal was granted on the terms that the appellant should pay the respondent's costs in any event.

De Gruyther, *K.C.* and *Narasimham* for the appellant.

Dunne, *K.C.* and *Subba Rao* for the respondents.

The JUDGMENT of their Lordships was delivered by

VISCOUNT DUNEDIN.

VISCOUNT DUNEDIN.—These are two suits which were brought by the Raja of Ramnad, as plaintiff, against the cowledar, who held a lease of certain villages, as

defendant. The two suits relate to two different villages. The date of the leases is 1894, and there being no practical difference between them, it will be sufficient to quote one lease.

The lease, which is termed a cowlenama, was executed on the 10th December 1894, and was in these terms :—

"Whereas cowle has been given to you for 30 faslis from fasli 1303 last with a poruppu of Rs. 420-10-10 per fasli according to peshkash rate, in respect of Vahaikudi village situate within the four boundaries mentioned below and attached to Kottakudi division, Rajasingamangalam taluk, which is of the extent of nanja seed land kalams 187-3-0 and punja kurukkams 3-0-0 whose average per fasli for the aggregate 10 faslis from fasli 1289 to fasli 1298 works at Rs. 972-3-2, you shall enjoy the same together with *mavadai, maravadai, thittuthidal*, etc., in the said village and duly pay the said poruppu amount of Rs. 420-10-10, each fasli commencing from fasli 1303 last according to kistbund instalments whether you make cultivation or let the lands to run waste and whether there be or be not any yield. In default, you shall make payment with interest at 1 per cent per mensem from the date of default. You shall conduct repairs to the tanks, etc., in the said village. You shall be rendering accounts showing particulars of collections in respect of cultivation made in the village every fasli. Along with the said poruppu amount, you shall pay the amounts for road cess, jari mahamai, dharma mahamai, etc., to be fixed bearing on the aforesaid accounts. In default of payment of the said poruppu amount, etc., you shall be liable to the following, viz., your being proceeded against under Act VIII of 1865, the said village being liable to the said amount falling due, your having no concern in the avarampattai, etc., lease and proceedings being taken according to law in case of default in any part hereof. Yourself and your heirs are bound to cause to be rendered every year the services to the Devastanam temples and the palace which have to be rendered during the *Navaratri and Sankaranthi* and for dragging the car, as also to pay uluppai, etc., and you shall deliver possession of the village to the estate in the beginning of fasli 1333 when the cowle expires. To this effect is the cowlenama executed. An income of about Rs. 100 is derivable from the said village in respect of dharma mahamai, jari mahamai, road-cess, etc."

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Then the particulars and the boundaries are set out.

In order to consider the import of this lease, it is necessary first to consider what was the state of affairs in 1894. It has been proved that the state of affairs was this. The grain on the estates was all brought to the granary. It was then divided. The cultivating tenants got 52 per cent of the grain. That left 48 per cent undisposed of. Of this, 9 per cent was appropriated to pay the village officers and 3 per cent was appropriated for various charities. This left 36 per cent, which the Raja kept for his own use. In 1911, the Government relieved the zamindars from the charge of paying the village officers. The defendants in these two cases fell into arrears and plaints were then started which asked for decrees for (1) the rent, (2) the amount payable for the charities, and (3) the amount which, prior to 1911, had been handed over to the village officers. A decree was granted for (1) and (2) and there is no question now raised as to that. As to (3), that is to say, the amount which was handed over to the village officers, it is admitted that the defendants *de facto* took the grain, but they pleaded, that it was their own under the terms of the lease.

The Subordinate Judge gave judgment in favour of the plaintiff for all three sums. On appeal the two Judges differed and therefore the judgment stood. Second appeals were taken under Letters Patent. Two of the three judges before whom the appeals were heard held that the grain belonged to the defendant under his lease, and they therefore confirmed the decrees of the Subordinate Judge as to (1) and (2), but allowed the appeal as to (3).

