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to make her a party in this Court, we make no order as to costs either in this Court or in the District Court.

The memorandum of objections will be dismissed but there will be no order as to costs.

A.S.V.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Patanjali Sastri.

1939, March 28.

VALIA MALIYAKKAL SAYID MUHAMMAD JIFFIRI ATTAKOYA THANGAL AND TWO OTHERS (DEFENDANTS 1, 4 AND 5), APPELLANTS,

v.

SEYID MUHAMMAD BIN ALABI AYIDROSS KUNHI-KOYA THANGAL (PLAINTIFF), RESPONDENT.*

Interest Act (XXXII of 1839), sec. 1 proviso—Inam grant confirmed at the time of Inam Settlement—Land revenue, land cess and education tax in respect of land covered by—Amounts paid by inamdar in respect of—Suit by him for recovery with interest from persons in possession of land—Interest upon amount paid for land revenue—Inamdar's right to—Conditions—Land cess—Amount paid as—Inamdar, if entitled only to half of—Madras Local Boards Act (XIV of 1920), sec. 88—Applicability and effect of—Interest on amount—Inamdar's right to—Art. 120 of Indian Limitation Act (IX of 1908)—Applicability of, to claim to recover land cess—Education tax paid by inamdar—Recovery of—Inamdar's right of—Madras Elementary Education Act (VIII of 1920) before amendment by Madras Elementary Education Amendment Act, 1931—Case governed by—Rule framed under sec. 36 of that Act—Scope and effect of.

The respondent, an inamdar of land situate in the district of Malabar under an inam grant made by Tippu Sultan and

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* Second Appeal No. 712 of 1935.

confirmed at the time of the Inam Settlement, sued the appellants, persons in possession of a portion of the land covered by the grant, for the recovery with interest of a sum of money made up of land revenue and amounts paid by the respondent in respect of land cess and education tax over a period of twelve years. The suit was filed in 1932 and the respondent's case with regard to the land cess and education tax was that he had been compelled to pay the amounts to Government and therefore was entitled to recover them from the occupiers of the land. The inam grant did not fix the dates when the land revenue was to be paid to the inamdar, all that he got under the instrument being the right to collect the land revenue. And no notice in writing had been given to the appellants that interest would be claimed in default of payment of the amount paid by the respondent for land revenue or land cess.

Held: (i) The respondent was not entitled to interest in respect of the amount due for land revenue because the case did not fall within the proviso to section 1 of the Interest Act.

Bengal-Nagpur Railway Company, Limited v. *Ratanji Ramji*(1) relied upon.

(ii) The respondent was only entitled to half the amount of the land cess paid by him in respect of the six years immediately preceding the suit. He was not entitled to interest on the said amount.

For the purposes of section 88 of the Madras Local Boards Act, 1920, the respondent must be taken to be the landholder and the appellants his tenants. The second proviso to that section gave the respondent the right to recover half the amount paid by him from the appellants. That right was subject, however, to the law of limitation and the article of the Indian Limitation Act which applied was article 120.

Bhupathi Raju v. *Subba Rao*(2) and *Rajah of Vizianagram* v. *Thammanna*(3) referred to.

(iii) The respondent was not entitled to recover anything in respect of the amount paid by him for education tax.

The case was governed by the provisions of the Madras Elementary Education Act, 1920, before its amendment by the Madras Elementary Education Amendment Act, 1931.

(1) I.L.R. [1938] 2 Cal. 72 (P.C.).
(2) (1931) I.L.R. 55 Mad. 646. (3) I.L.R. [1937] Mad. 498 (F.B.).

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There was no provision in the unamended Act that the landholder should be allowed to recover the tax or any portion of it from the tenant and the rule framed under the power conferred by section 36 of that Act did not, and could not, supply the deficiency.

Nagabushanam v. *Venkanna*(1) referred to.

APPEAL against the decree of the District Court of North Malabar in Appeal Suits Nos. 5 and 9 of 1934 preferred against the decree of the Court of the District Munsif of Quilandy in Original Suit No. 648 of 1932.

K. Kuttikrishna Menon for appellants.

B. Pocker for respondent.

LEACH C.J.

