APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

LAKSHMANNA (DEFENDANT), APPELLANT,

v.

APPA RAU (PLAINTIFF), RESPONDENT.*

1893.
March 21
April 26.

Rent-Recovery Act—Madras Act VIII of 1865, s. 11—Implied contract as to rates of rent—Customary fees—Prohibition of buildings.

In order to support the inference of a contract under the Rent Recovery Act, Madras, section 11, from payment of the same rent for a given number of years, the intention that the same rent is payable in future years must be clear and unequivocal: it is unsafe to imply such a contract from a single lease for five years.

A patta is not unenforceable by reason of its providing for the payment of fees to village artisans in a case when such fees are customary, or by reason of its prohibiting the tenant from erecting buildings on his holding, if such prohibition is limited to erections not compatible with the agricultural character of the holding.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 405 of 1890, modifying the decision of L. M. Wynch, Acting Head Assistant Collector of Kistna.

Suit by a zamindar against a tenant on his estate to enforce acceptance of a patta. The Head Assistant Collector directed certain alterations to be made in the patta tendered and his decision was modified by the District Judge.

The further facts of the case appear sufficiently for purposes of this report from the judgment of the High Court.

The defendant preferred this second appeal.

Parthasaradhi Ayyangar for appellant.

Subbramanya Ayyar for respondent.

JUDGMENT.—These second appeals relate to suits brought by the zamindar of Nuzvid to compel the raiyats in the village of Kuyur to accept pattas for fasli 1297. The raiyats are the appellants and the zamindar is the respondent before us. The items in the pattas to which appellants object in second appeal are (i) the consolidated wet rate; (ii) the fees to village artisans; (iii) the tax on trees; (iv) the condition that no land should be cultivated without first obtaining a patta; (v) that no building

* Second Appeal No. 683 of 1891.

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should be erected on lands in appellant's possession; (vi) that no remissions are to be allowed, and (vii) that interest shall be paid on instalments of rent from the dates on which they fall due according to the kistbundi.

The first item is the most important and the history of the rates which prevailed in the village from fasli 1265 is given by the Head Assistant Collector in his judgment. It will be observed that the sharing system was in force till fasli 1264, that the money rates varied from faslis 1265 to 1292, and that from faslis 1292 to 1296 the raiyats accepted a five-years' lease. The rates mentioned in the patta tendered are those for which five-years' leases were accepted, but the appellants objected to those rates on the ground that they had executed the leases upon respondent's promise to repair certain channels and that the promise had not been kept. Their contention was that they should revert to the rates which prevailed at earlier periods, even as far back as the date of the permanent settlement. But it was in evidence that the rates paid from faslis 1285 to 1291 were Rs. 2-11-4 for dry land, Rs. 10 for mamul or old wet, and Rs. 8 for dry converted into wet, whereas from faslis 1292 to 1295 they were raised to Rs. 3 for dry land, Rs. 9, including water-tax, for dry converted into wet, and Rs. 10 for mamul wet land. Though appellants denied that there was any mamul wet land in the village, the Head Assistant Collector found, and the Judge agreed in the finding, that their allegation was not true, and that the mamul wet as entered in the pattas from faslis 1285 to 1291 extended to acres 358·32. The Head Assistant Collector refused to infer a contract from the five-years' lease and considered that Rs. 10 per acre for mamul wet, Rs. 2-11-4 for dry land and Rs. 2-11-4 *plus* the water-rate of Rs. 4 an acre for dry converted into wet were the proper rates to be inserted in the pattas. On appeal, the Judge inferred a contract from the five-years' lease, and rejected as not trustworthy the evidence produced by appellants to show that they took the lease for five years because the zamindar promised to excavate the channels. The Judge also expressed it as his opinion with reference to appellant's wish to revert to the rates which prevailed at the permanent settlement, that the rates paid from faslis 1285 to 1291 were at all events binding upon appellants if not the rates mentioned in the five-years' lease. The contention before us on appellant's behalf is that no contract can be lawfully implied

from the facts found that no sanction was obtained from the Collector under the first proviso of section 11, Act VIII of 1865, for enhancing the rates, and that the Lower Appellate Court acted illegally in enhancing the rates in these cases in which no memoranda of objections were filed by the zemindar.

We are of opinion that the decision of the Judge that there was an implied contract cannot be supported. In order to sustain the inference of a contract from payment of the same rate for a given number of years, the intention that the same rate is payable in future years, must be clear and unequivocal. Neither should the period be very short, nor should there be any other circumstance in the case inconsistent with such intention. The presumption is a matter of positive law under the Bengal Tenancy Act but under Act VIII of 1865 it is one of fact. In *Apparau* v. *Narasanna*(1) it was pronounced to be unsafe to imply a contract from a single lease extending to five years. It appears from later cases decided by the Judge that he considered nothing less than seven years was long enough to support the presumption. In the Full Bench case, there had been a continuous payment of the same rate for a period of not less than fourteen years. Again, the presumption arising from the duration of payment should also be tested by the other circumstances in evidence. In *Siriparapu Ramanna* v. *Mallikarjuna Prasada Nayudu*(2) we have pointed out that in the absence of a contract, the sanction of the Collector is indispensable. The decision of the Judge must be set aside and that of the Head Assistant Collector restored in so far as it relates to the rates.

As regards the fees to village artisans the Judge finds that they are customary and there are no grounds for interference in second appeal. As regards the condition about building, the tenant is clearly not entitled to build a house except for purposes not incompatible with the character of the holding as an agricultural holding. With respect to the other considerations the Judge has followed the decision of the High Court in the *Mustabad Mantena* suits, dated the 29th October 1889 and 3rd March 1890.

The decree of the Judge will be set aside so far as it relates to rates of rent and that of the Head Assistant Collector restored,

(1) I.L.R., 15 Mad., 47. (2) See *ante*, p. 43.

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and as regards the prohibition to build, the words "except for "purposes not incompatible with the character of the holding as an agricultural holding" will be inserted, and in other respects the decree of the Judge is confirmed. The appeal has succeeded in part and failed in part, and we direct each party to bear his own costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893. October 18.

SAMIA PILLAI (DEFENDANT No. 2), APPELLANT,

v.

CHOCKALINGA CHETTIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sch. II, art. 179—Step in aid of execution—Defect in application for execution.

Where there has been in fact an application for execution made by the party entitled to make it, it is to be regarded as a step in aid of execution within the meaning of the Limitation Act, art. 179, although by mistake a deceased judgment-debtor is named as the person against whom execution is sought.

APPEAL against the order of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in civil miscellaneous petition No. 628 of 1891.

This was an application made on the 20th August 1891 for execution of a decree obtained by the petitioner in original suit No. 30 of 1883 against three defendants. In February 1891 a petition was filed praying for execution of the decree against defendant No. 1, who was then in fact dead. The Subordinate Judge held that the petitioners were at that time aware of the death of defendant No. 1 and that his name was inserted in the petition through a *bonâ fide* mistake. In this view he held that that petition should be treated as a step taken in aid of execution for the purposes of limitation, and he accordingly directed that execution should issue.

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* Appeal against Order No. 84 of 1892.