

(1918) 03 MAD CK 0038
In the Madras High Court

Duddampudi Venkatrayudu (dead) and Others	APPELLANT
Vs	
Bikkina Subbarayudu and Others	RESPONDENT

Date of Decision : 22-03-1918

Acts Referred:

Citation : 46 Ind. Cas. 179 : (1918) 8 LW 599

Hon'ble Judges : Napier, J;Abdur Rahim, J

Bench : Division Bench

Judgement

Abdur Rahim, J.—This second appeal is by the 3rd defendant in the suit. The plaintiff 1st respondent as found by both the lower Courts is purchaser of the rights of defendants Nos. 1 and 2 in the lands in question amounting to 18 and odd acres, and he seeks to recover possession of the property from the 3rd defendant. The Kinds were granted as a "Nimebadi" Inam by the Rajah of Pittapur more than 100 years ago, but after the Permanent Settlement, to the ancestors of defendants Nos. 1 and 2, and both the District Munsif and the Subordinate Judge agree that the grant must be taken to have been of the Melvaram atone. The point for determination before us is whether the 3rd defendant is entitled to the benefit of Section 6, Madras Estates Land Act, and that depends upon the further question (a) whether the possession of the 3rd defendant on the date of the passing of the Act was or was not in the character of a mortgagee and if it was not, (b) whether the 3rd defendant had possession, of the land as Ryot or merely as a subtenant of the Inamdars. The land consists of 12 acres wet and 6 acres dry and it is found by both the Courts to be "Ryoti land", that is, cultivable land in an estate other than private land.

2. With reference to the first question, the 3rd defendant's connection with the land began on 27th February 1896, when defendants Nos. 1 and 2 borrowed money from him on a simple mortgage bond and let him into possession under a lease for 8 years (Exhibit A). In 1899 the Inamdars borrowed an additional amount and executed a consolidated usufructuary mortgage (Exhibit C); in 1900 they obtained from the 3rd defendant a further loan and for this amount

executed another usufructuary mortgage (Exhibit D) and on the same date as Exhibit D, defendants Nos. 1 and 2 granted a lease for 8 years (Exhibit MM). If the dealings had stopped here, the question whether the 3rd defendant's possession of the land was in the character of a Ryot or a mortgagee would in my opinion, be one of considerable difficulty. But on the 6th July 1904 the defendants Nos. 1 and 2 paid off all that was due to the 3rd defendant and got back the mortgage deed. (See Receipt Exhibit F.) On the same day, however, they executed Exhibit G, by which the lease Exhibit MM was kept in force. Therefore, since 1904 the 3rd defendant's possession was that of a lessee and this is supported by the fact that in 1910 defendants Nos. 1 and 2 sued and recovered decrees for rent from the 3rd defendant." This question was one of mixed law and fact and depended entirely on the effect of the above transactions. The Subordinate Judge, in holding against the 3rd defendant on this point, overlooked the fact that the mortgages were paid off in 1904 and he remained in possession wholly as lessee by virtue of Exhibits G and MM. If the 3rd defendant's possession were as in *Bengal Indigo Co. v. Raghobur Das* 1 C.W.N. 83: 7 Sar.P.C.J. 94 in part at least, not that of cultivator's only, but that of creditor's operating repayment of the debt due to them by means of the security, it would raise a question requiring serious consideration how far the judgment of the Privy Council could be distinguished on the basis of the provisions of the Madras Estates Land Act.

3. If, as I hold, the 3rd defendant was not in possession as mortgagee on the date the Madras Estates Land Act came into force, was he in possession as a "Ryot"?

4. "Ryot" means a person who holds for the purpose of agriculture Ryoti land in an estate on condition of paying to the land holder the rent which is legally due upon it. Now, that the land is "Ryoti land in an estate" is conceded and that the plaintiff is a landholder" is also conceded. See *Upadrasta Venkata v. Devi Sitaramudu* 24 Ind. Cas. 224 and *Kanti Venhanna v. Chelikani Rama Bow Garu* 26 Ind. Cas. 510. There can be no doubt that the 3rd defendant holds the land on condition of paying to the plaintiff for its use and occupation something which will be "rent" if the land is held by the former for the purpose of agriculture, a common requisite in the definitions both of Ryot and of "rent."

