Privy Council Appeals Nos. 125 *and* 126 *of* 1916.

Sri Sri Sri Vikrama Deo Maharajulum Garu, Maharaja of Jeypore - *Appellant*

v.

Sri Rukmini Pattamahadevi Garu - - - - - *Respondent*

v.

Sri Rukmini Pattamahadevi Garu - - - - - *Appellant*

v.

Sri Sri Sri Vikrama Deo Maharajulum Garu, Maharaja of Jeypore - *Respondent*

CONSOLIDATED APPEALS

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1919.

Present at the Hearing:

LORD PHILLIMORE.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD PHILLIMORE.]

This is an appeal from a decision of the High Court of Judicature at Madras which varied a decree of the Court of the Agent to the Governor of Madras.

The suit was brought by the present appellant against the husband of the present respondent for possession of the pargana of Bissemkatak, and for arrears of rent and mesne profits.

The case made in the plaint filed on 17th September, 1906, was that Bissemkatak was in the plaintiff's Zamindari, that under various grants or leases it had been held by the ancestors of the

defendant paying rent and rendering services to the ancestors of the plaintiff, and that at the present time the governing instrument was a patta of the 1st August, 1877, under which the then Maharajah continued the father of the defendant in possession of the pargana on his payment of an annual Kattubadi of Rs. 15,000. The further contents of the patta were stated as follows :—

> " Just as your father used to attend in Dasara for service, so, now you should also present yourself with 500 paiks for service whenever directed to do so. These directions are given imperatively."

The plaint proceeded to aver that the defendant had been directed in 1903 to render services by attending the ensuing Dassara Durbar, at Jeypore, that he did not attend the Dassara, or remit the Kattubadi that year or in 1904, but had replied to the effect that Bissemkatak pargana was not held on service tenure, but that it was an independent Zamindari, which had only to pay to the Zamindar of Jeypore a fixed, unchanging and unchangeable Kattubadi of Rs. 2,200 as per permanent settlement records, and had remitted therewith Rs. 3,300 only ; that he had been warned of the consequences of his conduct and given an opportunity for withdrawing his repudiation, but that he persisted in repudiating the plaintiff's title to the pargana and in denying his liability as service holder under the plaintiff, and also in setting up a title in himself to the pargana as an independent Zamindar subject only to the payment to the plaintiff of a fixed, unchanging and unchangeable Kattubadi of Rs. 2,200 annually.

The plaintiff thereupon contendedt hat the pargana was held either on service tenure by the defendant merely as a remuneration for discharging the services annexed to the said office, or on a tenure subject to the condition and burden of rendering such service to the Zamindar, that in the former case it was competent to the plaintiff to dispense with such services and to resume the pargana at pleasure, and that in either case the defendant was liable to forfeit the pargana by reason of his repudiating the plaintiff's title and his (defendant's) liability to render such services and to pay the Kattubadi of Rs. 15,000 and of his refusing to perform such services.

The defendant by his written statement said that the estate of Bissemkatak was an independent estate at first, but became subordinate to the Jeypore Zamindari, that the owner of Bissemkatak, whom he styled Zamindar, did not hold his estate on condition of rendering any service to the Maharajah, and that at any rate, some time before 1689, he agreed to pay a fixed rent to the Maharajah and thereupon any duty to render service ceased. And he set up a patta supposed to be engraved on a copper plate whereby the Maharajah acknowledged the permanent and hereditary freehold right of the Bissemkatak Zamindar, fixing the Jamabandi or rent at Rs. 2,200. He further said that the Bissemkatak estate had no connection with Jeypore, nor was it subordinate to it, except in the manner mentioned above. He admitted that he had repudiated the claims made by the Maharajah in his letters of summons as to the tenure on which his estate was held, and he denied the various allegations made in the plaint,

both in respect of the nature of his tenure, and of the plaintiff's right to resume. He gave reasons why even if the obligation to render services was not put an end to by the fixing of a Jamabandi in lieu in 1689, the liability to render them had at any rate now ceased. And finally he submitted that in the circumstances of the case he had made no disclaimer, or denial in law, of the plaintiff's title such as to work a forfeiture of the estate.

The first question, therefore, to be determined was that of the tenure by which the defendant held his estate. His father had unquestionably accepted the patta of 1877; but if the defendant could establish the copper plate of 1689, he might then be able to free himself from the effect of the patta of 1877. There would still be a good many difficulties in his way, but in their Lordships' opinion it is unnecessary to discuss them. At the root of the defendant's case lay the question of the genuineness of the copper plate.

