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because they had been destroyed by white ants, renders it pretty clear that he could not produce such proof.

Little was however said in the argument as to the principle on which the account ought to be taken, and we have reserved to the parties liberty to apply to this Court upon that matter.

Appeal dismissed.

[The Judgment of the Court as to the principle on which the account ought to be taken in this suit, will appear in the next part of these Reports.]

APPELLATE JURISDICTION (*a*)

Special Appeal No. 481 *of* 1864.

ELLAIYA .....*Appellant.*

LATE COLLECTOR OF SALEM.....*Respondent.*

In a suit against a Collector for an illegal seizure and subsequent usurpation of plaintiff's shares in an Agraharam village for non-payment of tirvai due from other tenants of the village, and to recover the increased tirvai imposed by the Collector.

Held, that the plaintiff's right to enjoy his share of the village lands under the original patta was not legally determined by resumption, and that, continuing liable only to the fixed rent, the plaintiff is entitled to the return of the amount paid under compulsion, in excess of such rent, at the date of the suit.

Held also, that the facts of pattas having been issued separately to each tenant, stating the share of land occupied, without defining the holding by boundaries, and the proportionate amount of assessment which the cultivator is to pay for it, though affording cogent evidence of the distinct liability of each for the amount of tirvai stated in his patta and no more, is not conclusive evidence of such individual liability.

Regulation XXVII of 1802 considered.

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THIS was a special appeal against the decree of the Civil Court of Chittur, in Regular Appeal No. 108 of 1861, on the file of the Civil Court of Salem, confirming the Decree of the Sub-Court of Salem in Original Suit No. 31 of 1856.

The suit was brought by Ellaiya (the special appellant) against the Collector of Salem, to recover rent levied from the plaintiff in excess of the permanent jodikay patta granted to him by Government.

(*a*) Present Scotland, C. J. and Innes, J.

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The plaintiff stated that in the year 1795 his ancestors obtained patta for 4 shares in the agraháram of Neykárapatti ; that by this patta they were required to pay annually rupees 67-13-2 jodikay ; that plaintiff's ancestors, and after them the plaintiff, paid the said jodikay regularly up to the January kist in 1853. That at that time, there being a balance found due by the village, the *whole* village was sequestered and the rents raised. That he, plaintiff, refused to pay rent in excess of what he had hitherto paid ; that in consequence of such refusal his property was ordered by the defendant to be zafted and sold ; that thereupon plaintiff paid the excess demanded, which he seeks to have refunded. The defendant answered that the village was not held in severalty, but jointly, and that consequently the shareholders were jointly as well as severally liable for the quit rent due on it.

Plaintiff replied that when the original paimásh was made, a separate patta was given for the holding of each person; that according by each paid the Circar dues separately, The Subordinate Court dismissed the plaintiff's claim.

The Lower Appellate Court, on review of judgment, upheld the decision of the Subordinate Court.

The plaintiff preferred this special appeal.

Mayne, for the appellant.

Dale, for the respondent.

The Court delivered the following

JUDGMENT :—Some delay has taken place in the decision of this case owing to enquiries, which, since the argument, it has been considered necessary to make of the Civil Court.

The plaintiff complains of an illegal seizure and subsequent usurpation by the Collector of Salem of his four shares in the agraháram village of Neykárapatti for non-payment of an account of tirvai or quit rent due from other tenants of the village ; and seeks to recover rupees 335-9-2, being the amount for three faslies of the increased tirvai which he had been compelled to pay upon resumption of the agraháram lands by the Collector.

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The Subordinate Court of Salem, in which the suit was instituted, decreed against the plaintiff. But on appeal the Civil Judge of Chittur, to whom the case had been referred for determination by the High Court, decided in his favour on the ground of irregularity in the proceedings of the Collector which rendered the resumption of the lands invalid. That decision, however, the Civil Judge afterwards, on a review of judgment, set aside on the ground of misconception of the evidence as to the times at which the tirvai fell due, and passed a decree dismissing the suit.

