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claims to have vested in him the complete right to all that remains due of the judgment-debt, and, assuming that he can substantiate his claim by proof, he is the transferee now entitled to the benefit of the attachment in execution of the decree.

The order appealed from must be set aside, and the appellant left at liberty to renew his application for process of execution. Upon such application the Civil Court will hear and determine the claim upon its merits. The appellant's costs of this appeal must be paid by the respondent. The costs in the Civil Court will abide the determination of the Court in the renewed application and be paid by the party who fails. If the application should not be renewed within one month from the re-opening of the Court after the adjournment each party will bear his own costs.

Miscellaneous Petition No. 79 of 1869 put in by Mr. Mayne on behalf of Vencataramangeri Josayee, but which was not argued in consequence of our intimating the opinion we had formed, will be simply dismissed.

Appellate Jurisdiction. (a)

Special Appeal No. 612 *of* 1868.

THESIKAM IYENGAR and another...*Special Appellants.*

GANAPATHY IYER and 3 others.....*Special Respondents.*

By an agreement entered into between the predecessors of the plaintiffs, Durmakartas of a Temple, and the defendants it was provided that the defendants should have a permanent right of cultivating certain lands belonging to the Temple upon payment of the circar tirva and a swamibogam mentioned in the agreement. Subsequently to the agreement the Government notified that the melvarum payable to the Government would be thenceforth permanent and not according to the nerick ascertained by reference to the market prices in certain towns, and the Government stated that any advantage arising from the change of system should go to the ryots themselves.

The plaintiffs sued the defendants to recover the balance of the market value of the produce of the land cultivated by the defendants after deducting the amount of circar kist paid by them.

Held,—(reversing the decree of the Lower Courts) that the defendants were only liable to pay the amount of swamibogam mentioned in the agreement and that no right was acquired by the plaintiffs by virtue of the subsequent arrangement made by the Government.

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THIS was a Special Appeal against the decision of A. D. Srinivasa, the Principal Sadr Amin of Tinnevelly, in Regular Appeal No. 424 of 1866, confirming the decree of

(a) Present: Scotland, C J, and Carmichael, J.

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the Court of the District Munsif of Brammadesum in Original Suit No. 157 of 1866.

The suit was brought by the plaintiff, one of the durmakurtas of the Subhandraraja Permal pagoda. The plaint stated that out of the market value of melvarum paddy of two and half years of certain land set apart for certain ceremonies of the said pagoda, the circar tirva paid by the 1st and 2nd defendants should be deducted, and that the balance should be recovered from them.

The 1st and 2nd defendants denied the claim.

The District Munsif gave a decree in favor of the plaintiffs. The following is taken from the District Munsif's judgment:—

It is undisputed that the land referred to in the plaint belongs to the plaint pagoda, and that the 1st and 2nd defendants are bound to pay to the pagoda swamibogum either in paddy or in market value on account of the said land,—this is a fact which the defendants admit.

The moment the 1st and 2nd defendants admit that they are liable to pay swamibogum to the plaint pagoda, it is clear that the said pagoda is the owner of the said land that the deity alone is the tenant, and that the 1st and 2nd defendants are purakudies.

On the produce of any land there are three sorts of varum; they are the purakudie's varum payable to the individuals who cultivate the land as purakudies, the swamibogum or kudivarum payable to the owner of the land, and the melvarum payable to the circar. According to this arrangement, the purakudi varum has been enjoyed by 1st and 2nd defendants, the melvarum by the circar, and the swamibogum or the kudivarum by the plaint pagoda. As two sorts of varum have been paid by the 1st and 2nd defendants, it is further established they are purakudies of the said land.

The land referred to in the plaint appears to be in the possession of the 1st and 2nd defendants under the former consent of the plaintiff and others.

Defendants appealed, and the Principal Sadr Amin dismissed the appeal. He delivered the following judgment:—

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In Original Suit No. 121 of 1851 before the District Munsif of Brammadesam brought by the then durmakurtas of the temple of Sunthararaja Perumal at Virananallur against these 1st and 2nd defendants and another for rent and ejectment, a razinamah was filed on the 30th December 1852, and it provided among other things that the 1st defendant and his heirs should allow the temple a fixed annual rent of 45 kottas of paddy, besides paying to the Government the usual assessment of the lands. In 1859, the Government resolved to take the value of their melvarum at a fixed favorable rate and the 1st and 2nd defendants have ever since enjoyed the profit accruing from this arrangement, *i. e*, the difference between commutation and market prices of the melvarum paddy. Now the durmakurtas allege that the proprietary title of the lands being in the temple and the 1st and 2nd defendants being its tenants the temple is entitled to this profit and therefore sue for rupees 732-3-1 the estimated profit of a certain period prior to the suit.

