PRIVY COUNCIL.*

SUBRAMANYA CHETTIYAR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SUBRAMANYA MUDALIYAR AND OTHERS (PLAINTIFF), RESPONDENTS.

1929, March 19.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Landlord and tenant—Right of permanent occupancy—Burden of proof—Long continued possession at uniform rent—Alienations—Purchase of kudivaram.

It is well established that those claiming a right of permanent occupancy must prove that it exists by custom, contract or title, or possibly by other means.

In a suit by a ryotwari pattadar claiming partition of his undivided half share in an estate, the defendants contended that they had a right of permanent occupancy as to certain well-irrigated lands and palmyra trees, and that consequently they should be excluded from the partition.

Held that the defendants, who proved that they had been in undisturbed possession of some of the land for a long period at a more or less uniform rent, and that at a comparatively recent date they had made alienations not of such a kind as ordinarily would be brought to the notice of the pattadar, had not discharged the burden of proof upon them ; the fact that some of the defendants had purchased the kudivaram militated against their claim.

Seturatnam Aiyar v. *Venkatachala Gounden*, (1919) I.L.R., 43 Mad., 567 ; L.R., 47 I.A., 79 and *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*, (1922) I.L.R., 45 Mad., 586 ; L.R., 49 I.A., 286, distinguished on the facts.

APPEAL (No. 10 of 1927) from a decree of the High Court (October 15, 1924) varying a decree of the Subordinate Judge of Tinnevelly.

The first respondent was the owner by purchase of the pattadar rights in an undivided moiety of certain

* *Present* : Lord CARSON, Lord SALVESEN and Sir GEORGE LOWNDES.

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lands in a village. He brought the present suit claiming a partition. The defendants-appellants were, or claimed through, persons who had been in possession since 1857 or earlier. By their written statement they alleged that as to part of the land they had a permanent right of occupancy, and they contended that it should, therefore, be excluded from the partition.

The facts appear more fully from the judgment of the Judicial Committee.

The High Court (WALLIS, C.J., and SADASIVA AYYAR, J.) held that the burden of proof was upon the defendants in question, and that they had failed to discharge it. The decree of the trial Judge was accordingly varied.

Dunne, *K.C.*, and *E. B. Raikes* for the appellants.

DeGruyther, *K.C.*, and *Dube* for the first respondent.

The JUDGMENT of their Lordships was delivered by

LORD SALVESEN.

Lord SALVESEN.—This is an appeal from a judgment and decree, dated the 15th October 1920, of the High Court of Judicature at Madras, which varied a judgment and decree, dated 21st December 1917, of the Subordinate Judge of Tinnevelly.

The appellants were defendants in a suit which was raised at the instance of the plaintiff-respondent for a partition of his one-half share of certain lands situate in what is called the Chinna Pannai division of the village of Ayyanarkulam in the Tinnevelly district. By alienations and purchases which are not now disputed, the first respondent is the owner of a one-half share of the Chinna Pannai division of the village, and the *ryotwari* settlement having been made by the Government with his predecessors-in-title, he is at present *ryotwari pattadar* of one-half undivided share of this estate. The earliest document of title is dated 1857 and refers back

to a state of possession in 1851, but it is probable that the settlement took place at an earlier date. Even at that time the land was described as belonging to three classes: rain-fed lands, dry lands, and lands which were then irrigated by means of wells but had been formerly dry; and the wells were at least of two classes, *samudayam* wells—that is, wells common to the three *pannais*, of which the respondent now holds one-half share of the *chinna pannai* and other wells, some of which are probably named after persons through whom the appellants claim, and may be assumed to have been sunk by the cultivating occupiers. It appears also that palmyra trees had been planted, some by the owners and some by the cultivators. It is these lands, irrigated by wells, and the palmyra or garden lands, which alone are in dispute in the present suit, which is one for partition between the appellants and the said respondent of the properties comprised within the *chinna pannai* above referred to.

In the statement made on their behalf, the appellants admitted that the respondent's predecessors-in-title had been regularly receiving *tirwa swamibhogam* for his share of the lands. *Tirwa* is the share of the rents payable to Government, and *swamibhogam* the revenue derived from the tenants or occupiers over and above what was necessary to pay the tax. In statement No. 11 they raised no objection to a division being effected in respect of the dry and rain-fed lands specified in Schedule No. 3, but they maintained that the well-irrigated lands and palmyras should be excluded from the partition on the ground that they had acquired permanent rights of occupancy in the same, subject to the payment of a fixed rate of Rs. 4–6–0 for *punja* lands irrigated with water obtained from old wells, and Rs. 2–3–0 per acre for *punja* lands irrigated with water from new wells and

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pies four per palmyra. Some of these new wells, it appears from the evidence, were of comparatively recent date, but no distinction is made between the lands watered by these wells and those which were watered by wells of older date. In respect to all of them the appellants claimed that they were permanent tenants who had acquired by long occupation the *kudivaram* of these lands, subject only to the payment of a fixed annual return at the rates above mentioned.