The Agent in the Court of first instance accepted it as genuine; the High Court took the opposite view.

After hearing all that could be said upon the subject by counsel for the respondent, who was in this respect a cross appellant attacking the decree of the High Court, their Lordships think that the decision of that Court was right, and they concur in the reasons given by Oldfield, J.

The ancestors of the defendant were no doubt from time to time, as far back as it can be traced, in occupation of Bissemkatak. They were excluded by the then Maharajah from possession about 1816 and remained out of possession till somewhere about the year 1850 or it may be 1853, when a lease was granted at the rent (said to be a reduced rent) of Rs. 1,500.

In October, 1853, occurs the first mention of the alleged copper plate, but it was probably not produced to anyone in authority. At that time and since the rent supposed to be reserved according to the copper plate was stated to be Rs. 2,200, but in 1902 to be Rs. 2,500.

The story told on behalf of the defendant was that some representative of the then owner took it to the Government agent in 1853 or 1854, and then instead of bringing it back to his master kept it, because he had a quarrel with his master; that it remained in his house for many years till there was a threat that some Government official was going to search the house in connection with some charge of malversation, whereupon the defaulting servant took the copper plate to the brother of the widow of the last owner, who gave it to the widow, who gave it to a Government agent in the year 1891. The document, therefore, according to this story, was out of proper custody from 1854 to 1891.

No doubt, in 1891, the copper plate which was produced at the trial, and which was relied upon by the defendant, was produced and handed to the Government agent, since when its possession is accounted for.

But the whole story is a most improbable one, and against it are the unquestioned facts that in 1845 and 1846, during the

time when the defendant's ancestors were out of possession, two suits were brought against the Maharajah to recover possession and discontinued; that when the defendant's ancestor was restored to possession it was on a reduced rent of Rs. 1,500, but with the condition of rendering service; that in 1854 a new lease at Rs. 2,500, and in 1864 a further lease at the increased rent of Rs. 5,000, always with the condition of service, and finally in 1877 the patta or lease already referred to were given and accepted; a state of things entirely inconsistent with the supposed existence of a permanent tenure at a fixed rent of Rs. 2,200 without any duty to render service.

In their Lordships' opinion the genuineness of the copper plate of 1689 was not proved, and there is no reason for saying that the patta of 1877 was invalid; and the relations between the parties must be held to be governed by the terms of this patta.

The cross appeal of the respondents, therefore, fails.

Their Lordships have now to deal with the principal appeal.

The High Court, while reversing the decision of the Agent and making a decree in favour of the appellant, has granted him relief to a limited extent only. It ordered and decreed that the respondent, who had by that time succeeded to the estate of the deceased defendant, should pay with interest the arrears of rent at the rate prescribed by the patta, but it did not give to the appellant possession of the property, holding that no forfeiture had been established.

In their Lordships' opinion it is a consequence of the decision of the High Court that the respondent holds a tenure derived from the Zamindari of the Maharajah, and there is an obligation upon the tenant for the time being to pay the rent, and so far as modern conditions of society and law permit, to render the service prescribed by the patta.

So far they accede to the contentions of the appellant. They have now to enquire whether in these circumstances the acts and omissions of the deceased defendant were such as to create a forfeiture of his estate.

The case for the appellant is put in paragraph 31 of his plaint:—

> "Whether the Pargana was held on service tenure by the Defendant merely as remuneration for discharging the services annexed to the said office or on a tenure subject to the condition and burden of rendering such service to the Zamindar, it is competent to the Plaintiff in the former case to dispense with such services and to resume the Pargana at pleasure, and in either case the Defendant is liable to forfeit the Pargana by repudiating the Plaintiff's title and his (Defendant's) liability to render such services and to pay the Kattubadi of Rs. 15,000 and by refusing to perform such services, and it is competent to the Plaintiff to enforce such forfeiture as he has done by his notice, dated 24th April 1906 and resume the possession and management of the Pargana."

He thus raises two grounds of forfeiture; the second, which their Lordships propose to take first, being that the tenant has repudiated his landlord's title; and it must be accepted that it

is the law of India that there are circumstances in which such a repudiation will work a forfeiture. This law is not ancient Indian law, but has been adopted by the Courts from the law of England, and is now embodied in a statute.

By the Transfer of Property Act, 1882—

> "Section 3. A lease of immoveable property determines :—
>
> * * * * * *
>
> "(*g*) By forfeiture ; that is to say (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease."

