Privy Council Appeal No. 158 *of* 1917.

M. R. Seturatnam Aiyar and others - - - - *Appellants*

v.

Venkatachala Gounden 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 15TH DECEMBER, 1919.

Present at the Hearing:

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

These consolidated appeals are from three decrees of the High Court at Madras dated the 18th February, 1917. The decrees had modified three appellate decrees of the District Court of Trichinopoly which in turn had modified three original decrees of the Court of the District Munsiff of Kulitalai.

The three suits thus came before the High Court in second appeal, so that the Court had no jurisdiction to interfere with any finding of fact by the District Court; its only power to determine issues of fact was that created by Section 103 of the Code of Civil Procedure, 1908.

Each of the suits is for the recovery of possession of agricultural land in a ryotwari tract, and has been instituted by the plaintiff as the Government Pattadar.

The number of the defendants in the several suits is 165, 103 and 30. They are not, however, in joint possession; on the contrary, they have separate holdings and should have been separately sued.

The plaintiff's title is conceded, and he alleges that the defendants are tenants under him and that their several tenancies

have been determined by notice. The defendants plead in answer to his claim for possession (1) that they severally have a permanent tenancy or right of occupancy, and (2) that they are protected from ejectment by the doctrine of estoppel.

The land in suit is of three classes, garden, dry, and pasture. In the Court of the Munsiff it was held that the plaintiff's claim to recover the garden land was barred by the plea of estoppel, but that his claim to the rest must succeed as no right of permanent tenancy was established.

From this decision cross-appeals were preferred. At the first hearing of the appeals the District Judge disallowed the plea of estoppel, and also held that the defendants had not established their right to a permanent occupancy. It is important to observe how he dealt with this last aspect of the case :—

> " The question for consideration in this case," he said, " is whether the defendants have shown that the plaintiff or his predecessor in title had contracted the right of tenancy (which) should be changed into a right of permanent occupancy."

His finding on this was as follows :—

> " In these circumstances it is, I think, clear that the defendants have not established any contract on the part of the plaintiff or his predecessor-in-title to convey to them a right of permanent occupancy."

Ultimately he passed decrees in the plaintiff's favour for possession of all the suit lands. The defendants appealed to the High Court, and the learned judges expressed the view that the mode in which the District Judge had dealt with the question of a permanent tenancy was not satisfactory. And after quoting the proposition as formulated by him they observe that :—

> " The real point for determination before the learned judge was whether on the admitted and undoubted facts of the cases and the evidence of both sides the defendants held the lands in their possession as tenants from year to year or as persons having a right of permanent occupancy."

The distinction between the two propositions is manifest. In the result the learned judges asked the District Judge to return revised findings on the following questions :—

> " 1. Whether the appellants in these appeals are tenants from year to year, or whether they have a permanent right of occupancy in the lands in dispute ?
>
> " 2. Whether the plaintiff is estopped from denying that the appellants in these appeals have a permanent right of occupancy ?
>
> " 3. What compensation, if any, the appellants in these appeals are entitled to for effecting improvements on the land by digging wells and ponds ? "

It has been contended that the Court acted without jurisdiction. But this proceeds on a misapprehension of what the High Court did. It did not remand under Rule 23 of Order 41 of the C.P.C., but merely framed issues and referred them for trial to the District Court as provided in Rule 25, and for this reason.

In the opinion of the learned judges of the High Court, the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits ; he had failed to consider whether, apart from the

particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the defendants were permanent or in the nature of occupancy rights.

It is perhaps to be regretted that the learned judges of the High Court did not give a fuller and clearer explanation of the reasons which influenced them, for the result was that the District Judge failed to grasp the true meaning of the issues framed by the High Court, and again dealt with the question in the same incomplete manner.

He treated the long duration of the tenancy and the uniform and unvarying rate of the rent as a circumstance by itself not sufficient " to raise a presumption of an implied contract that the right of tenancy should be changed into a right of permanent occupancy."

The District Court's findings were returned to the High Court, and the learned judges pointed out that the District Judge in his order submitting his findings had, notwithstanding the caution given by the High Court again assumed that the defendants' original right was that of tenants from year to year, and that it lay on them to prove an express or implied contract by which the right of tenancy from year to year was changed into a right of permanent occupancy.

Instead of a further reference the High Court proceeded to determine this issue and, if and so far as this was an issue of fact—a point on which it is not necessary to express a definite opinion in the circumstances of this case—the Court had power to deal with it under Section 103 of the Civil Procedure Code, 1908.

The conclusion at which it arrived was that the defendants had occupancy rights.

