APPELLATE JURISDICTION (*a*)

Regular Appeal No. 18 *of* 1865.

VAIRICHARLA SURYA NÁRÁYANA RÁZ BAHÁDUR, ZAMINDÁR OF KURAPAM } *Appellant.*

NADIMINTI BHAGAVAT PATANJALI SHÁSTRI *Respondent.*

In a suit to recover, with mesne profits and other incidents, a jiráyati village alleged by the plaintiff to form part of his Zamindári and to be wrongfully held by defendant by virtue of the execution of a decree of the late Commissioner of the Northern Circars passed in 1844, the defendant pleaded that he held on a permanent lease subject to a fixed quit-rent, that he and his ancestors had held on that tenure since and previously to the permanent settlement, and that the quit-rent had been received from him by the plaintiff. The agent dismissed the suit on the ground that the matter had become res judicata against the plaintiff by a former decree in 1807. *Held*, that the matter of the present claim was not res judicata, because the question of the existence and validity of the alleged grant, on which the defendant relied, was not determined in the former decree.

Held also, that, as the defendant stated that the plaintiff had received Kattubadi from him since 1857, the plaintiff's claim to eject could not be disposed of absolutely on the ground that it was barred by the Act of Limitations. *Held* also, that as the plaint, praying for the recovery of possession, proceeded on the ground, amongst others, of the invalidity of the grant relied on by the defendant, the question as to the validity of the permanent Kattubadi tenure claimed by the defendant was properly open for determination in the present suit.

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THIS was a regular appeal from the decree of D. F. Carmichael, the Agent to the Governor of Fort Saint George at Vizagapatam, in Original Suit No. 45 of 1864.

The suit was brought for the recovery of a jiráyati village of the Kurapam Hill Zamindár with mesne profits. The plaint stated that the produce of the said village was, according to the settlement accounts, included in the assets on which the peshkash of the Zamindári was fixed. That in the year 1800 the said village was forcibly taken possession of by the defendant's father under the pretext that it was granted to him under a patta by the then Zamindár, but resumed in 1807, on the Zamindár attaining his majority. Thereupon the defendant's father instituted a suit in the Court of Vizagapatam in which the said Zamindár contended that the grant was invalid, having been

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made by his mother during his minority. The Court found for the defendant's father, declaring that the Zamindár could only take possession of the village under the decree of a Court of justice. In 1825 the Kurapam estate was attached for arrears of peshkash and the village now sued for zafted as a grant made contrary to Section XII, Regulation XXV of 1802. The defendant's father petitioned the Board of Revenue, who (in 1825) rejected his petition because the village was a jiráyati one.

In 1827 the defendant's father filed a suit against the next Zamindár complaining that he had encroached upon the village and the Court held that the village was a jiráyati one, but found that the grant should be in force during the life-time of that Zamindár. This decree was affirmed on appeal in 1841, and the village put in possession of the widow of that Zamindár, the maternal grandmother of the plaintiff.

On the death of the then defendant, his son the present defendant preferred a Special Appeal in 1844, in which the Special Commissioner, overruling all subsequent proceedings, declared that the decree passed in 1807 stood good and must be carried out. The defendant moved to enforce that order and the matter was referred to the late Sadr Court by the then Agent. The Sadr Court, in their proceedings of 20th January 1855 declared that until the Zamindár obtained a decree to the contrary the decree passed in 1807 should be in force. In accordance with this decree the village, the subject-matter of the present suit, was separated from the plaintiff's Zamindári in 1857, zafted and subsequently made over to the defendant. Plaintiff therefore brought this suit to recover the said village, his right not being affected by the decrees and proceedings of the several Courts.

The defendant entirely repudiated the plaintiff's claim and represented that in the suit of 1807, the then Zamindár admitted that Kattubadi was fixed on the village in question before the permanent settlement was made. That his permanent right to the village was established by the late Sadr Court and that therefore the present suit was inad-

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missible under Section X, Reglation II of 1802. That the disputed village had been in the enjoyment of his (defendant's family prior to the permanent settlement and that the quite-rent had been received from him by the plaintiff.

The Agent dismissed the suit as having become res judicata against the plaintiff by the decree of 1807. The plaintiff appealed.

G. E. Branson, for the appellant, the plaintiff.

Sloan, for the respondent, the defendant.

