

**(1960) 10 KL CK 0006**  
**In the High Court Of Kerala**  
**Case No : S. A. No. 267 of 1957**

Kalu Amma and Others

APPELLANT

Vs

Raman Pillai and Others

RESPONDENT

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**Date of Decision :** 14-10-1960

**Acts Referred:**

Limitation Act, 1908 — Section 28

**Citation :** (1960) KLJ 1431

**Hon'ble Judges :** S. Velu Pillai, J

**Bench :** Single Bench

**Advocate :** S. Nilakanta Iyer, for the Appellant; T. S. Krishnamoorthi Iyer For 1st Respondent, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Velu Pillai, J.—The Second appeal arises out of a suit instituted by the plaintiff on behalf of Kudavur Devaswom, for the recovery of the dues payable under a lease granted by it. The first court dismissed the suit, but on appeal, the Subordinate Judge gave a decree for the realisation of dues, for a period of three years preceding the date of the suit. The first defendant has therefore come up in Second Appeal. The suit properties are two in number, and admittedly, they belonged originally to the Devaswom. According to the plaintiff, the predecessors-in-interest of the defendants have been, and the defendants are now, enjoying them on lease from the Devaswom. The first defendant who contested the suit, denied the lease and set up a "karaima" from the Devaswom, pleaded, that the Devaswom had lost its title on account of the dealings with the properties by the defendants and their predecessors, as absolute owners and repudiated the plaintiff's case, that any dues were paid under the lease at any time.

2. The two questions which arise for determination are whether the properties were demised on lease and if so, whether that lease is subsisting. Though the original lease deed has not been produced, it is seen from Ext. A, an assignment deed of the year 1044 by one Subramonia Iyer in favour of Peruman

Padmanabhan, that the lease was of the year 1024, in favour of Subramonia Iyer, on a "varam" of 35 paras 71/2 edangalies of paddy. The lease deed of the year 1024 was handed over to the assignee. By Ext. B of the year 1053, a member of the tarwad of Peruman Padmanabhan, mortgaged the suit properties confirming, that the properties were held on lease with premium ("artha edupattom") from the Devaswom, and stipulating for the payment of 35 odd paras of paddy as aforesaid, and of one fanam as "chumadu". The original lease deed of 1024 was also handed over to the mortgagee. A member of the tarwad of Peruman Padmanabhan gave a "melotti" for the properties in the year 1089 under Ext. II, stipulating for the redemption of Ext. B. This was assigned to Krishna Kurup by Ext. III in the year 1091. In the year 1094, the first defendant took a sale deed, Ext. IV from the tarwad of Peruman Padmanabhan, for its rights in the suit properties, and on the same day, she redeemed the property under Ext. V. It was thus, that the first defendant came into possession and the stipulations in Exts. A and B may be relied on against her. In the year 1116, the first defendant herself mortgaged item 2 of the suit properties by Ext. D, stipulating for the payment of 9 paras of paddy per annum to the "matom"; from the description of the property as "Kudavur Devaswomvaka Karairna", and there being no indication to the contrary, it is reasonable to think, that the "matom" referred to was really the plaintiff's family which owned the Devaswom. The first defendant's son as D. W. 1 has stated as a witness in the case, that he could not tell, which "matom" it is. On this evidence, the Subordinate Judge was right, in my opinion, in his conclusion, that the suit properties were held on lease from the Devaswom.

3. The next question is whether the lease is subsisting. The defendant's case, as noticed already, was, that the properties were given on "karaima" by the Devaswom. The term "karaima" has been interpreted by the Travancore High Court to connote a permanent lease. It is however, not necessary to base the decision on this point, on this interpretation of the term. Apart from the denial of the lease, the first defendant had no further or alternative case, that the lease was for a fixed period which had expired. The contention was, that by reason of the subsequent dealings by the first defendant and her predecessors, and of nonpayment of rent for a long time, the original title of the Devaswom, if any, had ceased to subsist. It is on these pleadings, that the question of the subsistence of the lease has to be determined. It is clear law, that mere non-payment of rent by the tenant, will not bring about a termination of the tenancy. It has been laid down by the Privy Council in AIR 1922 272 (Privy Council) that:

mere non-payment of rent or discontinuance of payment of rent, has not by itself, been held in India to create adverse possession.

Sir Dinshaw Mulla in his Commentaries on the Transfer of Property Act has observed at page 641:

When once the relationship of landlord and tenant is established, mere non-payment of rent is not enough to prove that the relationship has ceased.

