the appellant-vendee to show that the inhabitants depend in the main on agriculture. After a consideration of the arguments advanced at the Bar I am unable to see any reason to differ from the view taken by the Courts below, and therefore dismiss this appeal with costs.

FFORDE J.—I agree.

C. H. O.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Addison.

SINGH RAM (PLAINTIFF) Appellant

versus

KALA AND ANOTHER (DEFENDANTS) Respondents.

1925

Dec. 21.

Civil Appeal No. 1490 of 1925.

Custom—Village cesses—Kurhi Kamini—*definition of—House or ground rent—Punjab Tenancy Act, XVI of 1887, section 77 (3) (j)—Suit for declaration—by owner of house that he is not liable to pay it—Jurisdiction—of Civil Courts*—Onus probandi—Wajib-ul-arz—*entries in—value of.*

Held, that *Kurhi Kamini* cannot be taken to mean a tax designed to show the overlordship of the proprietors of agricultural land as against all other residents of the village, but is a cess of the nature of house or ground rent (and not a hearth tax) and that a suit for a declaration that such dues were not recoverable from owners of their own houses did not come within clause (*j*) of section 77 of the Punjab Tenancy Act, but could be brought in the Civil Courts although the *Lambardars* could sue in the Revenue Courts for the recovery of the cess.

Rattigan's Digest of Customary Law, para. 248 (*f*), and *Fazal* v. *Samandar Khan* (1), referred to.

Dewak Ram v. *Kour Pirthi Sing* (2), *Natha* v. *Jai Ram* (3), and *Sheikh Muhammad* v. *Habib Khan* (4), followed.

Raj Sarup v. *Hardawari* (5), disapproved in part.

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(1) 49 P. R. 1891.
(2) 74 P. R. 1879.
(3) 21 P. R. 1888.
(4) 67 P. R. 1905.
(5) 95 P. R. 1907.

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Held further, that where the plaintiffs (*Mahajans* of village Bidhlan, in the Rohtak *Tahsil*) were admitted to be out-and-out purchasers of their houses and sites inside the village, it was not sufficient for the defendant-lambardars to say that the accounts of the cess were kept by the *Mahajans* who had not produced them, and to refer to previous entries in the *Wajib-ul-arzes*, which are binding only upon the proprietors who were parties to them; the burden of proof of a custom to the effect that the plaintiffs were liable to pay *Kurhi Kamini* remained on the defendants, and no such custom had been established.

Arur Singh v. *Dal Singh* (1), followed.

Azmat Ali Khan v. *Harnam* (2), referred to.

Second appeal from the decree of Pandit *Devi Dial* Joshi, *Senior Subordinate Judge, 1st class, Rohtak, dated the 13th March 1925, reversing that of* Mirza *Zahur-ud-Din, Subordinate Judge, 4th class, Rohtak, dated the 11th June 1924, dismissing the claim.*

Shamair Chand, for Appellant.

G. S. Salariya, for Respondents.

JUDGMENT.

ADDISON J.

ADDISON J.—The defendants, who are *Jat Lambardars* of village Bidhlan in the Rohtak *Tahsil*, sued four *Mahajans* of the same village in the revenue Courts for recovery of *Kurhi Kamini* cesses and obtained decrees. Each of these *Mahajans* then filed a suit for a declaration that he was not liable to pay *Kurhi Kamini* as he had actually purchased his houses and the sites thereunder and was not merely a cultivator or *Kamin* to whom the sites had been given for residence. It was found by the trial Court that such suits were cognizable by the civil Courts, and that the

(1) 40 P. R. 1879. (2) 61 P. R. 1875.

plaintiffs were the purchasers of their houses and were not holding the sites as *Kamins* or cultivators. It then went on to find that the burden of proof was upon the proprietors of the village to establish that those who purchased houses were liable to pay this cess which was in the nature of a ground rent and which would thus be ordinarily recoverable from those who were given permission to occupy sites as *Kamins* or cultivators. The lower appellate Court also held that the suits were cognizable by the civil Courts and that the plaintiffs were out-and-out purchasers of their houses and sites, but it held that as there was a custom of payment of *Kurhi Kamini* cesses in this village, it was incumbent upon the plaintiffs to establish that they were not liable. It accordingly remanded the suit for a retrial on this issue after it changed the burden of the issue. The trial Court then held again that this cess was in the nature of a ground rent, and that the defendants had failed to prove that they had ever realised it from the plaintiffs. It, therefore, again decreed the suits. The lower appellate Court then accepted the appeals and dismissed the suits, holding that the cess in question was in the nature of a hearth cess and not of a ground rent and that it applied to all persons who were not proprietors of the village estate, that is, village agricultural land. It brushed aside the fact that the defendants had failed to prove its collection from the plaintiffs by noting that the defendants said that the accounts were kept by the village *Mahajans* who did not produce them. Certificates were obtained from the lower appellate Court in order to allow second appeals to be preferred to this Court and they are now before me.

