
(1941) 10 MAD CK 0047
In the Madras High Court

Eletath alias Muthetath Mallisseri Narayanan Nambudiri and Others APPELLANT

Vs

Etacheri Kunnath Chathukutti Nayar and Others RESPONDENT

Date of Decision : 21-10-1941

Acts Referred:

Citation : AIR 1942 Mad 307 : (1942) ILR (Mad) 550 : (1942) 55 LW 18 : (1942) 1 MLJ 166

Hon'ble Judges : Abdur Rahman, J; Abdur Rahma, J

Bench : Full Bench

Judgement

Abdur Rahman, J.—The main question to decide in the appeal relates to the plaintiff's claim for setting off the arrears of the rent due to him by the defendants against the value of improvements found to be payable by the former to the latter. A decree was secured by the plaintiff Dewaswom in regard to the arrears of rent but it has become barred by limitation.

2. The properties in suit including certain other items of property, sixty-three in all, belong to the plaintiff Dewaswom. They were demised by it on a kanom of Rs. 116 to defendants 1 to 55, who were members of a tarwad, for a period of five years so far as paddy lands were concerned and for a period of twelve years in respect of parambas. It appears that a Kuzhikanom deed was executed by the plaintiff Dewaswom on the 26th February, 1917 in favour of one V. Krishnan Nair who was then Karnavan of the defendants' tarwad. Since he died without executing a corresponding marupat, the marupat on the basis of which the present suit was instituted, Ex. A was executed by the next Karnavan Kunhoonham Nair and 2nd defendant in favour of the plaintiff Dewaswom on the 9th June, 1917. The plaintiff Dewaswom assigned one year's rent. The assignee brought a suit O.S. 175 of 1922, obtained a decree, and in execution the tenancy rights of the defendants 1 to 55 were sold and purchased by the 56th defendant. The other defendants who are now in possession are claiming under the 56th defendant.

3. The plaintiff Dewaswom brought a suit O.S. No. 487 of 1921 for the recovery of rent due for the year 1096 (corresponding to 1920-21) in respect of both paddy lands and parambas and obtained a decree for the same on the 17th December, 1923. The amount claimed in the suit as rent forms one of the amounts which, is being claimed in the present suit.

4. The plaintiff Dewaswom. brought another suit O.S. No. 373 of 1922 for rent and for recovery of paddy lands alone, shown as items 33 to 63 in the marupat. This was decreed although items 62 and 63 in the marupat were excluded from the decree on the ground that they were parambas and. the suit in regard to them was premature. The items of property which were recovered in the execution of the decree passed in that suit do not form the. subject-matter of the present suit.

5. The suit for redemption, out of which the present appeal-arises was instituted by the plaintiff Dewaswom for the recovery of paramba lands on payment of a kanom of Es. 116. Arrears of rent amounting to Us. 6,305-6-11 including those for which the decree was passed were asked to be set off against the value of improvements found to be payable to the tenants by the plaintiff. The defendants claimed the value of improvements in excess of the amount claimed by the Dewaswom but contended that the arrears of rent for which the decree had been obtained could not be set off, against the improvements due to them as the decree had become barred by time.

6. The Subordinate Judge of Tellicherry passed a decree for redemption in favour of the plaintiff Dewaswom on payment of the value of improvements due to various defendants detailed in the judgment but accepted the plea advanced by the defendants and refused to allow the set off to the plaintiff in respect of the amount for which the decree had been obtained. The plaintiffs appeal and the first contention as stated above advanced on their behalf is that they were legally entitled to have the amount of rent covered by the decree in O.S. No. 487 of 1921 set off u/s 6 (2) of the Malabar Compensation for Tenants' Improvements Act (I of 1900) against the improvements decreed in favour of the defendants in spite of the fact that the decree in its favour might have been barred by time. It was also contended that the decree passed in O.S. No. 487 of 1921 was not barred by time in fact; but on hearing the learned Counsel for the appellants we were not satisfied that this contention had any force and we did not for reasons which we will give later in this judgment call upon the other side to address us on that point.