The JUDGMENT of the Court was delivered by LEACH C.J.—The respondent's predecessors-in-title obtained an inam grant from Tippu Sultan. The grant was confirmed in 1866 at the time of the Inam Settlement. The validity of the grant had, however, been recognized for many years before that. The land in respect of which the respondent holds the grant is situate in Malabar. In 1932 he filed a suit in the Court of the District Munsif of Quilandy to recover from the appellants, who are in possession, a sum of Rs. 450-4-11 made up of land revenue and amounts paid by him in respect of land cess and education tax over a period of twelve years. He also claimed interest. With regard to the land cess and education tax the respondent's case was that he had been compelled to pay the amounts to Government and therefore was entitled to recover them from the occupiers of the land. The appellants denied that the respondent was entitled to recover anything from them. The District Munsif held that the respondent had the right to recover the amount claimed for land revenue with interest and also the amount claimed in respect of

(1) (1929) I.L.R. 53 Mad. 151.

land cess, but in that case without interest. He rejected the claim so far it related to the education tax. An appeal and a cross-appeal were filed in the Court of the District Judge, North Malabar. The District Judge held in favour of the respondent on all the points and decreed the suit. The appeal before us is from the decree of the District Judge. The learned Advocate for the appellants concedes that the respondent is entitled to recover from them the amount claimed in respect of land revenue, but he challenges the findings of the District Judge on the other points. The questions which the Court is called upon to decide are therefore these : (i) Whether the respondent is entitled to interest in respect of the amount of the arrears of land revenue ; (ii) whether anything is recoverable from the appellants in respect of land cess and education tax ; and (iii) if they are liable in respect of land cess or for education tax, what is the period of limitation ?

It is clear that the respondent is not entitled to interest in respect of the amount due for land revenue unless the case falls within the proviso contained in the Interest Act. The inam grant does not fix the date when the land revenue is to be paid to the inamdar and no notice in writing was given to the appellants that interest would be claimed in default of payment. The proviso to the Interest Act, however, leaves it open to the Court to award interest where a Court of Equity would recognize the claim. This was the construction placed upon the proviso by the Privy Council in the recent case of *Bengal-Nagpur Railway Company, Limited* v. *Ratanji Ramji*(1). In delivering the judgment of the Board, Sir SHADI LAL

(1) I.L.R. [1938] 2 Cal. 72 (P.C.).

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quoted the observations of Lord TOMLIN in *Maine and New Brunswick Electrical Power Co.* v. *Hart*(1) where Lord TOMLIN said :

" In order to invoke rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance."

In *In re Drax. Savile* v. *Drax*(2) the Court of Appeal recognized that interest was payable when a settlement or contract contained a provision that a certain sum should be charged on land and be paid at a fixed time. In the case before us neither of these conditions is fulfilled. It is true that the trial Court and the District Court considered that the respondent was entitled to a charge and this finding has not been expressly challenged by the appellants in their memorandum of appeal. I shall state presently what we consider should be the form of the decree, but, for the purposes of deciding whether interest is recoverable or not, we have to consider whether a Court of Equity would grant it.

In *Subbaroya Goundan* v. *Ranganada Mudaliar*(3) WALLIS C.J. observed that it was well settled that by virtue of an assignment from Government of the right to land revenue the inamdar did not acquire a charge upon the land and that the assignee was left to recover rent from the occupiers under the Madras Rent Recovery Act. SESHAGIRI AYYAR J. indicated that had it been open to him to do so he would have come to a different conclusion, but he recognized that the principle of *stare decisis* applied. The decision in that case was that where *jodi* is payable by an inamdar

(1) [1929] A.C. 631. (2) [1903] 1 Ch. 781.
(3) (1915) I.L.R. 40 Mad. 93.

to Government it is recoverable as revenue and is a first charge on the interest of the inamdar, but where a zamindar has been given the right to collect *jodi* payable by an inamdar to Government he has no charge on the interest of the inamdar for arrears. In the course of his judgment WALLIS C.J. pointed out that in *Kasturi Gopala Ayyangar* v. *Anantaram Thivari*(1) it was laid down broadly that assignees of revenue could not proceed under section 42 of the Madras Revenue Recovery Act and had only a personal claim, and referred to the earlier decisions to the same effect. We are bound by those decisions, but, assuming we were not and were disposed to hold that in this case there was a charge, the respondent would still be disentitled to ask a Court of Equity to award him interest. As I have indicated, his grant does not stipulate when the land revenue shall be paid to him. All that he gets under the instrument is the right to collect the land revenue. If it is not paid within the year or by the end of the year he has his remedy by suit. He could by giving notice in accordance with the provisions of the Interest Act make sure of a right to interest in default of payment, but he does not come within the provisions of the Madras Revenue Recovery Act, which only applies to the payment of revenue due to Government. In these circumstances the respondent is not entitled to interest and the decision of the District Judge on this question will be reversed.

The claim in respect of the land cess payments requires a consideration of certain sections of the Madras Local Boards Act, 1920. Section 74-B states that in every district, a land cess being a tax on the annual rent value of lands shall be levied in accordance with the provisions of the Act. Section 81

(1) (1902) I.L.R. 26 Mad. 730.

