Appellate Jurisdiction (a)

Regular Appeal No. 78 *of* 1868.

RANI KATTAMA NACHIAR, ZEMINDAR OF SHEVAGUNGA and another... ... } *Appellants (1st and 3rd Plaintiffs).*

SUBBARAMA AIYAN and another..... *Respondents (Defts.)*

A suit brought by the plaintiff, a Zemindar, to recover mesne profits from the defendants who held under the preceding Zemindar whose possession of the zemindary during the period included in the suit was declared to be wrongful, was dismissed by the Civil Judge on the ground that puttahs and muchilkas had not been exchanged between the plaintiffs and defendants under Section 7, Madras Act VIII of 1865.

Held, that the cause of action did not arise out of the relation of landlord and tenant, the ground of suit being that the defendants were wrongfully in the enjoyment of the villages as against the plaintiff and liable to account for all the profits received during the period of such enjoyment.

Held, further, that the period of limitation applicable to such a claim is six years before suit.

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THIS was a Regular Appeal against the decree of E. C. G. Thomas, the Acting Civil Judge of Madura, in Original Suit No. 3 of 1867.

The plaintiff sued for the recovery of rupees 12,622-14-11, being the balance (after deducting what had been credited in the account of mesne profits of the zemindary for the intervening period), of the melvarum (landlord's share), from Fusli 1260 to Fusli 1272 collected by the defendants, though payable to the Zemindar of Shevagunga, for the two villages Muthankammai and Mathukammai Uthukammai in Amarapathy taluk of the zemindary, which were enjoyed by the defendants under an invalid lease granted to the 1st and 2nd defendants by Bothagurusami Tevar, the senior paternal uncle of the late Zemindar of Shevagunga, at a time when he wrongfully enjoyed the zemindary and under a sale of a portion of those villages made by the 1st and 2nd defendants to the 3rd defendant.

The plaint stated that under the decree of the Privy Council, dated the 8th December 1863, the plaintiff got the zemindary of Shevagunga and its appurtenances; and by an order of the Civil Court dated 27th February 1865, she

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was declared to be entitled to the mesne profits thereof from and after Fusli 1260. Subsequent thereto, the defendants were demanded, but they did not pay the amount for the period during which they wrongfully enjoyed the said villages, nor did they account for or make good the melvarum (landlord's share) wrongfully collected by them during that period. Then the cause of this action accrued

The written statement of the defendants set forth and relied upon the fact that puttahs and muchilkas had not been exchanged between plaintiff and defendants and submitted that the suit ought to be dismissed under Section 7, Madras Act VIII of 1865.

The defendants, besides relying on the validity of the lease under which they held, pleaded the Act of Limitation.

The issues were settled in the following terms :—

1. "The defendants aver their cowle valid and binding on the 1st plaintiff. The 1st plaintiff denies the same. The issue therefore is for the defendants to file and prove the cowle-deeds and their validity as against 1st plaintiff, and also the deed of sale executed between 1st and 2nd defendants and 3rd defendant."

2. "The 1st plaintiff will be allowed to bring evidence to disprove their validity."

The Civil Judge dismissed the suit.

The following is extracted from the Judgment :—

The two villages in dispute were obtained on cowle from the Zemindar now declared by the Privy Council to have been in wrongful possession in the years 1831 and 1833 respectively.

They were at that time uncultivated and covered with jungle. They were granted to the defendants on easy terms, and they have (doubtless by a considerable expenditure) brought them to a high state of cultivation and enjoyed the possession of them now 36 and 34 years respectively.

The 1st plaintiff now seeks to recover the difference between the amount of rent that she learns, from their own accounts, the defendants have lately been obtaining

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and that mentioned in their cowle title deed as she considers this former sum to be the amount rightly leviable by her as proprietor from the time the Privy Council declared her to be the rightful owner of the estate. The demand is not for the usual mesne profits, for they have been paid and credited but for an enhanced rate.

Although issues were given, no witnesses were examined, as all the facts were admitted and each party relies on the law points they consider to be in their favor.

As to the point involved in the 1st issue, although the genuineness of the cowle-deed is not questioned, the validity of it cannot be maintained because it was granted by an individual who has been declared by the Privy Council to have had no right to the zemindary, and by the High Court to be therefore incapable of granting any deeds connected therewith and all such transactions of his must therefore be held invalid.

The 2nd issue depending upon the first, the sale-deed must be held to be invalid when the invalidity of the cowle deed is declared.

When we come to a consideration of the 3rd issue we find that the 1st plaintiff relies entirely on the decision of the Privy Council and the accounts of the defendants for a single year. To this the defendants reply that whatever the position given to the 1st plaintiff by that decree she is not entitled to the enhanced mesne profits which she now claims because she has not gone through the legal forms which can alone give her a right to them: she has not observed the conditions they say are required of her by Section 9 of Regulation V of 1822 and Section 7 of Act VIII of 1865: no exchange of puttahs and muchilkahs has taken place between plaintiff and them as landlord and tenant.