5. The Subordinate Judge holds that a subtenant of an occupancy Ryot is not a "Ryot" within the meaning of the law and in this, he is right. By Section 10 the rights of an occupancy Ryot are heritable and transferable and Section 19 contemplates a Ryot having tenants under him without forfeiting his right as a Ryot. A Ryot holds the land directly under a landholder" or, may be, under an Ijaradar or farmer of rents; therefore a Ryot's tenant cannot have the status of a "Ryot." This is also evident from the whole scheme of the Act, which I shall presently examine in connection with the next and the most important question in the case, whether defendants Nos. 1 and 2 combined in them the status both of a "landholder" and a "Ryot" and if so, what would be the result?

6. The grant itself is not forthcoming and it is not proved that by the grant both the Melvaram and the Kudivaram parsed to the ancestors of defendants Nos. 1 and 2. Nor is there any direct evidence to show either that at the time of the grant the ancestors of defendants Nos. 1 and 2 were in possession of the lands as cultivating Ryots or acquired the Kudivaram interest after the grant. It is not shown that they ever cultivated the lands themselves or through farm-servants. The lands were in fact always cultivated by tenants and the fact that defendants Nos. 1 and 2 and their ancestors were high caste Vaishnavites related to the priests of the Rajah of Pittapur and resided away from the village where the lands are situate, would tend to support the District Munsif's inference that their possession and enjoyment were in the character of land-holders. The lower Appellate Court on the other hand relies upon the facts that the defendants Nos. 1 and 2 and their predecessors-in-title have been leasing the land for definite periods, hanging the tenants from time to time and varying the rent at their pleasure and that the 3rd defendant's ancestors had no connection with the land, for his conclusion that the former owned the Kudivaram as well as the Melvaram. The above facts taken together, to my mind, lead to the conclusion, not that there were no Ryots on the land who had a permanent right of occupancy at the time the Inam was granted to the ancestors of defendants Nos. 1 and 2, but that either no such right was insisted on against them or it must be taken to have been relinquished. It is observed by Wallis, C.J., in *Zemindar of Chellapalli v. Rajalapati Somayya* 27 Ind. Cas. 77 : (1915) M.W.N. 1: "In this connection it is to be borne in mind that numerous instances have come before the Courts in which subsequent to the decision of *Chockalinga Pillai v. Vythealinga Pundara Sunnady* 6 M.H.C.R. 164, Zamindars succeeded in inserting in pittas and muchilikas terms negating the existence of occupancy right and that one mode of effecting this purpose was to deal with the land as Kambattam or home-farm land, even though it had never been cultivated by the Zemindar himself and there was no intention of so cultivating it". The mere fact that the 3rd defendant had not acquired occupancy right before this Act came into force, would not help the plaintiff. For it would not follow therefrom either that the plaintiff possessed the Kudivaram or that the 3rd defendant could not acquire a permanent occupancy right by virtue of Section 6

7. Now must the occupancy right always inhere in some one or other; if it is not in the tenant in actual occupation must it be presumed to belong to the landholder? This was so laid down by Miller, J., in *Ponnuswamy Padayachi v. Karupudayan* 24 Ind. Cas. 217 with respect to "old waste"; but Sadasiva Aiyar and Seshagiri Aiyar, JJ, dissented from this proposition in *Upadrasta Venkata v. Devi Sitaramudu*, 24 Ind. Cas. 224. It may be presumed that Miller, J., would have a fortiori applied the proposition in the case of ordinary cultivable Ryoti land and I am not sure that Sadasiva Aiyar, J.'s dissent is not limited to the case of waste land. The answer has to be sought in the true interpretation and effect of Section 8 of the Madras Estates Land Act. That Act, whose object is to declare and amend the law relating to the holding of land in estates in this Presidency,

