Privy Council Appeal No. 86 *of* 1916.

Raja Jagaveera Rama Venkateswara Ettappa Maharaja Iyen Avergal, since deceased - *Appellant,*

v.

Alawarasa Asari and Others - - - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND JULY, 1918.

Present at the Hearing:

LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* LORD SUMNER.]

This was a consolidated appeal in suits brought by a number of ryots in the zemin of Gandamanaickanoor against their landlord, the zemindar of Ettiyapuram, in the district of Tinnevelly. He had tendered pottahs for Fasli 1312, at 8 fanams per guli, at which rate they had paid rent for several years. These the ryots rejected, claiming that the proper rate was 4 fanams only, and brought these suits under § 8 of the Madras Rent Recovery Act (No. viii of 1865) to obtain such pottahs as they said they were entitled to receive.

The Act of 1865, though since repealed by the Madras Estates Land Act (No. i of 1908) was the Act then in force, and in suits "involving disputes regarding rates of rent," § 11 provides that "all contracts for rent, express or implied, shall be enforced." Though this statute does not define "rent," § 3, which makes the delivery of pottahs and muchalkas mutually obligatory, requires that they shall state "the amount and nature of the rent," according as "it is payable in money or in kind or by a share in the produce." Regulation 30 of 1802, which had provided for such written records, and for fixing rents by the rates in the Government assessment, was generally silent as to rents fixed by contract between the parties. *Venkatagopal's Case* (I.L.R., 7 Madras 365) explains the circumstances under which, between 1802 and 1865, it had become necessary to give effect to contracts and not merely

to status and usage, and more particularly to such contracts as are implied from bare payment and acceptance of rent at a particular rate or measured in a particular way. Whether the framers of the Act fully appreciated its effect or not, the expression "implied contract" is an English term of art, and must be so construed. It involves the legal incident of some consideration moving from the landlord, as that incident is understood in English law. Accordingly the scheme of the section was as follows: If a contract, express or implied, and legally enforceable, was once established, the issue was determined, and the proper pottah was one giving effect to that contract. If, on the other hand, no such contract could be established, then, since in the words of the District Judge on the second hearing in his Court, "it is not pretended that this zemindari was surveyed by Government before the 1st January, 1859," local usage could be proved. If such usage established a proper rent, then either party, if dissatisfied with it, could require resort to the warum customary in the village for the division of the crop between landlord and tenant (of which no evidence was given or could have been given in these suits, as events happened), and, failing proof of such a customary warum, it would have been the collector's duty to fix such rate as he thought just, "after ascertaining if any increase in the value of the produce or in the productive power of the land has taken place, otherwise than by the agency or at the expense of the ryot." It followed, under this scheme, that if these ryots failed to prove an implied contract at 4 fanams enforceable between the parties, and, if the landlord succeeded in proving such a contract at 8 fanams, no further issue arose for decision.

The course which the litigation took was this: Thirty-eight suits were begun in 1903 and, although the ryots came from different villages in the zemindari, and had paid the garden rate for very varying terms, one alone, taken as typical of the rest at any rate so far as concerns the present appeal, was gone into. It was the suit brought by Arumugam Chetti, of the village of Poomalaigundu, in the zemin of Ganda-manaickanoor. The common state of facts was this. At some date, which varied a good deal from case to case, the ryot had made a well or tank at his own expense to water the land, which had been "punja" or dry land before, and thereafter, thanks to the water-supply, he resorted to garden cultivation. No permission for the working of these wells was required on the part of the zemindar. Rent had previously been paid at the rate of 4 fanams per guli, the usual "dry" rate: thenceforward, it was always demanded and paid at the rate of 8 fanams per guli, which was alleged to be the usual rate for "garden" cultivation. There seems to have been no demur to the 8 fanams rate till 1903, and presumably pottahs and muchalkas at this rate were regularly exchanged, in accordance with the Act.

Arumugam Chetti, the selected plaintiff, pleaded, rather indefinitely, that the field in question "was a punja land, bearing 4 fanams rate of assessment," but that since the well had been sunk "the defendant had been charging garden assessment," without having any right to do so. The zemindar did not deny the ryot's statement quoted above, but, besides relying on the actual payment of rent without dispute at the rate of 8 fanams, pleaded "a long standing custom for the zemindar to collect *teerva* from the ryots according to the following rate: (1) from 8 fanams to 10 fanams per guli for garden cultivation, and that, "in the said zemindari, the *faisal* rates have been fixed in Fasli 1210 at 15 fanams per guli for garden cultivation." The record leaves the actual course taken at the trial on these pleadings somewhat conjectural.