Relying on the above and referring to other cases, a Full Bench of the Madras High Court has held in *Katragadda Brahmayya, minor by mother and guardian Katragadda Jagadamba and Others Vs. Katragadda Balatripura Sundaramma and Others*, that:

By withholding payment of rent, a tenant cannot place himself, in effect, in the position of a third party and assert that the relationship of landlord and tenant has thereby terminated and he has converted his occupation from a lawful one into an unlawful one, so that, at the expiration of twelve years, the landlord is prevented from recovering possession of the land demised. So far as the limitation Act is concerned, the failure by a tenant to pay rent is merely non-payment, but has no consequence other than as above stated.

Prior to the decision of the Privy Council referred to above, a somewhat discordant note had been struck in *Umar Bakhsh v. Baldeo Singh* (32 I. C. 35) in deciding whether a lease was subsisting, the Court observed, that no rent having been paid for a long time, and the plaintiff-lessor having made no serious attempt to recover such rent, the lessee must be deemed to have been in adverse possession. As a proposition of law, it is opposed to the dicta of the Privy Council and of the Madras High Court. But at page 38 of the report, the court observed further, that "at the abstract proposition" that mere non-payment of rent by tenant does not establish his adversity of possession, "we are not disposed to cavil, but we think, that each case must be decided on its own particular features" and referred to an over-riding circumstance present in that case, that the defendant had denied on oath, that he had ever intended to pay rent or had regarded himself as a lessee. However, the weight of authority is in accord with the view taken by the Madras High Court. In the present case, even so late as in the year 1116, provision was made in Ext. D, for the payment of dues to the Devaswom, although the plaintiff has not been able prove actual payment by the lessee.

4. The learned counsel for the defendants placed reliance on a number of cases, which turned on the applicability of Article 139, read with Section 28 of the

Indian Limitation Act. The case decided by the Privy Council, AIR 1922 184 (Privy Council) arose out of a suit to recover possession of certain lands from the defendants and the finding was that the lease had expired. Article 139 being applicable, it was held, that the lessor had lost his title to the property by reason of Section 28 of the Indian Limitation Act. In *Purushottam Yeswant Acharekar v. Vishnu Gorathe Dalvi* (AIR 1927 Bom 650) the crucial finding was, that the defendants were tenants only up to the year 1890, and no tenancy was proved subsequent to that year; Article 139 was applied. The decision of a Full Bench of the Bombay High Court in *Sidram Lachmaya Vs. Mallaya Lingaya Chilaka*, was only, that:

If in a suit for possession it is established, that there was a relationship of landlord and tenant between the parties, and that relationship has come to an

end, then the only Article that can apply is Article 139 and not Article 144.

Sheogobind Bhakat and Others Vs. Sujan Mahto and Others, also laid down the same rule. There, the tenancy was for a fixed period, and by the defendant's continuance in possession he became a tenant by sufferance, and without any further act on the part of the landlord recognising him as tenant, he could not be deemed to be a tenant-at-will, and a suit brought more than twelve years after the termination of the tenancy, was held to be barred by Article 139, The last of the cases, was Neelakantan Parameswaran Namburi v. Krishnan Narayana Pillai (AIR 1955 TC 145) where the suit was for the redemption of a sub-mortgage, in which, there was a provision for the sub-mortgagee to account for the surplus profits of the mortgaged property and make payment to his mortgagor. The contention was advanced, that the undertaking in the document for the payment of surplus profits to the mortgagor, was part of an arrangement of lease to which Section 28 of the Indian Limitation Act did not apply, and which could be enforced, though the right of redemption was lost. But the Travancore-Cochin High Court held, that the undertaking was part of and ancillary to the mortgage transaction and when the bar applied to the mortgage, the undertaking also became unenforceable. From this, the learned counsel sought to establish that, if the recovery of the suit properties is barred, no claim to recover rent can arise. The assumption made has no foundation in this case, and so, this argument has no application. In most of the cases cited, the lease was for a fixed term and was shown to have expired and Section 28 directly applied. This is not the case here, where there was no contention, that the lease had expired by efflux of the period limited, but only a failure on the part of the plaintiff, to establish payment of rent by the lessee. This, in my opinion, cannot disentitle the plaintiff from suing for the dues payable under the lease. For the foregoing reasons, I come to the conclusion, that the decree under appeal does not call for interference. This Second Appeal is therefore dismissed with costs.