The plaintiff has appealed to this Court, and the questions we are called upon to consider are, first, whether the plaintiff's portion of the village lands was liable to attachment for tirvai due from other tenants of the agraháram lands: secondly, whether the Collector was legally empowered by direct resumption of the village to determine the plaintiff's holding and impose a new tenancy at an increased rent: and if so, then, thirdly, whether the act of resumption was irregular and ineffctual by reason of the tirvai not having been in arrear whilst the land was under attachment for a year before the resumption.

The first question depends entirely upon the conclusion, to be drawn from the evidence in the case, as to the terms and conditions of tenure upon which the plaintiff held his share of the agraháram lands; and, this being a special appeal, the conclusion come to by the Court below is final, unless affected by some substantial error or defect in law. Now the Civil Judge, taking the same view of the evidence as the Subordinate Judge, concurs with him in finding that joint liability for tirvai was a well understood condition attached to the holdings of the plaintiff and the other agraháram tenants. But it has been objected for the appellant, that the plaintiff's original patta was the only proper evidence of the terms of his holding, and that, taken with the mányams and other village pattas, it was conclusive of a separate tenancy and of the liability of the plaintiff to only the proportion of tirvai assessed on his share of the lands, and consequently, that there was error in law in the decision of the Lower Court. We are, however, of opinion that this objection is not sustainable. The pattas are all near-

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ly alike. Each states the share of land occupied, without defining the holding by boundaries, and the proportionate amount of assessment which the cultivator is to pay for it. No doubt such a patta, issued separately to each tenant, affords cogent evidence of the distinct liability of each for the amount of tirvai stated in his patta and no more; and its effect in that respect is strengthened by the form and terms of the mányam's patta in evidence, relating to the entire village. But it is not conclusive evidence of such individual liability. What we find expressed in the pattas is not necessarily inconsistent with a clear understanding, on the part of the tenant cultivators, that, although they cultivated certain portions of the village lands independently of one another, still that the whole of the lands continued liable to be attached for any rent in arrear. In this case the pattas were good evidence, but not, we think, conclusive, as to the plaintiff's liability in respect of rent, and they appear to have been fully considered by the Civil Judge with the other evidence. It certainly may seem unjust that a cultivator, holding a separate patta and not in arrear and who is not recognized as having any interest or control beyond the cultivation of the portion of land which he occupies, should be liable to seizure of his land for default of another cultivator in payment of the tirvai assessed upon his separate holding. It may however be that peculiar circumstances connected with an agraháram village have warranted the imposition of such a liability and make its continuance not unreasonable: and we suppose that must be so, as the Board of Revenue, through the defendant, strenuously insists upon the liability. At all events we must in this case, for the reasons just stated, consider the decision of the Lower Court final as to the liability in respect of rent, subject to which each tenant held; and it is to be observed that the same decision appears, from exhibits I and II, to have been arrived at in a suit like the present before the Subordinate Court in 1844.

Then as to the second question. It has been taken throughout the case that the plaintiff and the other villagers had a continuous right enjoy the land as tenants, subject to the payment of the fixed rent. Further, it is

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clear that the Collector did resume the whole of the agraháram lands, after they had been attached under Regulation XXVII of 1802, and that he proceeded under Clause 32 of the Hukumnámá or rules of Revenue Practice of the district; and taking its requirements to have been complied with, the important point for decision is the power of the Collector to resume the lands for non-payment of rent, and increase the amount of tirvai fixed by the original patta issued in 1795 and paid regularly from that time by the plaintiff and his predecessors :—an apparently still more harsh proceeding towards the plaintiff for another's default than the attachment of his land to compel payment of the rent in arrear.

The Lower Court's decision upon the point appears to have proceeded on the ground that the Collector acted properly, in exercise of the discretionary power which the Government possessed by reason of its proprietary right, and also under the provision in Section 6 of Regulation XXXI of 1802. In the argument before us the Counsel for the appellant urged in effect, that Regulation XXVII of 1802 alone provided for the powers which the Collector might exercise on default made in payment of the Government tirvai, and that it contained no provision empowering him to resume the land and impose an increased tirvai on restitution to the tenant of the land attached. For the respondent the Government Pleader not only contended the contrary, but further asserted, as a protection to the Collector, the general right of the Government at any time to resume the lands and increase the tirvai, whether in arrear or not.