divides lands in a Zemindari into two main classes (1) "private" or home-farm land and (2) Ryoti land including what is called "old waste", A Zemindar or landholder may enjoy his private land" in any way he chooses and the Act does not interfere with his right to make any contracts he likes with reference to its possession and enjoyment. The private" lands of a Zemindar are not capable of being added to, except by acquisition through especial proceedings instituted before the Collector in the nature of proceedings under the Land Acquisition Act. He can, on the other hand, if he so chooses, by contract or grant convert private" land into "Ryoti." His power to deal with what is called "old waste" is in certain respects larger than with respect to Ryoti land. But in "Ryoti land" proper, which forms the bulk of the land in a Zemindari, the rights are divided between two classes of persons, the Zemindar or landholder" to be more accurate, who is ordinarily entitled only to collect a "fair or equitable rent", and persons who are entitled to direct occupation and possession of the land for purposes of cultivation, that is, the Ryots, on the condition of their paying such rent to the landholder. This is in accordance with the rulings of this Court in Vencata Mahalakshamma v. Ramajogi 5 Ind. Dec. 896, Venkatanarasimha Naidu v. Dandamudi Kotayyu 7 M.L.J. 251 and Cheekati Zamindar v. Ranasooru Dhora 8 Ind. Dec.624, which expounded the law as it existed before the Act. The Act has taken every precaution to uphold the two distinct interests in Ryoti land, that is, the landholder's right to collect rent or "Melvaram" as it is called, and the Ryots' right to occupation for purposes of cultivation or "Kudivaram." The next question arises, what happens if the landholder acquires the occupancy right as well? Shephard and Subramania Aiyar, JJ., held in Cheekati Zamindar v. Ranasooru Dhora 8 Ind. Dec. 624 before the passing of the Act that even in such a case a Ryot who is admitted to possession of the land must be presumed to hold it on the same terms as an ordinary Ryot in a Zemindari, viz., that he or his heirs would be prima facie entitled to occupy the land for purposes of cultivation so long as they were willing to pay just or customary rent. Such a Ryot was not to be treated as a tenant from year to year except that where there was an express contract the rights of the parties would be governed by such a contract. The Act, however, has gone further in favour of the Ryot except in the case of acquisition of Kurdivaram interest by an Inamdar falling within the description of Clause (d) of Sub-section 2 of Section 3, i. e., an Inamdar whose grant has been confirmed or recognized by the British Government, which is not the case here.

8. Section 8(1) enacts : "Whenever before or after the commencement of this Act the entire interests of the landholder and the occupancy Ryot in any land in the holding have become united by transfer, succession or otherwise in the same person, such person shall have no right to hold the land as a Ryot but shall hold it as a landholder". Then Sub-section (3) says, the merger of the occupancy right under Sub-sections (1) and (2) shall not have the effect of converting the Ryoti land into private land." The effect of such an union, therefore, shortly is that the occupancy right ceases to exist; there is only the Melvaram left in the landholder, but the land still retains its character of Ryoti land and is removed, generally

speaking, from the operation of contracts. Thus, whomsoever the landholder thereafter lets the land to, he comes in not as a, tenant of an occupancy Ryot but as a Ryot of. Ryoti land within the meaning of Section 6(1). The lower Appellate Court holds that Section 8 (I) does not apply, because in its opinion defendants Nos. 1 and 2 could not be said to hold the entire interests" of the landholder as they were the grantees of a portion only of the Melvaram. But the mere fact that defendants Nos. 1 and 2 as Inamdara have" to pay something by way of quit rent to the Zemindar cannot make their interests in the land as landholders anything less than the entire interests", since the Ryot has to pay rent to defendants Nos. 1 and 2 alone as "landholders." The words "entire interests" were apparently intended to exclude such interests as those of a mortgagee. The Subordinate Judge has also relied on *Marapu Tharalu v. Telukula Neelaiaanta Behara* 2 M.L.T. 470, which lays down that the ruling in *Cheekati Zqnindar v. Ranasooru Dhora* 8 Ind. Dec. 624 as to the presumption that Ryots of Zemindari have a permanent occupancy right does not apply to the tenants of Inamdars. But he overlooks the fact that the above case was not governed by the Madras Estates Land Act. My conclusion, therefore, is that even if defendants Nos. 1 and 2 had acquired the Kudivaram right by succession, transfer, surrender or otherwise, by virtue of Section 8 (1) they retained the land only as landholders and defendant No. 3, having been in possession of it as a Ryot at the passing of the Act, acquired occupancy right therein u/s 6.