This finding, however, is attacked on the ground, first, that the burden of proof was wrongly thrown on the plaintiff, and secondly that in any case the facts did not justify the inference.

To determine on whom the burden of proof lay it is necessary to ascertain with precision upon what propositions of fact or of law the parties were at variance, and how matters stood when the cases reached the High Court.

The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed. It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established then the defendants must fail, and, to adapt the language of Section 101 of the Evidence Act, as the defendants were bound to prove the existence of their permanent tenancy or occupancy right, the burden of proof as to it lay on them. This view as to the incidence of the burden has been repeatedly recognised in the series of Madras decisions cited in argument and is, in their Lordships' opinion, not open to doubt.

There are passages in the High Court's final judgment which unquestionably invite the comment that the learned judges

misapprehended the proper incidence of the burden of proof. Thus the learned judges say :—

> " We hold that the mere fact of the plaintiff being Pattadar does not entitle him to any presumption in his favour."

This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title but also to negative the defendants' claim to permanency, and if this is what was meant it was wrong. But the sentence that immediately follows shows a truer perception of the position. The learned judges there say :—

> " We also hold that even if that fact could be of any use to him the various circumstances proved, unrebutted by anything in the plaintiff's favour, necessarily raise a presumption that the defendants have occupancy rights."

The controversy had passed the stage at which discussion as to the burden of proof was pertinent ; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them.

In the end the learned judges drew the inference—they speak of it as a presumption—in favour of the defendants' occupancy rights, and as finally expressed their determination was unvitiated by any error as to the burden of proof.

Nor is their inference contradictory of any finding of fact by the District Court ; on the contrary, it rests on the findings of that Court, and in the shape it took in the High Court it certainly had not been negatived by the District Court.

A word of explanation will make this evident. Permanence is not a universal and integral incident of an under-ryot's holding ; if claimed, it must be established. This may be done by proving a custom, a contract, or a title, and possibly by other means. Custom is out of the question here ; there is no suggestion of it. Contract has been decisively negatived by the finding of the District Court. Title was left untouched, and it was on title that the High Court pronounced in the defendants' favour ; for the meaning of their finding is not that there was a subsequent change in the relations of the parties, but that at the inception of those relations the defendants' predecessors possessed occupancy rights.

Conflict with any finding of the District Court being eliminated, it next has to be seen whether there were materials on which the High Court could come to its conclusion. They are minutely indicated in the judgment under appeal, and, in the absence of all information as to the origin of the defendants' holdings, it cannot be said that there is no evidence to support the High Court's finding. It may be that regarded even as a finding of fact—and it has been so treated throughout—it is not conclusive, though curiously enough it would have had that character had it been pronounced by the District Judge and not by two judges of the High Court. But after due consideration of the evidence brought to their notice and of all the circumstances, their Lordships see no sufficient reason to interfere with the High Court's conclusion; nor is it in their opinion to be regretted that effect

has been given to the very long possession—" immemorial " in the High Court's view—of the defendants and their predecessors.

It has been objected by the appellant that much of the evidence that has been used against him is not relevant, as the long possession, the alienations and the improvements to which it relates have not been traced to the several defendants or their predecessors in title. But the plaintiff, in disregard of the provisions of the Code, has united in the same suit not merely several causes of action, but several actions or suits against separate defendants, with the result that in effect the litigation has been conducted and treated throughout as though the defendants were a community with common interests. The plaintiff therefore cannot now be heard to object to the use of evidence to which the irregularity of his procedure has given relevance and to which he apparently took no exception when it was tendered at the trial.

The objection might have been formidable had the plaintiff sued the several defendants in separate suits, and their Lordships recognise that in view of the exceptional and irregular character of this litigation this case cannot in this respect be a satisfactory precedent in a properly constituted suit. As it is, however, the objection must fail and the High Court's finding as to the permanence of the defendant's rights in the garden and dry lands must stand.

Following on this finding the High Court, while confirming the decree for possession of the pasture land passed by the lower Courts, ordered that the plaintiff's suits, so far as they sought delivery of possession of the garden and dry lands, be dismissed.

The plaintiff alone has appealed from the High Court's decree, and the present appeals are limited to the garden and dry lands. For the reasons already indicated they must fail.

Their Lordships therefore will humbly advise His Majesty that the appeals should be dismissed. The appellant must pay the costs of the appeals.

In the Privy Council.

M. R. SETURATNAM AIYAR AND OTHERS

v.

VENKATACHALA GOUNDEN AND OTHERS.

DELIVERED BY SIR LAWRENCE JENKINS.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.