We may at once observe, as to Regulation XXXI of 1802, that it has no application to the present case. That Regulation no doubt given in express terms a power of resumption to Collectors, but it applies only to lands claimed to be *exempt* from assessment to the public revenue, and to the assessment of lands upon expiration of the grants or estates by or for which they were exempted. Lands which, having been held rent free, are found not to be entitled to *exemption* from assessment, or in respect of which the right to hold *rent free* has become forfeited, may be resumed.

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Was the Collector then empowered to act as he did by Regulation XXVII of 1802, under the provisions of which, there is no doubt, his attachment proceedings did and could alone take place? The whole scope and purpose of that Regulation is to provide summary process for the recovery of arrears of revenue; that is (as expressed in Clause II of Section 2), the whole or any portion of the month's kist payable by the holder of the land according to his Kabuliyat and remaining unpaid on the first of the next month. For the purpose of such recovery the modes of proceeding are,—attachment and sale of the land and other property of the defaulter to such extent as may be sufficient to make good the arrear (Section 5); and the imprisonment of him or his surety with attachment of the surety's land. Now here, throughout the numerous provisions of the Regulation, is mention made of resumption of the tenant's holding, nor is there anything to be found which gives to Collectors a discretionary power, without sale, to alter existing rights and make new terms of tenancy between the proprietor or farmer and the Government. When the proceeding is by attachment and the arrears with the interest and charges due are paid off during the current year of the attachment, it is made imperative on the Collector by Section 13, Clause 5, to withdraw the attachment and account for the receipts from the land; and the limiting of this provision to the revenue year current at the time of the attachment has no other effect, so far as appears in the regulation itself, than to leave the Collector at liberty, after the expiration of the current year to realize the amount remaining due by a sale conducted strictly according to the provisions of the law in that behalf:—how strictly, the late case of *Maharajah Mahashur Singh* v. *Baboo Hurruck Narain Singh*, (IX Mo. I. A. 268) is an authority tending strongly to shew. By such sale the plaintiff's interest in lands could be put an end to: but there appears to us to be nothing in the regulation, by which the Collector, obtaining from the tenant payment of the arrears and charges, is authorized to declare his tenancy forfeited simply for default in payment of rent and impose upon him new terms of holding. The only Sections (14 and 17) which provide for an immediate forfeiture, do so in express terms, and they apply only to a defaulters disobedience or resistance of the process

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issued to enforce payment of arrears. In our opinion therefore, the regulation under which the Collector attached the lands, furnishes no defence to the suit.

We are thus brought to consider whether the defendant might act as he has done, in exercise of the right which, it is urged, the Government possessed at anytime to resume and raise the rent to the full faisal rate :—in effect,to forfeit all the plaintiff's interest as tenant; for the right to resume, if it exists, goes the length of destroying the Inám character of the holding, and enabling the Collector to grant the land to a stranger. The defendant, no doubt, did only that which he believed he had the power to do, and the Government have adopted his acts. If therefore he can establish such right, the plaintiff has not been illegally coerced into payment of the increased tirvai. We certainly cannot recognize the broad proposition, which the argument of the Government pleader went the length of asserting, namely, that there was by law inherent in the Government, as paramount landlords, a perfectly arbitrary power to determine a tenancy such as that in the present case, and increase the tirvai, whether the tenant were in arrear or not. The case of the *East India Company* v. *Syed Alli and others*, (VII Moo. I. A. 555) cited as an authority, differs widely from the present, and beyond the case nothing was advanced in argument to shew that the grant or tenure of the village was in its nature resumable at pleasure. Indisputably the plaintiff had a right to a continuing tenancy at the fixed rent, and if he was liable to resumption and forfeiture of such right, quite independently of any regulation or other express legal enactment, it must because of the breach of a condition attached to his holding.