7. The third contention advanced on behalf of the appellants was that the improvements in regard to item Nos. 44, 64, 66 and 66-a should not have been allowed by the lower Court. This question is discussed in paragraph 65 of its judgment. Mr. Govinda Menon who appeared in this case on behalf of some of the respondents did not oppose this contention as he said that the clients for whom he was appearing had no concern with this claim made on behalf of the appellant. It was urged in the end that costs should not have been awarded

against the plaintiff when it had substantially succeeded in the suit. The last three questions being of minor importance we would like to address ourselves to start with on the first question that is by far the most important one to be determined in this appeal.

8. In view of decisions of this Court in *Achuta v. Kali* ILR (1884) Mad. 545 *Kanna Pisharodi v. Kombi Achen* I.L.R.(1885) Mad. 381 and *Unnian v. Rama* I.L.R. (1885) Mad. 415 it was not disputed that a jenmi was entitled to set off the arrears of rent due to him without any regard to limitation against the kanom amount and the value of improvements. Nor was it, in view of *Kunhi Krishnan v. Kunhi Pennu*¹, contested that the plaintiff could have lost his right to set off even if a decree for rent had been obtained in its behalf, provided that it had not become barred by time on the date on which the present suit was instituted. But it was contended that if a decree for arrears of rent had been obtained by a jenrai and it is allowed to be barred by time, the jenmi would not retain the right to have it set off against the kanom amount and the value of improvements. The question to decide is whether this contention is correct?

9. Our attention has not been drawn to any decision in which this question had directly arisen for decision but reliance was placed on certain observations of Mr. Justice Devadoss in *Chirapath Thamasikkum Kolathayi Kunhi Krishnan Nambiyar Vs. Puthiyottil Kunhi Pennu and Others*, , which were admittedly in the nature of obiter and of Mr. Justice Krishnan in a decision by a Division Bench of this Court in *Mangeshwar Narain Rao Vs. S. Shiva Rao and Others*, . The question in our view really turns on a correct interpretation of Section 6 (2) which reads as follows:

If in such a suit the Court finds any sum of money due by the defendant to the plaintiff for rent or otherwise in respect of the tenancy, the Court shall set-off such sum against the sum found due under Sub-section (1) and shall pass a decree declaring as the amount payable to him on ejectment the amount (if any) remaining due to the defendant after such set-off.

The words underlined by us are, in our opinion, important and it cannot be reasonably argued that arrears of rent will not remain due even if a decree has been passed in regard to them,,, but which has remained unsatisfied. There is a great deal of difference between a decree becoming unenforceable in a Court of law by lapse of time and thus making it impossible for a decree-holder to realise his dues by a process of Court and a decree becoming satisfied. Limitation in such cases bars the remedy but does not extinguish the right. The unpaid rent must still be regarded as due although it may not be possible for the person to whom the rent is due to bring a suit again for realising that debt from his debtor. If limitation cannot prevent a debt which is uncovered by a decree, from being claimed by a jenmi by way of set-off against the kanom amount and improvements as held in *Achuta v. Kali* I.L.R.(1884) Mad. 545 *Kanna Pisharodi v. Kombi Achen* I.L.R.(1885) Mad. 381 and *Unnian v. Rama* I.L.R.(1885) Mad. 415 and if the mere passing of a decree, if it is alive, does not, on the ground of

