MALLA REDDI v. PADMAMMA.

no doubt in conflict with the later decisions, but no evidence was taken in that case, and it was inferred that there was coparcenary, because the illatom custom was a mode of affiliation.

We think it is not safe to attach to the usage all the incidents of adoption without specific evidence. We shall, therefore, ask the District Judge to try the following issue:—

"Whether according to illatom custom the second defendant "excluded the daughters of Lakshmi Narasa Reddi from succes- "sion, and whether their father's undivided interest survived to "the second defendant?"

The finding is to be returned within two months from the date of the receipt of this order; and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

The finding of the District Judge was as follows:—

"I am of opinion that the evidence adduced is not sufficient to "find upon the issue sent down by the High Court for the second "defendant."

This Second Appeal having come on again for final hearing, the Court delivered judgment as follows.

JUDGMENT.—We accept the finding and dismiss the appeal.

APPELLATE CIVIL.

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

1893. March 20. April 26.

MALLIKARJUNA PRASADA NAYUDU (PLAINTIFF), APPELLANT,

v.

LAKSHMINARAYANA (DEFENDANT), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, *ss.* 9, 11—*Sanction by Collector of enhanced rates of rent—Implied contract to pay rent at a certain rate.*

In a suit brought by the Collector of a district, as receiver of a zamindari, against a tenant on the estate to enforce the exchange of patta and muchalka, it appeared that the rent demanded was assessed at an enhanced rate, and comprised a consolidated wet rate imposed on account of irrigation. To the enhancement of the rent by the addition of the water rate the sanction of the Collector required by the Rent Recovery Act, s. 11, first proviso, had not been obtained:

Held, that such sanction could not be implied from the fact that the Collector, as

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* Second Appeal No. 1695 of 1891.

such receiver, had caused the provision in question to be inserted in the patta, and now sought to enforce it by suit.

Upon the question whether from the fact that the tenant, had paid the water rate in question for some years previously an implied contract to pay it for the future could be inferred, *Held* upon the facts of the present case that no such contract could be inferred.

With reference to the Full Bench decision in *Venkatagopal* v. *Rangappa*(1), the Court stated what was the principle to be kept in view in considering whether an implied contract to pay enhanced rent could be inferred.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 762 of 1890, modifying the decision of C. Venkata Jagga Rau, Assistant Collector of Kistna, in summary suit No. 107 of 1890.

Suit to enforce the exchange of patta and muchalka.

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

Plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Parthasaradhi Ayyangar for respondent.

JUDGMENT.—These second appeals arise from suits brought by the receiver of the Devarkota estate to enforce the acceptance of pattas for fasli 1298 by raiyats in the Jirayati village of Nidumole. The raiyats objected to three items in the pattas tendered to them, viz., Nayakvadi fees, tax on palmyra trees, and consolidated wet rates imposed on lands irrigated by the anicut channels from the Kistna. As regards the first two items, both the Courts below decided in favour of the zamindar, and the raiyats have not appealed from their decision. As for the wet rate, it is conceded no sanction has been obtained from the Collector as required by the first proviso to section 11, Act VIII of 1865; but it is contended that such sanction was not necessary, and that, even if necessary, it must be taken to have been accorded, the wet rates being inserted in the pattas under the orders of the Collector, who was the receiver. The first proviso to section 11 expressly prescribes the sanction of the Collector as a condition precedent to a valid enhancement of rent on account of improvements, and the intention is to protect the raiyats against excessive rates by requiring sanction by an officer competent to hold the balance even between the zamindar and the raiyats. Nor do we consider the institution of these summary suits by the Collector in the

(1) I.L.R., 7 Mad., 365.

MALLIKÂRJUNA PRASADA NAYUDU v. LAKSHMINARAYANA.

capacity of receiver to be equivalent to such sanction, the sanction contemplated by section 11 being one judicially accorded upon consideration of the rights of both parties to what is deemed a fair and equitable rate. In *Rameśam* v. *Bhanappa*(1), it has been held that the addition of water-cess to the prior rent is an enhancement of rent within the meaning of the section. We consider, therefore, that the Judge was right in holding that, in the absence of a contract, the sanction of the Collector was indispensable, and that no such sanction, as is contemplated by Act VIII of 1865, has been given in the cases before us.