The principle upon which disputes of this kind, which have frequently come before the Courts in India, fall to be decided, have now been conclusively fixed by two judgments of this Board. In the earlier of these, *Seturatnam Aiyar* v. *Venkatachela Goundan*(1), the long-contested dispute as to the burden of proof was dealt with in the judgment of the Board which was delivered by Sir LAWRENCE JENKINS :—

> "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 adopt the language of section 101 of the Indian 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."

In the latest case, *Nainapillai Marakayar* v. *Ramanathan Chettiar*(2), this view was expressly re-affirmed.

The judgment of the Subordinate Judge in the present case is vitiated by the fact that he misapprehended

(1) (1919) I.L.R., 43 Mad., 567; L.R., 47 I.A., 76.
(2) (1923) I.L.R., 47 Mad., 337; L.R., 51 I.A., 83.

the proper incidence of the burden of proof, his judgment having been delivered before *Seturatnam Aiyer's* appeal above referred to had been decided in the Privy Council.

The question, then, in the present case, is whether on the evidence the appellants have established the permanent occupancy rights which they claim. In the case last mentioned, the High Court had held that the appellants in that case had satisfied the onus of proof which in the first instance lay upon them, and their Lordships of the Privy Council saw no reason to disturb the inference which they had drawn from the facts proved. A similar result was arrived at in the case of *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*(1), but in *Nainapillai Marakayar* v. *Ramanathan Chettiar*(2), the inference from the facts there proved was to the opposite effect.

In the present case the Judges of the High Court have very carefully examined all the evidence and have reached a result unfavourable to the appellants. It would serve little purpose to go through the evidence which has already been dealt with in detail by these learned Judges, seeing that the accuracy of their statement of facts and the soundness of their reasoning has not been successfully criticised. It is sufficient to point out that the facts in the other two cases, 47 I.A. and 49 I.A., were very different from those which the appellants have been able to prove here. In the former case it was found to be established as a fact that the possession of the occupancy tenants had been immemorial and, what is perhaps more important, that at the inception of the relations between the owner and the tenants, the latter had possessed occupancy rights. In the latter

(1) (1922) I.L.R., 45 Mad., 586; L.R., 49 I.A., 286.
(2) (1923) I.L.R., 47 Mad., 337; L.R., 51 I.A., 88.

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case the tenants succeeded in showing that they had been dealing with the property as their own for at least a hundred years. They had also shown that they had received compensation from the Government for lands taken out of their holdings for public purposes and that the plaintiff's evidence had been found to be mostly false and fabricated. No such facts have been established in the present case.

To use the language of Sir LAWRENCE JENKINS, "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 custom, contract or a title, and possibly by other means." In the present case, the appellants have succeeded in showing little else than that they have remained in undisturbed possession of some of the land in question for a long period at a more or less uniform rent, but they have not attempted to prove any custom upon which they could found, and the attempt which they made to prove a contract with regard to the lands in which new wells were sunk, under which they were to be allowed to occupy these on a reduced rate of rent as compared with the lands on which the old wells were situate, has completely failed. The alienations on which they found and which, if they had been made over a long period, would have been valuable evidence in establishing the right which they claim, all turn out to be of comparatively recent date, and not of such a kind as would ordinarily be brought to the notice of the *pattadar*, for they do not seem in most cases to have involved any change of tenancy.

There is also one point on which one of the learned Judges of the High Court relies, and which does not appear to have been present in any of the previous cases, namely, that in the half of the *chinna pannai* which is not claimed by the respondent some of the appellants

actually acquired the *kudivaram* of the land. This, while not conclusive, as it might have been done by way of excessive caution, militates against the claim which they are now making. A cultivator who has acquired permanent rights of occupancy may purchase the *melvaram* of the lands so as to become the absolute proprietor, but if he considers himself to be the owner of the *kudivaram* it is not likely that he would expressly purchase the latter without some indication that he was only doing so to avoid disputes. The present suit is not an action of ejection, but is brought to establish that the plaintiff-respondent is entitled to have all the lands within his title partitioned on the footing that the appellants as a community of cultivators have not acquired the permanent rights of occupancy which they claim. Their Lordships express no opinion as to the terms on which ejection of any individual occupier may be sanctioned by the Court if and when such a suit is brought.

Their Lordships have therefore come to the conclusion not merely that there are no sufficient grounds for disturbing the inferences which the High Court have drawn from the facts proved before them, but they agree with them that these were the proper inferences to be drawn.

They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

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

Solicitors for respondent : *Douglas Grant* and *Dold.*

A.M.T.