9. The decree of the Subordinate Judge will, therefore, be reversed and the appeal will be remanded to him for enquiry as to the amount of rent due to the plaintiff from the date of the suit to the end, of June 1917 and he will pass a decree for such amount.

10. The 1st respondent will pay the appellants" costs of this appeal and each party will bear his own costs in the lower Courts.

Napier, J.

11. The appellant is the 3rd defendant in this suit which was brought by the plaintiff to recover possession of the plaint lands and mesne profits from the 3rd defendant. The plaintiff is a purchaser from defendants Nos. 1 and 2, and the 3rd defendant, the present appellant, held the land under defendants Nos. 1 and 2 and now claims a permanent right of occupancy under the Madras Estates Land Act. The lower Appellate Court, after the framing of fresh issues on remand, stated the points for consideration as follows : "Whether defendants Nos. 1 and 2 had Melvaram as well as Kudivaram rights in the plaint lands, and were to be treated as landholders or Ryots within the Act; whether the 3rd defendant acquired the rights of permanent occupancy in the plaint lands under the Act," and decided both contentions against the appellant. Its finding on the 2nd point was that the 3rd defendant held the lands as usufructuary mortgagee, and as such was not a Ryot within the meaning of the Act. It further held that defendants Nos. 1 and 2 had both Warams in the suit lands and were thus Ryots within the meaning of the Act. I will deal with the latter finding first.

12. The process by which the lower Appellate Court arrived at this finding is as follows : It found that the plaint lands were a post Settlement Nimebadi- grant from the Rajah of Pittapur to the ancestors of defendants Nos. 1 and 2, that by that grant the latter were not created tenants of jerayati lands but that the grant was one of a portion of the Melvaranr and that, therefore, they were landholders within the meaning of the Estates Land Act as contended by the 3rd defendant. It then proceeded to consider the question whether they were also Kudivaram Ryots, and then found that the suit, lands had been in the possession of defendants Nos. 1 and 2 for the last one hundred years or more and had been leased out by them periodically to cultivating tenants, the tenants and the amount of rent varying from time to time, and that therefore, prior to the Act no cultivating tenant had any permanent right of occupancy. On this finding, the Court assumed that the permanent right of occupancy was in defendants Nos. 1 and 2, and that, therefore, the 3rd defendant, the tenant in possession at the date of the passing of the Act, could not acquire those rights. The logical result of such a proposition as this would be to render the provisions of the Madras Estates Land Act absolutely nugatory for if the fact that the cultivating tenants had not at the date of the Act a permanent right of occupancy showed that a permanent right of occupancy existed in their lessor, then obviously no tenant could acquire such a right under the Act, During the course of the argument we asked the learned Vakil for the respondent for authority for that proposition, and he was constrained to admit that so far as the Zemindar himself was concerned, no Court had ever held that the absence of occupancy rights in the tenants necessarily indicated that (he occupancy right was in the Zemindar and thus deprived the tenants of the benefit of the Act. He contended, however, that the position of the defendants Nos. 1 and 2 was different from that of the Zamindar, first, on the ground that they were riot Inamdars as found by the lower Appellate Court, but ordinary Jerayati tenants. With regard to this contention which was not very strongly pressed, I do not think it necessary to say more than that the name and history of this tenure clearly proves it to be, as found by both the lower Courts, an Inam.. He relied, however, most strongly on the reasoning of the lower Appellate Court above set out, contending that the fact that the lessors were Inamdars and not a Zemindar made all the difference, and that they were rightly held to have the permanent occupancy right. There can be no question that defendants Nos. 1 and 2 come within the definition of landholder, inasmuch as they are persons owning a part of an estate in that they are entitled to collect the rent of a portion of an estate by virtue of a transfer from the owner. This was found by the lower Appellate Court and is" not disputed by the plaintiff. Coming to the Kudivaram interest, there is no finding by the lower Appellate Court as to when this was acquired by defend ants Nos. 1 and 2. But the Court seems to assume that the fact that they were leasing the lands to their tenants at pleasure indicates that they owned those rights. It was contended by the, appellant that even if this was so, Section 8 of the Act would prevent the Inamdar holding the dual position, the section being as follows : " Whenever before or after the commencement of this Act, the entire interests of the landholder and the

