APPELLATE JURISDICTION (*a*)

Regular Appeal No. 114 *of* 1869.

MRS. JESSIE FOULKES.....*Appellant.*

S. RÁJAHRATHNA MUDALI.....*Respondent.*

Suit to recover the proprietary right in a village belonging to plaintiff's muttah, which was let to defendant's father under a pattah and muchalkah, and which, on the death of her father, and since, the defendant refused to surrender upon the grounds (1), that the right had been leased permanently, subject to the regular payment of the stipulated rent, which condition had been strictly fulfilled; (2), that her father had expended large sums in making substantial permanent improvements in the village; and (3), that he had by gift transferred the tenancy to her.

Held, that on the true construction of the terms of the pattah and muchalka only a tenancy from fasli to fasli was created.

Neither Regulation XXX of 1802 nor Madras Act VIII of 1865 operate to make tenancy, established by ordinary pattah and muchalkah, of a permanent nature by attaching to it the condition that it should be indeterminable as long as the stipulated rent was paid.

*Special Appeal No.*9 *of* 1870 [ante, page 164] followed.

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1871. *May* 1.

R. A. No. 114 *of* 1869.

THIS was a Regular Appeal against the Decree of E. F. Eliott, the Civil Juge of Salem, in Original Suit No. 4 of 1869.

The suit was brought to recover possession from the defendant of the village of Tadamputti appertaining to the muttah of Kunnankurchy, with arrears of produce of the said village.

The plaint alleged that the village in question was leased out with possession to Mr. G. Fischer, the father of the defendant, by the ancestors of plaintiff, on an annual rental of Rupees 1,478 under a lease-deed, dated 30th March 1846, and a pattah and muchalka duly exchanged between the respective parties in accordance therewith, and that Mr. Fischer continued to be in the enjoyment and possession of the same village on the payment of the aforesaid yearly rental up till the date of his demise in August 1867, when the defendant usurped possession of the village and collected the rents from the ryots. The plaintiff, therefore, preferred this suit to recover possession together with arrears of produce since the date of the demise of the late Mr. Fischer, the original lessee.

The defendant denied the plaintiff's right to recover the village or to eject her from the same, and claimed the same

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under a deed of gift duly executed to her, shortly before his demise, by her father the late Mr. Fischer, the original lessee, assigning and making over to her all his right, title, and interest in the said village, which (as stated in the said deed of gift) he (Mr. Fischer) had obtained on "permanent lease"—she further stated that she ever since continued to possess and enjoy the said village, and make no default in payment of the fixed rent of the village, but that the plaintiff, with a view to unjustly obtain possession from her thereof, refused to receive the kist amounts when tendered to him by defendant's people according to the terms of the pattah granted to her father, which she affirmed to be a pattah conferring a permanent right to hold the village in question, and containing no clause or condition limiting her father's or her right of enjoyment.

The following is a translation, in part, of the lease, exhibit A :—

"Lease muchalkah executed by Mr. G. F. Fischer..... to Arumuga Madali and Shunmuga Mudali.....

As I have obtained from you the village of Tadamputti attached to the said Kanndukurichi muttah under lease for an annual rent of Rupees 1,478, I myself shall hold under my enjoyment the Turapaddy lands, immemorial waste and all other poramboke lands.....and pay the above fixed rent, Rupees 1,478, every year, on the 30th of each month, according to the instalments fixed, commencing in the next year Parabava (1846) or Fasli 1256, and obtain receipts for the same. In case of failure to make such payments I shall be bound to pay the amount with interest calculated from the date of expiration of each instalment up to the end of that fasli ; and if I do not do so, I shall put you in possession of the said leased village in the beginning of the following year. I shall also be deprived of the benefit of the repair of the tank, bank, etc., if I had done any in the said village . .....I shall continue the payment of the said rent notwithstanding any impediment occasioned by the excessive rain or from want of the same."

The Civil Judge held that the lease-deed in question, exhibit A, was not of the nature of a "permanent lease" as

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contended by defendant, inasmuch as it contained no clause or condition to that effect, or in any way as regards "perpetuity" or insuring to the tenant a more stable hold upon the land, but, on the contrary, was expressedly an ordinary annual rental to the original lessee, Mr. G. Fischer, for the term of his life-time alone, and was inoperative after his death, after which the possession of the village reverted to the plaintiff; and as such, that it was a lease at will and that the defendant was not entitled to the enjoyment and possession of the said village. He, accordingly, decreed for the plaintiff as sued for with costs, leaving the question of mesne profits to be determined at the time of the execution of the decree.

The defendant appealed on the grounds, amongst others, that the lease did not create a tenancy at will, and that the tenancy was permanent, subject only to the condition of punctual payment of rent.

The *Advocate General*, for the appellant, the defendant.

Mayne, for the respondent, the plaintiff.

The Court delivered the following judgments :—

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SCOTLAND, C. J.—This appeal arises out of a suit to recover the proprietary right in a village belonging to the plaintiff's muttah, which was let to the defendant's father under a pattah and muchalka executed on the 30th March 1846; and which, on the death of her father in August 1867, just after the end of the Fasli, and since, the defendant had refused to surrender upon the ground (pleaded in the suit) (1), that the right had been leased permanently, subject to the regular payment of the stipulated rent, which condition had been strictly fulfilled; (2), that her father had expended large sums in making substantial permanent improvements in the village, and (3), that he had by gift transferred the tenancy to her. The plaintiff also sued for mesne profits from the death of the defendant's father. In the Court below there was no dispute as to the due payment of the rent by the defendant's father and the tender and refusal of it as it became payable since his death; and to establish the alleged permanency of tenure, the terms of the pattah and muchalka appear to have been alone relied upon. In the

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defendant's written statement it is also rested upon the custom of the country, but no attempt has been made to prove such a custom. The Court below decided that the pattah and muchalka created an ordinary yearly tenancy, which the defendant had no right to the continuance of, and decreed the surrender of the proprietary right to the plaintiff, reserving the claim to mesne profits for consideration in executing the decree.