The next contention is that the Judge was in error in refusing to infer from the facts found a contract to pay the wet rate, and we do not think that it is tenable. The leading case on the subject is *Venkatagopal* v. *Rangappa*(2). The general rule laid down in that case is that payment of rent in a particular form, or at a certain rate for a number of years, is presumptive evidence of a contract to pay rent in that form or at that rate for future years so long as the relation of landlord and tenant may continue. It was also there held that the presumption may be repelled by proof (1) that the rate in question was paid under a mistake, (2) that it was intended to be paid only for a certain term of years, and that, on the expiration of that term, the parties meant to revert to their original rights, (3) that there has been a diminution in the extent of the holding, (4) that its value has diminished by the deterioration of irrigation or other works which the landlord was bound to maintain, and (5) that there was some change of circumstances which would entitle the parties to the agreement to an alteration in its terms without necessarily putting an end to the relation of landlord and tenant. The Court also observed that when there is no proof of such special cause for alteration of the terms heretofore subsisting between the parties, it must be decided that so long as the tenant elects to retain the holding, he is liable to the obligations in respect of rent which, it is to be inferred, from his past conduct that he has accepted. With reference to the general rule, the Judge considers that it is vague so far as it does not mention a specific number of years as sufficient to raise the inference of a contract and draws attention to *Narasimha* v. *Ramasami*(3), wherein it was held that no contract as to future years

(1) I.L.R., 7 Mad., 182. (2) I.L.R., 7 Mad., 365. (3) I.L.R., 14 Mad., 44.

could be inferred from a single lease extending over the brief period of five years. Again, in *Apparau* v. *Narasanna*(1), it was considered that the fact that the tenant paid rent at a certain rate for six years was not sufficient to establish an implied covenant to continue to do so for the future. The Judge appears to have ruled in some cases that a period of three years was sufficient as under the Bengal Tenancy Act, and observes that he is inclined to hold in the cases now under consideration that nothing less than seven years will be long enough to satisfy the principle laid down in *Venkatagopal* v. *Rangappa*(2). In the case last mentioned, which was a Full Bench case, a contract was implied, as money rent was found to have been paid for not less than fourteen years. We do not think that, in the absence of an express enactment applicable to this Presidency, the Judge is right in fixing three or seven years as the period contemplated by the Full Bench case. The decision whether a contract can be implied must depend on the circumstances of each case. The principle, which ought to be kept in view, is that the distinction between an express and an implied contract consists only in the mode of proof, and that the circumstances from which a contract may lawfully be implied must be such as will satisfy a reasonable mind that the real intention of the parties was that the particular rate in question should be the rate in future years so long as the relation of landlord and tenant may subsist between the parties, unless there is some special circumstance, such as is indicated in the Full Bench case rebutting the presumption. It may be that payment of rent at the rate in dispute for five or six years is not sufficient where such payment is the only fact in evidence. It may also be that even when a particular rate has been paid for a longer period, there may be other circumstances which repel the presumption. In the cases now before us, however, there is no sufficient reason to doubt that the Judge has arrived at a correct finding. Apart from the fact that the wet rate in dispute has been paid in no case for more than seven years, in many cases for four or five years only, and in some even for one and three years, it is found that the raiyats paid the rate with reluctance and much protest. It is found, further, that the areas over which it has been paid are in many cases small and have varied from year to year. Moreover,

(1) I.L.R., 15 Mad., 47. (2) I.L.R., 7 Mad., 365.

MALLIKARJUNA PRASADA NAYUDU v. LAKSHMINARAYANA.

it does not appear that the zamindar has incurred any expenditure in connection with works of irrigation.

We are unable, therefore, to uphold the contention that the Judge was in error in holding that it was not the intention of the raiyats that they should continue to pay the wet rate in dispute in all future years.

The appeals fail, and we dismiss them with costs.

APPELLATE CIVIL.

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

1893. March 20, 21. April 21.

BHUPATHI (DEFENDANT), APPELLANT,

v.

RAJAH RANGAYYA APPA RAU (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, *ss.* 1, 11—*Sanction granted by Head Assistant Collector—Procedure—Customary rent—Restraint on building.*

A Head Assistant Collector is competent to grant a sanction for the enhancement of rent under Rent Recovery Act, s. 11.

The granting of such sanction is a judicial and not a merely administrative act and such sanction should not be granted without first giving notice to both the landlord and the tenant, and hearing, and considering the contentions of both parties.

In a suit by the landlord to enforce the exchange of a patta and muchalka, the tenant objected to the rate of rent imposed on part of the land, which was dry land converted into wet. *Held* that the finding of the Lower Appellate Court that there was an implied contract to pay rent at such rate was not open to any legal objection:

It appeared that the patta tendered contained a stipulation for the payment of rent at a special rate for garden (jarib) lands watered by wells which had been constructed by the raiyat at his own cost, and also comprised a stipulation that the raiyat should not build on his holding. The Court of first appeal held that the special rate of rent above referred to was customary and had been followed for many years:

Held, that there was no ground for interference on second appeal with the Lower Appellate Court's decision regarding the former of the stipulations above referred to, but that the latter should be so modified as to prevent the raiyat only from raising any building incompatible with an agricultural holding.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 520 of 1888, modifying the

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* Second Appeal No. 681 of 1891.