The 1st and 2nd defendants who are the substantial defendants contend that they are the owners of the land and that the temple is entitled to nothing more than the rent fixed by the razinamah of 1852.

The Lower Court found that the temple was entitled to the profits in dispute and decreed to the plaintiffs rupees 678-10-1. From this decision the 1st and 2nd defendants appeal now.

The razinamah of 1852 which is filed in this case as the defendant's document II distinctly states that the lands belong neither to the plaintiffs nor to the defendants nor to the villagers but to the temple, that no one could encumber or alienate the lands, and that the 1st defendant and his heirs should cultivate them "with the right of cultivation" subject to payment of rent and assessment. After such an emphatic and clear admission of the temple's right, it is absurd on the part of the opposing defendants now to deny that title and to claim to be the proprietors of the land. The Lower Court was therefore perfectly right in finding that these defendants were only the tenants of the temple. This being so it is clear to my mind that

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the profit arising from the olungu or commutation system should go to the landlord and not to the tenant.

The decree below must therefore be confirmed and the appeal dismissed.

The 1st and 2nd defendats preferred a Special Appeal to the High Court setting forth the following reasons:—

I. The plaintiffs as durmakurtas of the pagoda are not entitled to the profit arising from the commutation directed by the Government in 1859.

II. The Lower Courts have misconstrued the legal effect of the razinamah relied upon by the plaintiffs.

Scharlieb, for the special appellants, the first and second defendants.

Mayne, for the special respondents, the second and fourth plaintiffs.

The Court delivered the following

JUDGMENT:—The plaintiffs in this case have been decreed by both the Lower Courts the balance of the market value of the produce for three fuslies of the land cultivated by the 1st and 2nd defendants as parakudi tenants after deducting their share and the amount of the circar kist paid by them. And the question raised in the appeal is whether the plaintiffs were entitled to a decree for more that the amount of swamibogum payable under the agreement entered into on the 30th of December 1852 between the plaintiffs predecessors in the office of durmakurta and the 1st and 2nd defendants.

That agreement provides for a permanent right of cultivation and the granting of puttahs subject to the payment of the circar tirva and a fixed yearly swamibogum of 45 kottas of paddy from Fusly 1262 (1852) calculated at the rate of 8 kottas per kotta of the land. Under it the defendants have held and still continue to hold as tenants, and very recently before the present suit the plaintiffs brought a suit (No. 96 of 1866) to enforce payment of arrears of the swamibogum fixed by it. There is then a subsisting contract of tenancy which binds strictly the plaintiffs as well as the defendants in regard to the amount of swamibogum, and if the plaintiffs can exact what has been decreed them in excess of that amount, it

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must be on the ground of a fresh right acquired by the arrangement sanctioned by the Government in 1859.

The extract from the *District Gazette* proves what the arrangement was. The Government considering that the practice of settling the jumabundy according to the "nerick" ascertained by reference to the market prices in certain towns, instead of according to the "Olungu nerick" formerly fixed for each village, had been oppressive to the ryots, it was notified by the Collector to all the ryots that the "Olungu nerick" would from Fusly 1269 be the only jumabundy nerick; that by the change the profits arising from sales of paddy at higher prices than the Olungu rates would go to the ryots themselves,—and that thenceforward claims for remission would not be admitted except in the case of very heavy loss occasioned by unavoidable causes, such as want of water. Obviously the arrangement was intended to operate as a commutation of the Government melvarum for the benefit of the ryots, and in consideration of such benefit they have been thereby placed in a less favourable position as respects remission of the melvarum.

It was a concession to the ryots of the right to cultivate at a fixed melvarum, and the plaintiffs having had as durmakurtas no interest in the melvarum before the concession was made it is clear that they did not thereby acquire any right to that portion of the produce of the land which but for the concession would have gone to the Government as melvarum. Swamibogum is a distinct due, and the plaintiffs' right and the defendants' liability thereto are subject to the terms of the agreement subsisting between them.

For these reasons the decrees of the Lower Courts must be reversed, and it must be declared that the plaintiffs are entitled to recover as the annual swamibogum of the land mentioned in the plaint only 45 kottas of the produce, and the 1st and 2nd defendants must be ordered to pay the value of the arrears for the three fuslies mentioned in the plaint calculated at the rate of rupees 7-4-0 per kotta. We think the plaintiffs and the defendants should bear their own costs in the Court of First Instance and that the 1st and 2nd defendants costs in this and the Lower Appellate Court should be paid by the plaintiffs.