The Sub-Collector rejected the zemindar's evidence of custom, and made decrees in favour of the ryots, observing that their lands were "lands formerly paying punja rates (4 fanams)." He appears to have understood the custom pleaded by the zemindar to have been "a general custom to charge enhanced rents for garden crops, when raised by plaintiffs, irrespective of any improvement or alteration in the land made at plaintiffs' expense," and he held such a custom to be bad in law, as being contrary to the policy of the Act, relying on the case of Venkatagiri Raja (I.L.R., 9 Madras 27) and Fischer's case (I.L.R., 21 Madras 136). There is nothing in his judgment to show, that a contract, existing before the wells were made, for a rent at the dry rate of 4 fanams was either expressly proved on the one hand, or expressly questioned on the other, but there is good ground for thinking that the case could not have taken the course it did, unless the zemindar had conceded the existence of such a contract before the wells were made, and had alleged its supersession by another contract, since the payments at the garden rate began. In the High Court on the first hearing, Subramania Aiyar, J., says in terms that, "in the Lower Courts the parties throughout proceeded in all these cases on the footing, that there were no facts to try, except as to the existence of the alleged custom," and then proceeds to discuss the validity of such a custom, and whether or not the alleged contract to pay at the 8-fanam rate was or was not *nudum pactum*. This is only consistent with his having taken the view above stated of the course of the case at the trial on the arguments presented to the Court. Twenty-seven of these suits were appealed to the District Judge. In these cases the maximum period since the wells were made and payment of the garden rate of rent began was eighteen years. Eleven others, in which the period was over forty years, and therefore went back to a date before the passing of Act viii of 1865, had been reserved by the Sub-Collector for separate trial.

The District Judge allowed these appeals and made an order for a remand. On appeal to the High Court there was a difference of opinion on the first hearing, and on a second, under

§ 15 of the Letters Patent, the order of the District Judge was affirmed and the cases were sent back to the Sub-Collector. It is important to observe two things: (1) the zemindar had not appealed against the order as actually made by the District Judge; he appears to have been satisfied with it as it stood, whatever its true meaning and effect might be; (2) the High Court interpreted that order as meaning merely that the Sub-Collector ought to try the question, whether a presumption of the fact of an implied contract arose in any particular case, on the facts of that case, and declared that "Under the order of remand it is not competent to either party to reopen the question of custom raised in the first preliminary issue." Accordingly, neither on the remand nor in the subsequent proceedings until the appeal to their Lordships' Board has this question of custom been further raised. As the now appellant acquiesced in its being thus disposed of, and as the judgment appealed against accordingly does not deal with it, their Lordships cannot now entertain this point as a ground of appeal. It is enough to say that, if the custom was meant to refer to the determination of rates of rent "according to local usage," the evidence was irrelevant, unless and until it appeared that no contract, express or implied, had been made on the subject; and if, on the other hand, it was meant to be, as the Sub-Collector understood, a general custom to enhance rent if the tenant enhanced the value of the land at his own expense, then the zemindar was asking the Sub-Collector to do what the Act forbade him to do, at any rate when, in the last resort, and in default of proof of contract or of "warum," he came to fix a rent which he considered to be just. It never appears to have been suggested that what was meant was a custom of the country, with reference to which the ryots or their predecessors must be deemed to have contracted when they began to occupy the land in the first instance, or that the zemindar's claim was merely to have the original contract applied to new circumstances according to its terms, and was not a claim to alter those terms, and to imply a new contract for that purpose.

The hearing upon the remand took place in 1907. By this time seventeen of the thirty-eight suits of 1903 had been disposed of, or in some way had disappeared; but further suits had been brought for 1904 and 1905, respectively thirty-one and thirty-eight. Thus ninety suits were eventually dealt with; but again the suit of Arumugam Chetti was treated as typical of all, though he had "paid this enhanced rate for the first and only time in Fasli 1311, the year before suit" (Record, p. 185). Again the Sub-Collector decided for and the District Judge against the ryots, though neither Sub-Collector nor District Judge was the same person who had officiated before. Again, on appeal to the High Court, the ryots succeeded, and now it is the zemindar who appeals to their Lordships' Board.

The judgment of the High Court, now appealed against, says, "in the present suits it is admitted that, prior to the

construction of the wells, the tenants had always been paying the uniform punja rate of 4 fanams a guli for the suit lands, and this as far back as can be traced." From such facts it would be a legitimate inference that a contract to hold the lands at a 4-fanam rate of rent might be implied, and, when this is taken in conjunction with the terms of ryoti tenure, such a contract has at any rate an element of fixity, since so long as the ryot's rent is paid the zemindar cannot dispossess him against his will. It need not necessarily be inferred that such an implied contract gives a right of occupation at the punja rate in perpetuity. It would be enough for the purpose of the present case if its duration is implied to be so long as circumstances affecting the holding remain unchanged, otherwise than by the labour and outlay of the ryot himself. This is the basis of the decisions in favour of the ryots. How then is another and subsequent contract to be implied replacing the contract at the "dry" rate by a new one at the "garden" rate? The District Judge found as a fact, at the second hearing in his Court, that, in view of the long continuance of payments of rent at the garden rate, "in each and every case there was an implied contract to go on paying those rates, if not as long as the relationship of landlord and tenant continued, certainly as long as the conditions remained unchanged," and on this Ayling, J., delivering the judgment of the High Court, which is now under review, says—

> "The existence of an implied agreement is deduced mainly from the payment of the enhanced rate by the litigating tenants for a number of years varying from two to forty. The corroborative evidence is meagre, but I am not prepared, on second appeal, to set aside the District Judge's finding in this respect."