In paragraph 248 (*f*) of Rattigan's Digest of Customary Law *Kurhi Kamini* is defined as a house or ground rent levied from non-proprietor residents.

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It was held in *Dewak Ram* v. *Kour Pirthi Sing* (1) that *Kurhi Kamini* dues were of the same nature as house or ground rent. In that case there was a finding that such rent had been paid in the past by the persons who were sued. Again in *Natha* v. *Jai Ram* (2) it was held that this cess must be regarded as ground rent. The question had to be determined in order to decide as to which Court should hear the appeal. In Fallon's Dictionary *Kurhi* is defined as a household or family or house tax while *Kamin* is described as a menial servant. The meaning of the phrase, therefore, is a house tax or rent on menial servants according to the Dictionary. It was held in *Fazal* v. *Samandar Khan* (3) that the cess called *Kamiana* was a due customarily leviable from the *Kamins* of the village and a suit for its recovery was cognizable by the revenue Courts. In *Raj Sarup* v. *Hardawari* (4) *Kurhi Kamini* was held to be in the nature of a hearth cess and to be the equivalent of the door cess or *haqq-buha* of the western districts. It was further held that a suit for its recovery lay in the revenue Courts as was done in the cases now before me. The ruling, however, makes no allusion to the earlier rulings discussed by me where it was laid down that this cess was in the nature of a house or ground rent. The dictionary also was not consulted. In any case this ruling is an authority for the view that the suits for the recovery of this cess were properly brought in the revenue Courts.

In *Sheikh Muhammad* v. *Habib Khan* (5) however, it was held that a suit for a declaration that *Kamiana* dues were not recoverable from such residents of a village as were owners of their houses did

(1) 74 P. R. 1879. (3) 49 P. R. 1891.
(2) 21 P. R. 1888. (4) 95 P. R. 1907.
(5) 67 P. R. 1905.

not come under clause (*j*) of section 77 of the Tenancy Act and was cognizable by the civil Courts. This ruling has never been dissented from and must be followed. Though therefore the *Lambardars* can sue in the revenue Courts for the recovery of this cess the person proceeded against can bring a suit for a declaration in the civil Courts.

Following the earlier rulings and the dictionary meaning of the words I hold that *Kurhi Kamini* is a cess of the nature of a house or ground rent on *Kamins* and cultivators. This view was also accepted by Mr. Joseph, the Settlement Officer of that district, in 1910. He held that a person who became owner of a house by virtue of purchase was exempt from its payment. A different view was taken by the Financial Commissioner who, following certain revenue decisions, held that it was a hearth tax. There seems to me to be no foundation on which this view can be based. In these circumstances I hold that the burden of proving that the plaintiffs are liable to pay this cess is upon the defendants, seeing that it is admitted that the plaintiffs are out-and-out purchasers of their houses and sites inside the village. The words "*Kurhi Kamini*" cannot be taken to mean a tax designed to show the overlordship of the proprietors of the agricultural land as against all other residents in the village but only a kind of ground rent recoverable from *Kamins* and cultivators to whom sites have been given for as long as they remain in the village.

It is true that the names of the plaintiffs' ancestors who purchased the sites and houses before 1880 are recorded in the lists of *Kurhi Kamini* payers in the *Wajib-ul-arzes of* 1880 and 1909. It was held, however, in *Arur Singh* v. *Dal Singh* (1) that such

(1) 40 P. R. 1879.

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entries do not bind anyone except the proprietors who are parties to them. Similarly, an entry in the *Wajib-ul-arz* was held not to be sufficient to base a claim for grazing dues in *Azmat Ali Khan* v. *Harnam* (1). It is also admitted that there is no proof in the present case that the plaintiffs ever paid the dues in question. That is very good evidence against the existence of a custom that they are liable to pay them. It was not sufficient for the defendants merely to say that the accounts were kept by the *Mahajans* who did not produce them. Even if the accounts were written by *Mahajans*, which also has not been established, the book in which the entries were made would be kept by the *Lambardars*. Besides, the usual person to keep such accounts would be the *Patwari*. The burden, therefore, being upon the defendants to prove that the plaintiffs were liable to pay this cess, it is clear that they have failed to prove it and it was scarcely disputed that this would be so if the burden of proof was upon the defendants. I hold that no custom has been established to the effect that the plaintiffs are liable to pay the cess in question, and accepting the appeals I decree the plaintiffs' suits with costs in this Court.

N. F. E.

Appeal accepted.

(1) 61 P. R. 1875.