occupancy Ryot in any land in the holding have become united by transfer, succession or otherwise in the same person, such person shall have no light to hold the land as a Ryot but eha)J hold it as a landholder, " The Sub-ordinate Judge held, however, that the entire interest had not become united, taking the view that the word " landholder" meant the whole interest of the Zemindar; and that, as the Inam was only a portion of an estate subject to the payment of Kattubadi to the Zemindar, there was no union of the entire interest of the landholder and of the occupancy Ryot. The lower Appellate Court- has fallen into an error here. We are not concerned with the interest of the Zemindar. The word " landholder " in the section has reference to the person claiming the interest, and it has never been disputed, and indeed has been specifically found by the Court, that defendants Nos. 1 and 2 were landholders within the meaning of the Act. In so far as this holding is concerned, defendants Nos. 1 and 2, as Inamdars, held the entire interest" of a landholder's right. The object of the section was to prevent the extinction of existing rights "of permanent occupancy. Such rights were, of coarse, well recognized before the Act, the object of the A at being to make them universal. The word "entire" was inserted in the Act to apply where a mortgagee of the Melvaram interest of the landholder acquired the rights of an occupancy tenant in a holding". In such a cage he would not be prevented from holding the land as an occupancy Ryot by the fact that he bad an interest in the Melvaram.. It provides for the converse case of that dealt, with in Sub-section 6, explanation, the object of that explanation, and Section 8 being to prevent the loss of the rights of occupancy by a tenant purchasing the landlord's interest and to prevent ; the loss of rights of occupancy by a landlord acquiring the interest of an occupancy tenant. Vide Muthu Reddi v. Muthu Venkata-pathi Reddi 37 Ind. Cas. 1 : (1916) 2 M.W.N. 180.

13. There still remains, however, the question, "Were defendants Nos. 1 and 2 ever occupancy tenants with a permanent right of occupancy ? " As far as I am aware, the only section in the Act which specifically deals with the Kudivaram right is Section 3 (2), Clause (d), describing one class of estate: " Any village of which the land revenue alone has been granted in Inam to a person not owning the Kudivaram thereof provided that the grant has been made, confirmed or recognized by the British Government." This has reference to Inams granted by the State or persons who claim the right to make grants prior to the Permanent Settlement, which grants have been confirmed by the Inam Commission, and was meant to exempt cases where a revenue Inam had been granted to persons already in occupation and cultivation of the land. It is not contended that this land comes within the exception indicated by this clause, this being a part of the class of estates covered by Clause (a). The District Munsif, in finding that the inam was only of revenue, relies strongly on the fact that the ancestors of defendants Nos 1 and 2 were Gnatis of the family Gurus of the Rajah, and states it to be highly improbable that they ever cultivated their holdings themselves. He further finds that no such cultivation by them has been proved, this finding of non- cultivation not being disputed here. The lower Appellate Court considers this

as immaterial, because defendants Nos. 1 and 2 had been in possession for the last 100 years or more and were leasing out lands periodically to changing tenants, this latter fact" negating tenants" occupancy rights. This may be so and it is not argued before us that the tenants had occupancy rights before the Act, all that is contended being that the absence of occupancy rights in the tenants does not indicate, occupancy rights in the landlords, defendants Nos. 1 and 2, so as to debar any cultivating tenant from acquiring occupancy rights under the Act. The learned Judge relies on a decision in Gullapalli Bhadrappa v. Gullapalli Venkata-ratnam 11 Ind. Cas. 545 : 10 M.L.T. 54. The point for decision in that case was, not whether the Inamdar was a ryot himself, but whether the tenants had occupancy rights at the date of the suit, the suit being prior to the Estates Land Act. The Court held that the presumption was that the Inam grant was only of the Melavaram right, the Zamindar himself presumably only having that right, and that the fact that the Inamdar was ejecting the tenants did not prove the absence of occupancy right in the tenants. The claim there went far beyond that claim here, and the case does not support the learned Judge's view.