merger or any other principle of law, debar a plaintiff, as held in *Kunhi Krishnan v. Kunhi Pennu*¹ from getting a set-off under the aforesaid section of the Tenants' Improvements Act, there can be nothing in our opinion, which can be held to debar a plaintiff from getting a set-off in spite of the fact that the decree had become barred by time. It is instructive to compare the words "amount due by the plaintiff to the defendant" in this sub-section with the words "legally, recoverable" in O. 8, Rule 6, Civil Procedure Code. It has been held that if the defendant's claim is barred by the law of limitation at the date of suit it cannot be pleaded by way of set-off under the provisions of the Code of Civil Procedure¹; but the Courts have in construing that section confined that rule to a legal set-off merely, while in cases of equitable set-off claimed by a defendant no such exception has been engrafted for the simple reason that in granting equitable set-off the Court is not necessarily confined to the limits introduced in O. 8, Rule 6, Civil Procedure Code. The ordinary cases between lessors and lessees may be different. It has been held in a Madras case *Vyравan Chetty v. Deivasikomani Nataraja Desikar* (1915) 30 M.L.J. 59: ILR Mad. 939 that it was not open to a lessee to claim, by way of equitable set-off an unliquidated claim for damages which was barred at the date of suit. The same rule cannot however be applied to a kanom where the landlord is declared bound by the statute to pay for improvements effected by the tenant during the period of his tenancy which is usually twelve years and a tenant has to be made liable to pay the whole of the rent due by him to his landlord before a decree declaring the amount payable to him for improvements can be passed only after the set-off for rent in respect of the tenancy has been allowed to the landlord. We are aware of the dictum of Mr. Justice Devadoss in *Chirapath Thamasikkum Kolathayi Kunhi Krishnan Nambiyar Vs. Puthiyottil Kunhi Pennu and Others*, , where he said that a decree that was barred by limitation could not be set-off but we really see no reason or principle on which, in view of the clear words of Section 6 (2) of the Tenants' Improvements Act it can be supported.

10. Reliance was placed by Mr. Govinda Menon on the observations of Mr. Justice Krishnan in *Mangeshwar Narain Rao Vs. S. Shiva Rao and Others*, , where that learned Judge accepted the principle of the American law given by Jones in Section 936 of his treatise on Mortgages which was to the effect that

The merger of the note in a judgment does not extinguish the debt and the mortgage continues a lien till it is satisfied or the judgment is barred by the statute of limitation.

The other learned Judge Mr. Justice Phillips constituting the Division Bench was not however prepared to go to that extent. He observed as follows:

It would appear that under American law the respondent's contention is correct (vide Jones on Mortgages, Section 936), but the position is not so clear either in English or Indian law, for it would appear from a passage in 21 Halsbury 325, that the original charge would still remain unless the decree became satisfied and it is questionable whether a decree that has become barred by limitation is

on the same footing as a decree that has been satisfied.

Since there was no question of set-off in Naraina Rao's case such as is being claimed by the plaintiffs in the present suit, it is Unnecessary in the circumstances to consider Mr. Justice Krishnan's observations more closely. The decision in that case can be no authority for the contention that if the decree for rent had been obtained the amount decreed would cease to be due as rent under the Compensation for Tenants' Improvements Act even if the decree is barred by limitation, In our opinion, the decision of their Lordships of the Judicial Committee in Hewanchal Singh v. Jawahir Singh (1888) ILR 16 Cal. 307 (P.C.) goes to show that there could have been no merger in spite of the decree having been passed in favour of the mortgagee for certain interest so as to preclude him from claiming the same amount in a redemption suit instituted against him subsequently by the mortgagor. The judgment of their Lordships of the Privy Council may have been, as remarked by the learned Judges in Imdad Hasan Khan v. Badri Prasad I.L.R.(1898) All.401 very brief; but the summary of the decision of the Judicial Commissioner against which the appeal was taken to the Privy Council given in the facts of that case and the arguments addressed to their Lordships of the Judicial Committee leave no room for doubt as to the contention advanced before them and as to the view which ultimately prevailed. The mortgagee in Imdad Hasan's case had, in the words of the learned Judges of the Allahabad High Court "preferred to seek one remedy" and his debt should have been on this principle regarded by their Lordships of the Privy Council in the Calcutta case to have become merged in the decree and was only payable under the decree and not otherwise. But it was not so held by their Lordships.

11. The relationship between the parties in the present case is really that of a mortgagor and mortgagee and in taking an account between the parties which Section 6 (2) contemplates, the plaintiff who is in the position of the mortgagor would, in our opinion, and in accordance with the language of that sub-section be entitled to a set-off even in regard to a decree that was barred by limitation.