Now it has not been asserted by the defendant that, by non-payment of rent, the plaintiff, under the terms of his contract of tenancy, rendered himself liable to assumption ; and the pattas, which are the only evidence in the case of the terms of the original grant of the tenancy, contain nothing to that effect.

Nor are we aware of any authority establishing that resumption for non-payment of rent is a legal incident of an inám tenure like that of the appellant. The case of *Unide*

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Rajaha Raja Bommiraj Bahadur v. *Pemmasamy Vekantadry Naidu* and others (7 Moo. P. C. 128) is not authority bearing rather the other way.

Neither is it presented that the defendant acted under any special order of Government or the Board of Revenue. Obviously, the defendant has throughout proceeded under the discretionary summary powers given by Regulation XXVII, and has rested the right to determine the tenancy by resumption solely on the attachment proceedings and the Hukumnámá of the district. Since the hearing of the case we have had this Hukumnámá sent up for inspection. We find that, as usual, it is a book containing a number of written rules, which bear date in 1843—neary fifty years later than the plaintiff's original patta—and that it purports to be signed by the then Collector. The particular rules relied upon (31 and 32) are not limited to Agraháram lands, but in general terms state in effect that the quit rent, fixed on inám lands at a former time by certain persons who are named, and no other, should continue to be collected ; and that, for default in payment of such quit rent, the lands of inámdárs should, after being under attachment for one year be included in the Sirkár Amany land. Beyond these rules we have no information afforded us. Nothing was said in argument as to their authority or force, and we see no legal ground, on which in this case they can be held to give the additional summary remedy of direct resumption for non-payment of tirvai, when no Regulation or Acts warrants it, but on the contrary Regulation XXVII provides for the realization of the tirvai due by sale of the lands,and contains special provisions as to forfeiture of the rights of tenants. In adopting the discretionary summary remedy of attachment, the defendant, as Collector, proceed on his own responsibility and was bound to follow out the remedy strictly, and he was not, in our opinion, empowered to forfeit or determine the plaintiff's holding under theattachment except in the way pointed out by the enactments of the law. The defendant therefore has, we think, fail to justify the resumption of the land under the alleged paramount proprietary right of the Government. What would have been the legal effect (if any) of a previous special order from the Government to the Collector directing the resumption of the

lands for non-payment of rent, we are not called upon in this case to consider.

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The third question raised, it becomes unnecessary to decide; but we may state that we retain the opinion, expressed during the argument, that there was (as the Civil Court held on a review of judgment) a continuing arrear under the attachment for a year before the resumption took place, and therefore no irregularity as respects the requirements of Rule 32 of the Hukumnámá.

The result of our judgment is, that the plaintiff's right to enjoy his share of the village lands under the original patta was not legally determined by resumption, and that, continuing liable only to the fixed rent, the plaintiff is entitled to the return of the amount paid under compulsion, in excess of such rent, at the date of the suit. The appellant's costs in this and the lower courts must be paid by the respondent.

APPELLATE JURISDICTION (*a*)

Regular Appeal No. 38 *of* 1865.

SRI RÁJA SETA RÁMA KRISTNA RÁYUDAPPA RANGA RÁO BAHÁDUR GÁRU, Zamindár of Bobbily..... } *Appellant.*

STRI JAGUNTI SITAYAMMA GÁRU..... *Respondent.*

The appellant, a Zamindár, sued to recover a portion of the Zamindári granted by his grandfather upwards of 40 years ago, upon the ground that the grant was not made in conformity with the requirements of Regulation XXV of 1802, and that, in the absence of the observance of the formalities there prescribed, the grant was void.

Held, that more than 12 years having elapsed since the title accrued to the person under whom the plaintiff derived his right to resume, the appeal should be dismissed.

Clause 14, Section 1 of Act XIV of 1859 construed, and applied to the decision of the Court in *Regular Appeal No.* 23 *of* 1865.

THIS was a regular appeal from the decree of Charles Collett, the Civil Judge of Vizagapatam, in Original Suit No. 30 of 1864.

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(*a*) Present : Holloway and Innes, JJ.