The questions raised and argued in the appeal are, whether the Court below has rightly construed the contract of tenancy as evidenced by the pattah and muchalka, and whether, if in terms it created a fasli tenancy only, Regulation XXX of 1802 and Madras Act VIII 1865 did not operate to make every such tenancy one of a permanent nature, by attaching to it the condition that it should be indeterminable as long as the stipulated rent continued to be duly paid.

As to the first question, I am clearly of opinion that by the terms of the pattah and muchalka, only a tenancy from fasli to fasli was created. I think that they evidence substantially the same contract and understanding as the agreement in *Special Appeal No* 9. *of* 1870, in which I have just expressed my judgment. (*a*)

The second question I have fully observed upon in the same judgment, and, for the reasons there given, I am of opinion that neither the Regulation nor the Act operated to extend the duration of the tenancy beyond the term provided for by the contract creating it. It does not appear to me to make any material difference, as respects this 2nd question, that the tenant in the present case was a middleman between the muttahdar and the cultivators of the village.

With respect to the decision in the case of *Freeman* v. *Fairlie*, 1 Moo. I. A., 305, which was not cited in *Special Appeal No.* 9 *of* 1870, it is enough to say that it does not, I think, give any support to the contention of the appellant. Both it and the decision in *Baboo Dhunput Singh* v. *Gooman Singh and others*, 11 Moo. I. A., 433, show that a

(*a*) See page 167.

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right in property for which a pattah has been granted may, by other evidence, be proved to be a permanent right, although the pattah contains no words importing permanency, but in the present case no evidence tending to show that is forthcoming. Then as to the improvements alleged to have been made by the defendant's father, it is quite in accordance with the terms of the contract of tenancy that the defendant should receive from the plaintiff a just proportion of the amount which has been expended in making permanent improvements, by which the value of the village to the plaintiff has been increased.

I am of opinion, therefore, that the decree of the Court below should be affirmed, but without costs, and the plaintiff ordered to pay the amount which the Court below may find, upon an account taken for that purpose in execution of the decree, to be justly due on account of such unexhausted improvements.

HOLLOWAY, J.—I am of opinion that, on the plain construction of the document evidencing the lease, the tenancy granted was one from year to year even to Fischer. It is still more manifest that there is nothing to bind the lessor to Fischer's heirs or assignees. The terms of native conveyances, when they purport to convey permanent rights, are peculiarly emphatic, and it would be exceedingly difficult to construe any document not containing one of them as conveying a right to hold permanently.

With respect to the doctrine that a tenancy once created is rendered permanent by the law itself, I have given my reasons for considering this doctrine to have no foundation in my judgment in *Special Appeal No.* 9 *of* 1870.(*a*)

I think that there should be an inquiry as to the permanent improvements made, for which the lessee should be reimbursed, for the language of the contract implies that unless there was a failure to pay rent these should be restored.

I lay no stress upon the absence of words of inheritance, and I see no reason why Fischer's heirs or assignees should not have the benefit of the provisions.

(*a*) See page 171.

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As to *Freeman* v. *Fairlie*, much referred to in the argument, it seems to me to have no bearing upon the question, or perhaps bears the other way. The judgment of the Lord Chancellor shows that the estate of which the pattah was evidence was considered to have arisen under the Regulations of 1793, and the rent received by the pattah was considered rather to show that the estate was not of inheritance, but, on the explanation that the sum received was tax rather than rent, the estate was held freehold. The holding under the pattah did not make it so, but it was held to be so despite language apparently showing a holding as a mere tenant from year to year.

Appeal dismissed without costs.

APPELLATE JURISDICTION.

Regular Appeal No. 108 *of* 1870.

THE MADRAS RAILWAY COMPANY.....*Appellants.*

THE ZAMINDÁR of KÁVATINAGGUR.....*Respondents.*

Suit for damages sustained by plaintiffs by reasons of injuries caused to a line of Railway, the property of plaintiffs, by the bursting of defendant's tanks. Negligence, on the part of the defendant, was not alleged in the plaint. Upon the findings—(1)That the tanks were existent before living memory. (2) That they were breached by an extraordinary flood. (3) That they were tanks constructed in the ordinary manner with escapements sufficient for all ordinary floods and such as are universally employed. (4) That they were absolutely necessary to human existence, so far as it depends upon agriculture. (5) That the Railway was constructed with a full knowledge of their existence.—*Held*, that the suit was rightly dismissed.

Rylands v. *Fletcher* (L. R. 3 H. L., 330) discussed.

1871. *February* 15. R. *A. No.* 108 *of* 1870.

THIS was a Regular Appeal against the decree of C. G. Plumer, the Acting Civil Judge of Chittur, in Original Suit No. 17 of 1868.

The suit was brought in 1868 to recover payment from the defendant of the sum of Rupees 45,000, being the amount of damage sustained and incurred by plaintiffs by reason of injuries done in 1865 and 1866 to a line of Railway and to the works connected therewith, the property of plaintiffs, by the escape of water collected and kept by defendant on his land. At the first hearing the Civil Judge (E. F. Elliott)

(a) Present: Holloway, Acting C. J. and Innes, J.