This statutory provision not being retrospective (see Section 2) does not govern the present case. But it is in substance the placing in a statutory form of the rule of law which had been already adopted by the Courts in India. (See *Kally Dass Ahiri* v. *Monmohini Dassee*, 24 I.L.R., Calcutta, 440.)

They are directed by the several charters to proceed where the law is silent, in accordance with justice, equity, and good conscience, and the rules of English law as to forfeiture of tenancy may be held and have been held to be consonant with these principles and to be applicable to India. (See *Nizamuddin* v. *Mamtozuddin*, 28 I.L.R., Calcutta, at p. 135.)

Now the rule of English law is that a tenant will forfeit his holding if he denies his landlord's title in clear, unmistakable terms, whether by matter of record, or by certain matters *in pais*.

The qualification that the denial must be in clear and unmistakable terms has not unfrequently been applied by the Courts in India, which have held that where a tenant admits that he does hold as a tenant of the person who claims to be his landlord, but disputes the terms of the tenancy, and sets up terms more favourable to himself, he does not, though he fails in establishing a more favourable tenancy, so far deny the landlord's title as to work a forfeiture. (See *Vilhu* v. *Dhondi*, 15 Bombay 407 ; *Venkaji Khrisna Nadkami* v. *Lakshman Devji Kandar*, 20 Bombay, at p. 354 ; *Unhamma Devi* v. *Vaikunta Hegde*, 17 Madras 218 ; *Chinna Narayudu* v. *Hurischendana Deo*, 27 Madras 23.)

Counsel for the respondent contended that she was entitled to the benefit of these rulings, and that in this case there was no such clear and unmistakable denial.

Whether this be so or not, their Lordships do not find it necessary to decide for the following reasons :—

(1) There is here no denial by matter of record before the present suit was instituted. Denial in the suit will not work a forfeiture of which advantage can be taken in that suit, because the forfeiture must have accrued before the suit was instituted. (See *Nizamuddin* v. *Mamtozuddin* already referred to), and the previous case of *Pranath Shaha* v. *Madhu Khula*, I.L.R., 13 Calcutta 96, there cited.

(2) As to forfeiture by matter *in pais*, this, according to English law, occurred when the tenant purported to make a tortious conveyance such as a feoffment with livery of seisin, the result of which was to purport to give to the feoffee a greater estate than he himself had in the land; in such case the estate thus given, though forfeitable immediately to the person claiming by a prior title, was good against everyone else. The feoffment was then said to operate by tort.

When by the Real Property Act (8 and 9 Vict., c. 106, s. 4), it was provided that no feoffment should have in future any tortious operation, the reason for imposing a forfeiture ceased.

It never was applicable in India, and their Lordships can find no authority for saying that an "innocent conveyance," ever operated in England as a cause of forfeiture, or that it has ever been held so to operate in India.

The English law on this subject is conveniently to be found in Bacon's Abridgment, "Leases," T2, and Platt on Leases, Part 7, Ch. I, Sect. 2.

Some confusion has arisen from a misunderstanding of the reason why a tenant from year to year may, when he has denied his landlord's title, be ejected without notice. (*Doe d. Gray* v. *Stanion*, 1 M. & W. 695; *Vivian* v. *Moat*, 16 Ch. D. 730.)

The reason is explained in *Doe* d. *Graves* v. *Wells*, 10 A. & E. 427, and in Platt on Leases.

It is not because the denial or disclaimer works a forfeiture. Platt expresses it thus:—

> "The holding being from year to year subject to the mutual will of landlord and tenant to determine it on giving the usual 6 months' notice, evidence of a disclaimer . . . is evidence of an election to put an end to the tenancy and supersede the necessity for such notice. . . . Hence verbal or written denials of a tenancy have rendered a notice to quit unnecessary, but it does not appear that they have effected a forfeiture of the term."

That a tenant who disputes his character as tenant does not thereby forfeit a lease for a term certain is shown by *Doe* d. *Graves* v. *Wells*.

The doctrine of *Vivian* v. *Moat* does not apply to Indian tenures such as the present. (See *Kali Kishen Tagore* v. *Golam Ali*, I.L.R. 13, Calcutta, p. 3 and p. 248, and *Vilhu* v. *Dhondi* already cited.)

This being so there was in the present case no such renunciation by the tenant of his character as such as to work a forfeiture.

Their Lordships have gone at some length into this point, because it was argued with much learning and insistence at their Lordships' Bar; but it is difficult to find any trace in the judgment of the High Court of its having been made a serious matter of discussion there.

It was no doubt raised slightly but sufficiently in pars. 62, 63, 64 and 73 of the Memorandum of Appeal to the High Court; but the written judgment of the learned Judges seems to deal with the other ground of forfeiture only.