The Court delivered the following

JUDGMENT :—Having reconsidered this appeal, we think our former judgment should be amended and another decree passed. The suit was brought to recover, with mesne profits and other incidents, a jiráyati village alleged by the plaintiff to form part of his Zamindári and to be wrongfully held by defendant by virtue of the execution of a decree of the late Commissioner of the Northern Circars passed in 1844.

The defendant pleaded that he held on a permanent lease subject to a fixed pnit-rent, that he and his ancestors had held on that tenure since and previously to the permanent settlement, and that the qnit-rent had been received from him by the plaintiff.

The Agent dismissed the suit on the ground that the matter had become res judicata against the plaintiff by the decree of 1807.

The decree in that suit, brought by the father of the present defendant against the ancestor of the plaintiff, went upon the sole ground, that the summary attachment was wrongful because the village had been held previously to the permanent settlement on the title or claim of title then asserted, and judgment was accordingly given for the plaintiff.

We are of opinion, therefore, that the matter of the present claim is not res judicata, because the question of the existence and validity of the alleged grant, on which the

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defendant relies, was not determined, and there is nothing then to prevent the Zamindár from contesting it within the period prescribed by the statute of limitations.

Now if the case had stood upon the statements in the plaint and the records in the former suits, we should have thought the claim of the plaintiff clearly barred by the statute. It is unnecessary to consider now the effect, as against a Zamindár's successor, of the Regulations of 1802, because it is manifest that they have no application to titles existent at the period of the permanent settlement. If therefore, the plaintiff cannot otherwise succeed in the suit he will not be saved by these regulations.

In 1807 the ancestor of defendant asserted against the ancestor of the present plaintiff the title which is asserted to-day, and the Court determining that a right of proceeding summarily did not exist, referred the defendant to his action. Defendant was then left in peaceable possession until 1825, when, on the attachment of the Zamindári for arrears, this village was attached as a portion of it. The defendant then commenced another action, and the Commissioner of the Northern Circars directed that possession should be restored to the present defendant in accordance with the decree of 1807. The Judge therefore decided, that the act, by which the defendant had for this lengthened period been kept out of possession, was simply a wrongful act, and of consequence that the right of possession was during the whole of that period resident in the present defendant. It is impossible therefore to treat this erroneous incorporation of the village claimed with the Zamindári by the erroneous act of the Collector, as in any way interrupting the operation of the statute, which had clearly begun to run at the period of the decision in 1807. It seems perfectly clear upon plaintiff's own case that his suit is now and has long been barred by the statute of limitations.

But the defendant in his written statement relies on the right to hold the village in perpetuity under a grant made before the date of the permanent settlement, subject to a Kattubadi or quit-rent payable to the plaintiff, the amount of which the defendant distinctly states that the plaintiff has received from him since 1857. With this

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defence on record the plaintiff's claim to eject cannot now be disposed of absolutely on the ground that it is barred by the Act of Limitations. Payment of rent being admitted, he is not debarred from trying (as it is urged that he is desirous of doing) the validity of the permanent Kattubadi tenure claimed by the defendant. We have had, however, some doubt whether the question is one proper for determination in this suit, or whether the Court should let the decree for the dismissal of the suit stand ; reserving the right to bring another suit framed expressly to try such question. On consideration, we think that the question is properly open for determination upon the plaint in the present suit. It prays the recovery of possession, and although it proceeds on the right of the plaintiff, as owner, to recover from the defendant simply as a wrongful possessor, it does so on the ground, amongst others, of the invalidity of the grant relied on by the defendant, to which it refers (see the observations in the judgment in *Viraswami Graminy* v. *Aiyaswami Graminy* (I. M. H. C. Reps. 471.)

We are therefore of opinion that the proper course is to remand the case, in order that the disputed right to the possession of the village may be fully heard and determined and a decree passed by the Lower Court. And it appears to us at present that the proper issues to be recorded for that purpose are :—

1st. Whether the defendant, at the date of the suit held the village in question under a grant made to his ancestor before the date of the permanent settlement.

2nd. Whether the defendants holding under such grant was Kattubadi or other tenure subject to a fixed quit-rent, which the plaintiff could not legally determine.

We are not to be understood as confining the Lower Court to these issues, if, on the hearing, the Court should think an additional issue necessary.

The result is that the decree of the Lower Court must be reserved and the case remanded for further hearing and a decree on the merits. The costs of this appeal we think should abide the ultimate decision of the suit.

Suit remanded.