Appeal from that judgment is taken to His Majesty in Council. The sole question therefore is: Was there a right to the 9 per cent of the grain given to the

defendant under the lease. After the relief of the zamindar by the Act of 1894, the Government raised the peshkash payable by the zamindar, by the following notice:

"As the villages in the Ramnad zamindari are being grouped and fixed monthly salaries paid to the holders of the three village offices, headman, karnam and talaiyari or kavalgar, under section 6 of Act II of 1894, and as these village officers are not in future entitled to swatantrams or Ivu manyams which they have been hitherto getting and which were deducted from the total beriz of the zamindari when the peshkash was fixed, the Government of Madras have resolved to raise the peshkash of the Ramnad zamin by Rs. 13,105 under section 27 (2) of Madras Act II of 1894. You are therefore required to show cause in person or in writing on or before the 19th March next why the said sum divided rateably between the various portions of the zamindari should not be adopted and the same collected from you in addition to the present peshkash you pay."

This was obviously only done on the assumption that the zamindar was the person who benefited by the relief afforded.

Now the lease is silent as to the 9 per cent due to the village officers. The learned Judges who decided in favour of the defendant came to the conclusion that as the lease bore to be of the village, it must be inferred that the 9 per cent was transferred to the respondent, imposing on him an obligation to pay the village officers. They therefore thought that the case was analogous to cases quoted where, a conveyance having been made of lands under certain burdens, if from any extraneous cause the burdens disappear, the benefit accrues to the grantee of the lands and not to the grantor.

Their Lordships do not read the lease in this sense. No mention being made expressly of the payments to the officers, the transaction must be looked at as a whole to see what was meant to be done. Now, first it is certain

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that the officers, if they were not paid, had a claim against the zamindar and against him alone. They could not have sued the cowledar because there was neither privity of contract nor relation of tenure on which such a suit could have been based. It is therefore antecedently improbable that the zamindar would part with a specific fund which he had to pay to the officers to a third party, taking as his security the personal obligation of the third party to pay the officers. Further, it is admitted that the calculation of the average takings from the tenants put at Rs. 972 odd in the one lease, and Rs. 982 in the other, was calculated on the 36 per cent only of the total receipts of grain; and as the tenant was getting the lease for Rs. 420 odd, and also getting waste lands which were unlet to tenants, and had only to pay about Rs. 100 in the one case, and Rs. 120 in the other, for cesses, etc., he was getting a very ample margin of profit.

Then as to the clause with regard to the payment of the charity dues, which are admitted to be 3 per cent, this, it will be noticed, is not put as part of the rent, but as a separate payment. It was natural that the zamindar should wish the charity fund handed over to him, because he was the dispenser of the charities, a function for which the cowledar would have been totally unfitted. The fact that special words as to the payment of this are put in, makes it all the more significant that the question of the 9 per cent was left undealt with.

Their Lordships therefore come to the conclusion that the 9 per cent was not conveyed to the cowledar, that the *de facto* handing over of the grain by him was really done *ad hoc* as an agent for the zamindar, and therefore the claim of the cowledar to have a proprietary right in the 9 per cent under a personal obligation to

pay the village officers is quite unfounded in the circumstances.

In this view it becomes quite unnecessary to discuss whether, if the view had been opposite, the zamindar would have been entitled to a sort of conditional equitable compensation by getting his rent increased under the provisions of the Madras Act II of 1894.

Their Lordships will therefore humbly advise His Majesty to allow the appeals in both actions and to restore the judgment of the Subordinate Judge with the costs in the Courts in India. Under the Order in Council granting the appellant special leave to appeal, he will pay the respondent's cost of the appeals to His Majesty in Council as between solicitor and client.

Solicitors for appellant: *Chapman, Walker and Shepphard.*

Solicitor for respondent: *H. S. L. Polak.*

A.M.T.

SPECIAL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice Mr. Justice Wallace, Mr. Justice Beasley, Mr. Justice Jackson and Mr. Justice Srinivasa Ayyangar.*

IBRAHIMSA ROWTHER, ASSESSEE,

v.

COMMISSIONER OF INCOME-TAX, MADRAS.*

1928, February 1.

Indian Income-tax Act (XI of 1922) 2 (1), 4 (1), (3) (viii), 6 (iv) and 10—Agricultural income—Usufructuary mortgagee of land assessed to land revenue leasing it back to mortgagor for rent—Whether such rent is "agricultural income".

Held (JACKSON, J., dissenting) that if an assessee takes a usufructuary mortgage of a land assessed to land revenue

* Referred Case No. 11 of 1927.