14. To my mind the true tell is cultivation. This was the view taken by Sadasiva Aiyar, J., in an elaborate judgment in Upadrasia Venkata v. Devi Sitaramudu 24 Ind. Cas. 224, a case decided by him and Seshagiri Aiyar, J. He was dealing with waste lands in an Inam and said as follows: "The Inamdar, so far as the waste lands are concerned, cannot be considered to have the Kudivaram right in them, though he could create Kudivaram interest in a waste land by letting it to a cultivator and could have (before the Estates Land Act) converted it into a private land by cultivating it through his home-farm servants and thus got the Kudivaram right vested in himself. Till he does either of these things, the lands would lie waste, owned by the Inamdar...but he could not be said to have the Kudivaram right in it, Kudivaram implying direct contact by cultivation with the soil", and on page 897 Page of 38 M.--Ed. the learned Judge says: "When the Inamdar afterwards granted the lands for cultivation without giving the cultivators permanent occupancy rights and when he changed the cultivators from time to time, it cannot be said that thereby the Inamdar himself got any permanent occupancy or Kudivaram right in the land," as there is no evidence to prove that he let them expressly as his private or as home-farm lands. The occupancy right, that is the right to occupy and cultivate, was enjoyed by cultivating tenants from time to time though they did not get a permanent occupancy right thereby." I have pointed out in a case reported- as Tallapragada Subba Row v. Copisetti Narayana-swami Naidu 36 Ind Cas. 727 that to allow a person other than the cultivating tenant to intervene between the landholder and the cultivating tenant on a claim of Kudivaram right would be to frustrate the whole object of the Act, and for the purpose of arriving at the definition of the word "Ryot" by construing the rent section, I said that if a tenant is taking from the lands its Kudivaram interest and paying the Melvaram to the landholder, then, whether he cultivates the land himself or is compelled by circumstance to, have it cultivated for him, he is so paying money for the purpose of agriculture;

and applying that test, I declined to accept the proposition that, a person who had bought at public auction an interest in certain lanka lands from the Zemindar for five years and let it to cultivators, was" a Ryot within the meaning of the Act. It seems clear to me that defendants Nos. 1 and 2, the Inamdars, are not paying rent to the Zamindar and it seems to me, therefore, to follow that they cannot be Ryots. If they are not Ryots but have this Kudivaram interest, the result would be that no persons cultivating that land could ever acquire a permanent right of occupancy and that the object of the Act, namely, to grant permanent rights of occupancy to persons cultivating Ryoti land, would, in this case, also be frustrated. It is argued by Mr. P. Narayana-murthy that this view is incorrect, Miller, J., having taken a different view in an earlier case. The case is reported as Ponnusawmy Padayachi v. Kurupudayan 24 Ind. Cas. 217 : 26 M.L.J. 285 The learned Judge said that on the fact being found that the tenant had no occupancy right, the" presumption arises that the occupancy right was either granted to, or acquired by, the Inamdar. i am unable to see why any such presumption should be made. Unless the idea of the right to cultivate is to be essential to Kudivaram right, I do not see what meaning is to be given to that phrase and what difference there is in essence between such a right and Melvaram right. The earlier oases, in which the analogy between a Zamindari Ryot and a Government Ryot was traced by the late Muthusawami iyer, J., and Subramania Iyer, J., laid stress on the position of the Zemindar as the owner of the Melvaram corresponding to the Government ownership of the Melvaram in Ryotwari land and the position of the Zamindiri tenant as holding the right to cultivate just as the Ryotwari tenant has his right to hold and cultivate. To create a permanent right of occupancy under the name of Kudivaram right in Inamdars to whom the Melvaram alone has been granted, simply on the ground that they have been shown to have been letting the land to cultivating tenants for many years, is to give to them a right which does not naturally arise out of the relative positions of the., parties and is unknown where the " Zemindar alone is concerned. In his case the fact that he has been proved to have let the tenants into possession from the commencement, was, prior to the Act, sufficient to establish that the tenants had then no permanent right of occupancy, but it has never been suggested that these facts vested a permanent right of occupancy in him, created him a Ryot and thus prevented the Ryots from acquiring occupancy right under the Act. I do not see why the fast that he has assigned a part of his Melvaram rights to Inamdars who "are not shown ever to have cultivated the lands themselves should put them in any: better position than he himself would have been. From the date of the Inam, they would as a matter of course, exercise the rights that had previously been vested in the Zamindar, such rights including the letting of the lands to cultivators, and I can see nothing proved to have been done by them beyond what they would thus have been entitled to do. In this view I am of opinion that defendants Nos. 1 and 2 had not Kudivaram interest in the land in the sense that they had a permanent right of occupancy, I am further strongly inclined to hold, though I do not think it necessary to decide the point, that. where the land is admittedly part of an. estate and the lessor is