First plaintiff replies that this omission on her part was an unavoidable consequence of her position—the title was in dispute and therefore she was not acknowledged and could not act as landlord: she thus admits the defendants' argument but pleads that on account of her position the rigid letter of the law may not be strictly adhered to. She would have it equitably relaxed in her favor.

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To this however it is to be remarked that

1st. Even supposing the relaxation that she asks shewn her in the absence of any agreement or of an account shewing any other amount to be leviable from these lands than those acknowledged to have been regularly due and regularly paid it is impossible for 1st plaintiff to name any specific sum as that to which she can by right lay claim.

2ndly. If equity is to be allowed to come in at all it is manifest that it should be on the side of the defendants, at whose expense a worthless part of the zemindary has been rendered valuable, and who have spent large sums in reliance on a title which they had every reason at the time to believe a good one.

Whatever the rights confirmed by the decision of the Privy Council the 1st plaintiff is of course not exempted thereby from liability to such conditions and obligations as the laws of this country lay upon her.

I am of opinion therefore that, whatever the 1st plaintiff's powers of future enhancement of the rent and of eviction, the absence of the tender of puttahs is fatal to her claim for any enhanced rate for past time.

The plaintiff's claim is therefore dismissed with all costs.

The plaintiffs appealed to the High Court.

O'Sullivan, (*The Advocate General* and *Mayne* with him) for the appellants, the 1st and 3rd plaintiffs.

Miller, for the respondents, the 2nd, 3rd defendants.

Sanjiva Row, for the 1st respondent, the 1st defendant.

The Court delivered the following

JUDGMENT:—This is a suit for the recovery of mesne profits received from two villages of the zemindary of Shevagunga from Fusli 1260 to Fusli 1272, during which time the 1st and 2nd defendants held a lease of the villages from Bothagurusami Tevar whose possession of the zemindary was afterwards decided to be wrongful. The 3rd

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defendant held under the 1st and 2nd defendants for a part of the time. The Civil Court has decreed the dismissal of the suit on the ground that an exchange of puttahs and muchilkas as between landlord and tenant was necessary to entitle the plaintiff to recover.

This decision is clearly wrong. The cause of action did not arise out of the relation of landlord and tenant. The very contrary is the ground of the suit, namely that the defendants were wrongfully in the enjoyment of the villages as against the present Zemindar and liable to account for all the profits received during the period of such enjoyment, and there is no doubt that they are liable in the suit. The question is to what extent.

The first objection on the part of respondent was that the recovery from the Zemindar who was ejected under the decree of the Privy Council of the amount of rent which had been paid to him by the 1st and 2nd defendants was all that the present Zemindar was entitled to. But that is clearly not so. That amount was only a part of the mesne profits, and the defendants are liable to account for the remainder of the mesne profits received and retained by them.

The next objection was that the suit was barred by Clause 16, Section 1 of the Act of Limitations as respects so much of the mesne profits claimed as had been received more than six years before the institution of the suit. This objection is, we think, valid and the effect of it is to preclude the plaintiff from receiving more than the mesne profits received by the defendants in the years 1861 and 1862. The amount of these mesne profits must be ascertained by the Civil Court, and in taking an account for that purpose the Court should allow in favor of the defendants any outlay in either of these years which can be considered to have been properly incurred on account of the cultivation or in otherwise obtaining the profits of each year.

There must be a decree reversing the decree of the Civil Court and declaring that the 1st appellant the Zemindar is entitled to recover the mesne profits received and retained by the defendants during the years 1861 and

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1862 and directing the Civil Court to inquire and ascertain by a proceeding in execution of the decree the clear amount of such mesne profits with which the 1st and 2nd defendants and the 3rd defendant are and is separately chargeable. The amount so ascertained the said defendants must be ordered to pay to the 1st appellant. The parties, we think, should bear their own costs of this appeal and in the Lower Court.

Appellate Jurisdiction (*a*)

Special Appeal No. 384 *of* 1868.

YEKEYAMIAN.....*Special Appellant.*

AGNISWARIAN and another.....*Special Respondents.*

According to Hindu Law sons acquire rights only in the property which belonged to their father at the time of their birth and have no legal claim to property of which a bona fide disposition, effectual as against their father, had been made long before they were born.

The right of an after-born son to share as a co-parcener divided property depends upon his mother being pregnant with him at the time of a partition.

The father of the plaintiffs adopted the 3rd defendant. After the adoption the wife of the father gave birth to a son. Thereupon the father effected a division of the property with the adopted son and gave the latter a larger share than he was entitled to receive by law. The father married a second wife and the plaintiffs were the issue of the marriage.

Held that the plaintiffs were not entitled to a partition of any portion of the property which fell to the share of the adopted son.

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THIS was a Special Appeal against the decision of R. Davidson, the Civil Judge of Trichinopoly, in Regular Appeal No. 114 of 1866, modifying the decree of the Court of the District Munsif of Torriore in Original Suit No. 120 of 1865.

Srinivasa Chariyar, for the special appellant, (the 3rd defendant.)

Rama Row, for the special respondents (the plaintiffs.)

Savundranayagam Pillai, for the 1st special respondent (the 1st plaintiff.)

The facts are sufficiently set forth in the following

(*a*) Present : Scotland, C. J, and Collett, J.