

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Brett v. Ellaiya, from the High Court of Judicature at Madras; delivered 7th July, 1869.

Present:

SIR JAMES W. COLVILLE.

SIR JOSEPH NAPIER.

LORD JUSTICE GIFFARD.

SIR LAWRENCE PEARL.

THIS is an Appeal from a decision of the High Court of Judicature at Madras, made on Special Appeal, whereby it reversed a decision of the Civil Court of Chittoor given in favour of the Appellant, the Defendant in the original suit.

The Appeal comes before their Lordships *ex parte*, and it is desirable to state in detail the case as it is to be collected from the pleadings and issues, in order that the objections to the Judgment appealed from may be examined with reference to the case actually before the High Court.

The suit was brought in the Zillah Court of Salem by the Plaintiff, a Brahmin, against Mr. Brett, the then collector of that district. The Plaintiff states succinctly the nature of the claim, which is this: The Plaintiff therein describes himself as a co-sharer of Neikarappatu Agraharam, which means a maintenance for Brahmins. He claims to recover 335 rupees 2 annas 2 pice, being the rent collected from him in excess of the permanent Jodikai Pottah granted to him by the Government. He then proceeds to state the circumstances of that grant as follows: "On the assumption of his country by the Honourable

Company, a permanent revenue was settled in the time of Mr. Macleod for the four shares enjoyed by my ancestors and myself in the said Neikarappatu Agraharam for a long time; for my one karai, consisting of four shares, a pottah has been granted to the effect that a Jodikai revenue should be paid to the Government at 53 pagodas and $7\frac{1}{8}$ fanams, or 67 rupees 13 annas 2 pice."

He then proceeds to state due payment of his revenue, and that on a pretence that arrears were due on the whole village, it was, inclusive of his shares, attached unjustly, without ascertaining from whom the arrears were due, and collecting the same from the defaulter; and that a revenue in excess was fixed with a difference of rates, and was strictly demanded as stated by him thereafter in his *Plaint*. He then alleges that he paid the money under duress to avoid disgrace and sale of his lands, and stating the excess exacted during three years to be the sum for which he sues, he seeks to recover that demand, and prays that the annual revenue for the future may be adjudged to be collected from him under the *Pottah* of Mr. Macleod.

The answer filed by the Acting Collector on behalf of Mr. Brett, after stating the object of the *Plaint*, insists first on a want of jurisdiction in the Court to entertain the complaint, as it was unaccompanied by a written order under the Regulation 4 of 1831; and on the other part of the case it prays that the suit may be dismissed for want of due specification of the particular lands on which the alleged excess had been imposed.

A supplemental answer was subsequently put in which states further, in answer to the complaint, that the village was held not in severalty, but jointly, and that consequently the shareholders were jointly as well as severally liable for the quit-rent due on it. The reply insisted that the settlement was made for each plot, and a separate pottah given to each sharer; that no joint pottah was given for the whole, nor the money collected accordingly, nor a joint receipt given. It contains besides answers of an argumentative nature to the objection on the point of jurisdiction which it is not necessary to state in detail.

The *Rejoinder* reasserts and insists on the objection to the jurisdiction of the Court, and concludes

by saying that the Defendant does not consider it necessary to rejoin to any other part of the reply.

Upon this state of the pleadings the issues were framed, which are to be found at page 4 of the Record.

The points stated there for the Defendant to prove are :—

1. To prove that the village was not held in severalty, but jointly.

2. That Plaintiff, as a shareholder, was jointly responsible with the several holders.

3. That the excess of teerwah was legally due, and under what authority or regulation.

It appears, therefore, that the Court imposed on the Defendant the onus of proving the legality of the re-assessment, and of showing under what authority or regulation it proceeded.

The Defendant did not appeal from the framing of these issues; nor does it now appear to their Lordships that, in the framing of them, the Court miscarried by imposing any species of proof upon the Defendant from which the law exempted him.

If the new assessment was not legally imposed on the Plaintiff, his liability under the old assessment remained, and his title to recover in this suit was established.

The Court of Salem decided in favour of the Plaintiff on the point of jurisdiction, and on the issues it found in favour of the Defendant.

On appeal to the Civil Court of Chittoor, to which the Appeal was referred by the Order of the High Court, the decision appealed from was affirmed.

The Plaintiff then preferred a Special Appeal to the High Court, and that Court reversed the decision of the Civil Court at Chittoor, on the third issue, on the other issues agreeing with the Judgments below. The objection as to the jurisdiction was not enumerated amongst the grounds of Appeal, and was not renewed before the High Court.