found to be a landholder within the meaning of sub Section 5, it is immaterial what other rights he may claim in the land, if there is a person holding for the" purpose of agriculture Ryoti land in that estate on condition of paying to such landholder the rent which is legally due on it. As pointed earlier in the course of my judgment, Section 3, Sub-section 2(d), which excepts Inams in which the Melvaram and. Kudivaram are vested in the same person, has reference to grants recognised and confirmed by Government and-it can certainly be argued that all other oases in which there is a person coming within the definition of a landholder and a person coming within the definition of a Ryot, such Ryot is given occupancy rights by the Act.

15. It remains now to consider the decision of the lower Appellate, Court that the 3rd defendant, being only a usufructuary mortgagee, could not be a Ryot within the meaning of the Act. The learned Judge gives no authority for this proposition, but it is sought to be supported in this Court on two oases from Calcutta and one of the High Court of Allahabad. The case of Bengal Indigo Co. v. Roghobur Das 21 C.W.N. 83 : 7 Sar.P.C.J. 94 : 12 Ind. Dec 848 was a decision of the Privy Council confirming the decision of the Calcutta High Court on the construction of a zar-i-peshgi lease and turned on the language of the Bengal Rent Law, Act X of 1859, and the Bengal Tenancy Act, VIII of 1885. Section 5 of the latter Act provides that in determining whether a tenant is a tenure-holder or a Ryot, the Court shall have regard to the purpose for which the right of tenancy was originally acquired, and their Lordships of the Privy Council held that the leases in question were not mere contracts for the cultivation of the land let, but that they were also intended to constitute and did constitute a real and valid security to the tenant for the principal sums which he had advanced and interest thereon. The tenants' possession under them was, in part at least, not that of cultivators only but that of creditors operating repayment of the debt due to them by means of security. We are asked under an entirely different Act to apply the decision of the Board to the facts of this case. The first answer is that we have not got those words in the sections of our Act, Sub-section 15 of Section 3 defining a Ryot as a person who holds for the purpose of agriculture Ryoti land on condition of paying, to the landholder the rent which is legally due upon it; and it is the policy of this" Act which we are to enforce and not the policy of the Bengal Tenancy Act. I am certainly prepared to accept the proposition that a mortgage of the land by a landholder to a person who was not in any sense of the word a cultivator, the income to be derived from the land being applied in discharge of the interest on the mortgage, would not create the mortgagee a Ryot. This is in accordance with the view which I had taken of the case above referred to and my reasoning in this judgment for such a procedure could be utilised by a landlord to prevent permanent right of occupancy being acquired by the actual cultivating tenant. But where a person has bond fide taken the land for cultivation and is cultivating it, the fact that he has advanced money to his landlord and sets off his rent against the interest due from the landlord cannot, in the absence of the words in the Bengal Act, prevent such cultivating tenant becoming an occupancy Ryot