This their Lordships must now approach. It has been described at their Lordships' Bar as the contumacious refusal of the defendant to render the services prescribed by the patta.

After two or more formal demands requiring the defendant's attendance at the Durbar and his payment of the rent due, the agent and Muktyar of the defendant wrote to the Maharajah on the 26th November, 1904. the following letter :—

"MAHARAJAH,—

"I am in due receipt of your so-called Hukums Nos. 818 and 683 of the 4th October, 1904, calling on me to attend your Dasara Durbar of this year with 500 Paiks and Rs. 15,000 (fifteen thousand) on account of what you call Talapu Dewani Kattubadi of Fasli 1313 and Rs. 7,500 (seven thousand five hundred) for the first half-year of Fasli 1314.

"2. The Bissemkatak Estate is not held on service tenure as you seem to imply. It is an independent Zamindari which has only to pay the Jeypore Zamindari a fixed, unchanging and unchangeable Kattubadi of Rs. 2,200 (two thousand two hundred) as per Permanent Settlement Records.

"3. I have, therefore, remitted Rs. 2,200 (Rupees two thousand and two hundred) on account of kattubadi for Fasli 1313 and Rs. 1,100 (one thousand and one hundred) for the 1st and 2nd instalments of the present Fasli 1314, which, I request you will be pleased to accept and formally acknowledge."

Thereafter, though warned of the consequences of his refusal, the defendant persisted in his non-compliance.

The Judges of the High Court came to the conclusion that the second condition of attendance, when on Sircar business, was so indefinite as to be unenforceable, and that the first condition, now that there was no longer any question of military service, was merely one of an attendance on ceremonial occasions, which was not service but complimentary only, or a mark of respect which every person, even an official, is expected to pay to his superiors. And they said that there was no authority for holding that failure in this respect would lead to forfeiture, or to a liability to resumption.

At their Lordships' Bar the point was made that there was no proviso for re-entry upon breach contained in the patta, and reliance was placed upon *Forbes* v. *Meer-Mohammed Taki*, 13 Moore I.A. 438. This case, however, was not one of contumacious refusal to render a possible service ; it was a case where, owing to altered conditions of society, the prescribed services could no longer be rendered, and where the superior landlord sought thereupon to resume the tenancy, and in the opinion of their Lordships failed.

There are, however, expressions in their Lordships' judgment in that case which are of some assistance to the respondent, and no authority of weight was produced for rendering the breach of such a ceremonial observance a cause of forfeiture or resumption, at any rate where the superior landlord was a subject, and not the Government.

It may be said that in this case the rent reserved is the principal matter, and that the rest is only subsidiary.

It may also be observed that under modern conditions it is doubtful whether a strict compliance *modo et forma*, with the

provisions of the patta, would not be of public inconvenience and perhaps forbidden by superior authority. Modern conditions also make the service suggested highly burdensome and without any corresponding benefit to the superior.

Having all these considerations in mind their Lordships agree with the judgment of the High Court, that the refusal to render these services did not operate to create a forfeiture or give occasion for resumption.

At the same time their Lordships must not be held to approve of the total failure to render ceremonial respect to the Maharajah, still less of the language in which the refusal was couched; and they must not be taken as deciding that there is no method by which an absolute and blank refusal might not incur some appropriate penalty, and they hope that these observations will lead the parties to make some sensible arrangement in future.

When both landlord and tenant were minors, a sum of money appears to have been publicly paid at the Durbar in lieu of service. Whether this course should be taken, or the attendance of the tenant with a small retinue at the Durbar should be deemed appropriate and sufficient, must be left for the present to the good sense of the parties.

Their Lordships, however, think that the appellant is entitled to have his position as superior put in a clearer light than it was put in the formal decree of the High Court, and that the order and decree that the respondent should pay, should be prefaced by the words: "This Court being of opinion that the defendant held, and the respondent holds, a tenure under the appellant."

Subject to this variation the appeal fails. But seeing that there has been this slight success, and that the cross appeal has failed, their Lordships think that justice will be met by leaving the decision of the High Court as to costs as it stands, and by giving no costs of this appeal.

Their Lordships will, therefore, humbly recommend His Majesty that the decree of the High Court be subject to the variation above mentioned, affirmed; and that the cross appeal be dismissed, and that the parties should respectively pay their own costs of the appeals to His Majesty in Council.

In the Privy Council.

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DELIVERED BY LORD PHILLIMORE.

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

1919.