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provides that the cess shall be levied upon a landholder or sub-landholder. Section 88 says that every landholder and sub-landholder shall pay the land cess due in respect of lands held by him, but there are two provisos. The first allows the landholder or sub-landholder as the case may be to recover the amount paid by him from an intermediate landholder. If there is no intermediate landholder and the land is occupied by a tenant the second proviso allows the landholder or sub-landholder or an intermediate landholder to recover half the amount of the cess from the tenant. The definition of " landholder " is given in section 3 (9) and reads as follows :

" ' Landholder ' includes all persons holding under a sanad-i-milkiat-istimrar, all other zamindars, poligars, shrotriyamdars, jagirdars and inamdars, all persons registered as proprietors under section 5 of the Madras Limited Proprietors Act, 1911, and all persons farming the land revenue under Government ; all holders of land in the district of Malabar under whatever tenure ; and all holders of land under ryotwari settlement, or in any way subject to the payment of land revenue direct to Government, and all registered holders of land in proprietary right."

Section 3 (21) describes a " sub-landholder " as a person, not being a landholder, who (i) holds a portion of an estate consisting of one or more revenue villages on an under-tenure created, continued or recognized by the proprietor of the estate, or is entitled to collect the rents otherwise than as agent or servant of the landholder, and (ii) is registered as a sub-landholder in the office of the Collector. Sub-section 22 defines " tenant " as including all persons who, whether personally or by an agent, occupy land under a landholder or an intermediate landholder, and whether or not they pay rent to the landholder or intermediate landholder as the case may be.

The appellants and the respondent both come within the definition of " landholder." The appellants are the holders of land in the district of Malabar and the respondent is an inamdar. Neither the appellants nor the respondent are within the definition of " sub-landholder ", but the appellants come within the definition of " tenant ". In *Bhupathi Raju* v. *Subba Rao*(1) it was pointed out that a person could not at the same time be a tenant in respect of the land of which he was the intermediate landholder. It is obvious that the appellants cannot be both the landlords and the tenants of the same land. The definition of " landholder " in section 3 (9) is subject to there being nothing repugnant in the subject or context, and to treat the appellants as landholders and tenants would not only be contrary to the scheme of the Act, but would be impossible. In this case the landholder for the purposes of section 88 must be taken to be the respondent and the appellants must be taken to be the tenants. This very same grant had to be construed on a previous occasion by this Court. The case was *Alubi* v. *Kunhi Bi*(2), where a Division Bench held that the respondent was in the position of a landholder and the occupiers of a portion of the land covered by the grant were tenants. There is consequently authority for the statement that the appellants can only be regarded as tenants of the respondent.

This being the position and the respondent having paid the land cess, he is entitled to recover half of it from the appellants. The District Judge held that he was entitled to recover the whole under sections 69 and 70 of the Contract Act but this is not so. The respondent could recover the full amount from the

(1) (1931) I.L.R. 55 Mad. 646. (2) 1880) I.L.R. 10 Mad. 115.

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appellants only if he were " interested " in making the payments, but not personally liable. If he is liable for the money—and by reason of section 88 of the Madras Local Boards Act he is—he could only recover the full amount from the appellants by virtue of some statutory provision in that behalf. The only statutory provision is that contained in the second proviso to section 88 of the Madras Local Boards Act, which gives him the right to recover half the amount paid by him. The right is subject, however, to the law of limitation and the article of the Limitation Act which applies is article 120; *Rajah of Vizianagram* v. *Thammanna*(1). The respondent is, therefore, only entitled to half the amount of the land cess paid by him in respect of the six years immediately preceding the suit. The claim for interest fails for the reasons already given.

The remaining question is whether the respondent was entitled to education tax. The District Judge here again erred. The case is governed by the provisions of the Madras Elementary Education Act, 1920, before its amendment by the Madras Elementary Education Amendment Act, 1931. Section 34 of the unamended Act provided for the levy of an education tax and section 36 stated that the assessment and realization should be " in accordance with the procedure prescribed ". Under the power conferred by section 36 the following rule was framed :

" The tax levied by a local authority under section 34 of the Act under any head of taxation specified therein, shall be treated as an addition to the tax levied under the heads by the local authority under the law for the time being in force governing it, and shall be assessed and recovered along with the said tax as an integral part of it."

(1) I.L.R. [1937] Mad. 498 (F.B.).

There was no provision in the Act that the landholder should be allowed to recover the tax or any portion of it from the tenant and the rule did not, and could not, supply the deficiency; see *Nagabushanam* v. *Venkanna*(1). Under the Act as it now stands the respondent will in future be able to recover half of the education tax, but this was not the position at any time material to the present suit.

There will be a decree providing for the payment by the appellants to the respondent of (*a*) the amount claimed in respect of land revenue, but without interest, and (*b*) half the land cess paid by the respondent for the six years immediately preceding the suit, also without interest. The claim in respect of the education tax is disallowed *in toto*. As the appellants have not appealed against that part of the decree of the lower Court declaring a charge, the charge will be allowed to stand, but only to the extent of the amount payable under the decree of this Court. As the appeal has succeeded in part and failed in part the parties will pay and receive proportionate costs throughout.

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(1) (1929) I.L.R. 53 Mad. 151.