12. The other questions need not detain us long. It was contended on" behalf of the appellant that the decree in favour of his client was not barred by limitation. This contention was based on the fact that an application for execution was presented by him on the 7th August, 1933, but it was returned by the Court on the 10th August, 1933, to rectify certain defects that existed in the petition. It was not re-presented by him. Relying on certain decisions of this Court it was argued that the application for execution which was according to law should not have been returned and the effect of the wrongful return by the Court was that the application should be deemed to be pending. We do not however agree with that contention. Whatever may have been the effect of the order of the execution Court, if it was not justified, it cannot be said in this case that the order passed by the execution Court on the 10th August, 1933 was an unjustifiable or a wrong order. The claim for costs made by the petitioner was obviously in excess of what was actually due to him and the application had therefore to be returned for

amendment. Moreover, certain draft sale papers had not been produced and they were required to be produced. The execution Court had given three weeks time for amendment and for the production of the papers and having failed to comply with the proper order of the Court, within the time given to him he cannot advance the contention that this application which had been with him throughout should have been deemed to be pending.

13. The improvements to which objection has been taken by the appellants should not have been in our opinion allowed in regard to items 64, 66 and 66-a although the grant in regard to item 44 appears to be justified. As for the last item, the tenants appear to have built the compound) walls and unless the plaintiff had shown that they had only repaired the old walls compensation should have been and was rightly granted. In regard to item 64 however the onus was on the defendants to establish that they had effected the improvements for which they could have claimed compensation and not for the plaintiff Dewaswom to show that the trees had not been grown by the tenants. That would be the proof of a negative fact and unless the law required the plaintiff to prove a negative fact, which it did not, it should have been proved by the defendants. Similarly the statement of D.W. 4 should not have been, in the absence of the marupat, accepted in regard to items 66 and 66-a.

14. As for costs there is no reason why we should interfere with the discretion exercised by the Court below. Ordinarily the mortgagor is liable (to pay the costs of the mortgagee in a redemption suit. But in the circumstances of the case, the Court had decreed only a portion of the costs in regard to the court-fee and in regard to the expenses of a commission incurred by them. In other respects they were directed to bear their own costs. There is no reason why we should interfere with that discretion.

15. The result is that the appeal will be accepted to the extent that the item covered by the decree in O.S. No. 487 of 1921 would be allowed to be set-off as against the claim for improvements allowed to the defendants. The claim for improvements in regard to items 64, 66 and 66-a is disallowed. The plaintiff will have, in the circumstances, three-fourth of the costs of this appeal. Time for redemption is extended by three months from this date.

16. An application has been filed by Mr. Govinda Menon u/s 15 of the Madras Agriculturists' Relief Act (IV of 1938). It may be posted for hearing next week.

17. This C.M.P. No. 5946 of 1941 coming on for hearing along with the above Appeal No. 437 of 1938, The Court delivered the following

Abdur Rahman, J.

18. It has been contended by Mr. Govinda Menon that since the amount of rents covered by the decree is being allowed by us for the first time now, it should be deemed to have been discharged as his client had in accordance with the provisions of Section 15 of the Madras Agriculturists' Relief Act deposited the

sum due for faslis 1347 and 1346 before the dates mentioned in that section. In view, however, of the decree that was passed in this case in July, 1937"" before the Agriculturists' Relief Act came into force and which we are now only modifying by reducing the amount that was decreed in favour of the defendants under S. 6 (2) of the Malabar Compensation for Tenants' Improvements Act (I of 1900) after the full set-off allowable to the plaintiff had been taken into consideration, we are of opinion that Section 15 of the Agriculturists' Relief Act not being retrospective in character, can have no application and the amount due for improvements allowed to the defendants should have been decreed by the lower Court after the arrears of rent included in the decree that is now barred by limitation had been taken into account. Viewed thus the rent could not be regarded as due or payable after the Act came into force. The only decree that Section 6(2) of the Malabar Compensation for Tenants' Improvements Act contemplates is one for improvements after the arrears of rent, etc., have been set-off. The rent would thus be wiped off in any case and cannot be held to have been decreed. It would therefore follow that the rents alone included in the sum of Rs. 1,960 for which the decree was passed excluding costs and interest would be deducted out of the improvements and the balance that is found to be due after the amount of rents has been deducted will remain payable to the defendants.

19. The parties are directed to bring in a draft decree.