under the Act. The case of Altaf Ali Khan v. Lalta Prasad 19 A.a 496 : (1897) A.W.N. 123 : 9 Ind. Dec. 820 did not turn on any question of the right of occupancy, and is, therefore, of no assistance to us. The history of this tenure is as follows: The 3rd defendant was admitted by the defendants Nos. 1 and 2 to the land in the year 1896, and on the same day he advanced money on a mortgage bond to the 2nd defendant. The tenancy was created by exchange of patta and muchilika for 8 years, the tenant taking 20 acres of land agreeing to pay a Cist of Rs. 210 per year for the purposes of cultivation. He agrees to pay the Kattubadi cist and the local cess payable by defendants Nos. 1 and 2 part of the first crop realised by him, to pay Rs. 30 in cash to defendants Nos. 1 and 2 and credit the balance of Cist towards the complete discharge of the interest due on the mortgage-deed. Three years later, the landlord borrowed a further sum of Rs. 500, the original sum having been Rs. 500, on a mortgage. This document recites that the mortgagee is in possession under the Cowle. of 1896, Exhibit A, and makes the following provision for the discharge of the interest. The future Cist due is to be credited towards the interest due on the whole sum of Rs. 1,000, the balance being taken towards the principal. The document is called a mortgage-deed with possession. The effect of this mortgage is to cancel the provision in Exhibit A under which a certain amount was to be paid in cash and to provide for a discharge of both principal and interest from the rent. The next document, dated 21st August 1900, (Exhibit D) recites that Rs. 100 is due on the mortgage Exhibit C, that the landlord has borrowed another Rs. 100 and provides for the repayment of principal and interest in 9 years. At the same time the landlord gave a patta and the tenant executed a muchilika Exhibit MM for the lands, reducing the Cist of Rs. 210 agreed by Exhibit A to Rs. 150. Then come Exhibits F and G executed on the 6th July 1904, just prior to the date when the lease under Exhibit A would expire. Exhibit F is a receipt in full discharge of the amounts due on the mortgages. Exhibit G is a muchilika by the 3rd defendant under which he agreed to pay a Cist of Rs. 188 for the 20 acres with the addition of another 6 acres of garden land for a single year and after the expiry of that year he should continue to hold under the muchilika of 1900, Exhibit MM. It is not disputed that the patta and muchilika evidenced by Exhibit MM were in force at the date of the Act and it is further in evidence that defendants Nos. 1 and 2 treated the 3rd defendant as their tenant, for they brought a suit against him to recover the amount of Rs. 436 due under Exhibit MM. This is proved by Exhibit L, The 3rd defendant set up that the present 1st and 2nd defendants, the plaintiffs in that suit, had agreed to sell the land, and Mr. P. Narayanamurti contends that Exhibit F of 1904, which purported to acknowledge receipt of the whole of the mortgage money due, was a nominal document in connection with this sale. The District Munsif held that, as there had been no registered sale-deed, the sale was not complete and that, therefore, the relation of landlord and tenant still subsisted as contended by defendants Nos. 1 and 2 in that suit.

16. This is the history of the transactions between the parties and I can find nothing in these documents which supports the finding of the District Judge, that

the 3rd defendant's tenancy under Exhibit A merged in his right as a usufructuary mortgagee under Exhibit C and that from the date of Exhibit C his position as a mere tenant was at an end. Exhibit MM and the contention of defendants Nos. 1 and 2 in the suit, Exhibit L, are a complete answer to this finding and a further answer is to be found in the fact that in this very suit itself plaintiff, the assignee of defendants Nos. 1 and 2, sued the 3rd defendant in ejectment on the muchilika Exhibit MM. He has not sought to recover possession of the land from the defendant as a usufructuary mortgagee, but alleged that he was entitled to possession on termination of the period of the lease in Exhibit MM. It is not contended before in that the 3rd defendant was not cultivating the land. Under the pattas and muchilikas the land was expressly let to him for cultivation, and I do not think that it is now open to the plaintiff to resile from the position taken up by the defendants Nos. 1 and 2 in Exhibit L and in his plaint in this suit, and seek to treat the 3rd defendant as a usufructuary mortgagee, which in fact he never was simply because the Legislature has intervened and given him rights which were not contemplated at the date of the patta and muchilika.

17. Mr. P. Narayanamurthi has urged that if he is not entitled to recover the land, the Courts will give him a decree for rent due. The appeal will be allowed with costs and a decree for rent to be ascertained by the Subordinate Court will be passed. The decree will be in the terms proposed by my learned brother.