The objection to the jurisdiction of the Court was, however, renewed before their Lordships on the hearing of this Appeal. As the proceedings before their Lordships disclose the grounds on which this objection rests, and as, if valid, it would apply to the whole litigation from its inception to its close, rendering all the proceedings null and

void *ab initio*, their Lordships think it right to say that, in their judgment, the decision of this point in the Court of First Instance was entirely correct; and that the Regulation, which must be construed strictly, applies only to suits brought to try the validity of grants emanating from, or confirmed or affected by, the direct act and order of the Governor in Council, and that no proof exists in the cause to bring this inam claim within the provisions of the Regulation 4 of 1831.

The Judgment appealed from was besides impeached for error before their Lordships, on these grounds: that the High Court had treated the acts of the Government as founded on Regulation 27 of 1802; that they had considered the case as one of resumption, and not as one of forfeiture; and had not given due effect to the Hookoomnamah, as evidencing the right under which the Collector had acted.

There is some difficulty in their Lordships' minds in supposing that the High Court would have dwelt so much on the Regulation in question, had it not been in some manner relied on for the then Respondent. It must be remembered that the third issue imposed on the Defendant the necessity of showing under what law or regulation he had acted in varying and augmenting the old assessment on the Plaintiff's shares; and the Court was entitled to receive distinct information on that point. Had the power exercised in this instance been an acknowledged power of the Government, acted on and submitted to in that part of the country, the Collector could, in the opinion of their Lordships, have had no difficulty in proving its continued exercise. Had it grown up as a custom of the country, though without any written law to sanction it, the terms of the issue were wide enough to admit proof of such custom as legalizing the acts complained of. The High Court, however, states in its Judgment that no such proof was produced, and none has been presented to their Lordships beyond the Hookoomnamah, on which Mr. Forsyth mainly relied.

Their Lordships are anxious to guard themselves from being understood as questioning, or in any way drawing into doubt, any practice which that instrument may indicate as to inamdars. Such

an instrument being only a direction from a Government Board or officer to others engaged in the Revenue Department cannot indeed create of itself any new law, or impose any new obligation on existing tenures from which they were antecedently free; but it may indicate in many cases subsequent to it the terms of engagements, and be proof of conditions of tenure in such cases.

As to inams of an admitted precarious tenure it might serve as notice of an intention to resume them on failure of the obligation of the inamdars to pay their actual assessment. This case, however, must be determined on the facts alleged and proved. The Plaintiff alleges his tenure to be ancient,—antecedent, indeed, to the assumption of the country by the East India Company; he admits, indeed, that the lands held by him were re-assessed by Mr. Macleod, but he states that assessment to be permanent, and that he held a permanent tenure under a pottah from Mr. Macleod. This case is inconsistent with an assessment variable at the will of the Government. The Defendant nowhere denies in his pleading the permanency of the tenure in this sense, nor pleads that the inam was in its nature revocable at pleasure, or that the assessment could be raised at the pleasure of the Government; he pleads only that the village, though enjoyed in shares, was held in jointure and not severalty, and so the Plaintiff's share was liable for defaults of other shareholders.

Mr. Forsyth argued, correctly, that this increase of assessment was not properly a resumption proceeding. But in this particular case the Government claims a right to increase the assessment on one who holds under an ancient and permanent tenure (for that averment is not denied), by reason of a default not arising from himself or any person holding his share. This is not a common incident of tenure, and is not involved in the right to hold the whole lands as hypothecated for the whole rent, though shares are held in severalty and subject to several assessments, it therefore lies on the Defendant to prove by what authority this increase in the amount of the rent has been made. The ordinary remedies for revenue in arrear fall short of such a power; the non-payment of revenue may arise from causes implying only the misfortune of the

holder, and in reason and justice, in the absence of contract or consent, a forfeiture should not be implied from a mere default of that nature, still less should the terms of an instrument alleged to evidence a right to declare a forfeiture be constructively enlarged. Now, if the terms of the Hookoomnamah be referred to, they do not necessarily include such a case as the present. They are capable of being read as extending only to the forfeiture of the shares of the actual defaulters; in express terms the case of a co-sharer under a separate assessment, and not in default, is not included in it, and its language would not lead one in such a case to consider it as meant to subject him to its operation. Furthermore the Court rightly observes that, by reason of its posteriority in time to the tenure of the Plaintiff, that tenure cannot become subject to its operation; and their Lordships concur in the opinion expressed by the High Court on this point. Their Lordships think that a power of such an exceptional and anomalous kind as that which has been brought into operation, and insisted on in this case, ought to be shown to have a certain and legal origin, and cannot, in the absence of any Statute or Regulation, none such appears to exist, be presumed or established by a Court upon anything short of clear evidence of its continued exercise and prevalence. There has been no evidence amounting to proof of anything of the kind.

For these reasons their Lordships will humbly recommend to Her Majesty that the Appeal be dismissed.