The question for their Lordships then comes to be that of consideration for the subsequent agreement at garden rate thus implied. What is this consideration to be? The mere letting of the land by the landlord will not do, for it was let at the dry rate already, and the ryot was entitled to continue in occupation at that rate, and no fresh consideration therefore moved from the landlord for the ryot's assumed promise to pay at the 8-fanam rate. The District Judge appears to have found consideration in the landlord's abstention from exercising his right to resort to the "warum" system, if the ryot refused to consent to pay at the rate of 8 fanams, but, under the Act, if there was an implied contract for the 4-fanam rate, that contract had to be enforced, and there was no question of resorting to the "warum" system. By the admissions, such an implied contract did exist. As, by consent, all the cases have been treated as typified sufficiently by Arumugam Chetti's case, no point can be made that in the cases where the 8-fanam rate had been paid for over forty years, the question arose before the Act of 1865 was passed; but, even if it could, there is no evidence that there was any "warum" in the village in

question. If it be said that at any rate the landlord could have put the tenants to the trouble of proceedings in the Sub Collector's Court and forbore to do so, there is no evidence that there was actually any such forbearance. Besides, if he had done so, still by the hypothesis, proof of the implied contract for the dry rate would have promptly defeated him, nor can it be said that a valid consideration can be found for the abandonment of the ryot's rights in the zemindar's submission not to raise a hopeless and groundless dispute of those rights, any more than a promise to pay a sovereign in satisfaction of a debt of a guinea is supportable by the consideration that it saves the creditor the trouble of bringing an undefended action for the larger sum.

The High Court therefore concluded that the implied agreement to pay the 8-fanam rate, though found as a fact, could not be enforced for want of consideration, and accordingly if the contract to pay the 4-fanam rate still stood, it was enforceable. Some contention was raised that the ryots were estopped by their conduct in paying the garden rate, but this estoppel in pais, for what it might be worth, rested on an implied representation of some existing fact, on the faith of which the zemindar had changed his position, and of this there was no evidence. The contention was really only the implied contract for the garden rate in another form. A further argument has been advanced, turning on the supposed true intent of the original contract for the 4-fanam rate, namely, either that it was a promise to pay the 4-fanam rate so long as the land should remain dry, and then, if garden cultivation should take place, to determine that contract, leaving the parties to make a new one, express or implied, and in default to resort to the "warum" system, or else, in the alternative, that there never had been two implied contracts, but really from the beginning only one, to the effect that the ryot would pay at the 4-fanam rate for the land while dry, and at the 8-fanam rate or some appropriate garden rate for the land when under garden cultivation, no matter at whose expense the water-supply should be procured, and this, as the legal result of this tenure having originated historically, as it is said, in a division of the produce of the holding, such as it might be from time to time, between ryot and zemindar in accustomed proportions. To both arguments there must be the same answer. The zemindar throughout contended for a new contract, arising in each case when the 8-fanam rate first began to be paid, and this is what the District Judge found and the High Court accepted. No case was made below, when the facts were examined or admitted, that the question was merely one of applying a very ancient agreement to new circumstances in accordance with its terms; nor would it be easy, to say the least of it, to suppose that any ryot voluntarily agreed to have his rent enhanced, whenever his own outlay should have rendered an improved mode of cultivation possible. Furthermore, such a theory, if applicable at all,

is of general application and is repugnant to the whole scheme of Act viii of 1865, which is based on the idea of making contract paramount, even when it is only implied, and of recognising agreed rents in supersession of division of the produce, which is to be resorted to only if no contract for a rent can be proved and if the fixing of rent according to the local rate is objected to.

In the result the whole case now turns on the question whether there was any consideration for the new promise to pay at the rate of 8 fanams for land, which was already held on a binding contract of tenancy at the rate of 4 fanams per guli. Their Lordships agree with the High Court that the answer must be "none." If the cases had been examined separately, if distinctions had been drawn between cases where the higher rate was paid for forty years and cases where it was only paid once or twice, if the possibility of presuming a lost pottah at 8 fanams or lost proof of consideration had been mooted, if the origin of these tenancies had been investigated and the terms of the original contracts fully discussed, other questions might possibly have arisen. As it is, their Lordships must deal with the case as they find it. They will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA MAHARAJA IYEN AVERGAL.

v.

ALAWARASA ASARI AND OTHERS.

DELIVERED BY LORD SUMNER.

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