

(1934) 08 MAD CK 0058
In the Madras High Court

Kizhiakalathil Puthan Veetil Thavazhi Karnavan	APPELLANT
Vs	
Manikat Variath Ukkali Varissiar's son Sankunni and Others	RESPONDENT

Date of Decision : 02-08-1934

Acts Referred:

Citation : AIR 1935 Mad 52 : (1934) 40 LW 730

Hon'ble Judges : Walsh, J

Bench : Division Bench

Judgement

Walsh, J.—The legal representative of plaintiff 2 in the suit is the appellant in this Court. Under Ex. B dated 26th Juno 1919 plaintiff 2 got a melcharth of the suit property from plaintiff 1, the sthani. The previous demisee, who was defendant 1, had a kanom, which did not expire till 1922. Plaintiff 1 (the sthani) and plaintiff 2 waited till the expiry of the previous demise and then instituted a suit for redemption. Defendant 1 transferred his rights to defendant 2, who is now the principal contesting defendant and he impugned the validity of the melcharth and in the alternative claimed reclamation expenses in case the melcharth be found good. During the pendency of the suit plaintiff 1 died and defendant 15 came on the record as his legal representative. He did not prosecute the suit but contented himself with appearing as a defendant and disputed the validity of the melcharth Ex. 13, and he further executed a renewal in favour of defendant 2. During the pendency of the appeal defendant 15 died and his legal representative came on the record as respondent 20. He supported the appellant and impugned the kanom granted by defendant 15 to defendant 2. The Court of first instance held that the melcharth having been granted before the expiry of the existing demise) was void and dismissed the suit and the lower appellate Court took the same view. Plaintiff 2's legal representative has preferred the present appeal.

2. There had been conflicting decisions in this Court as to whether a melcharth granted before the expiry of an already subsisting demise was void in law. An unreported decision in S.A. No. 774 of 1917 was relied on by plaintiff 2. In that

case it was held that where the grantor lived after the expiry of the subsisting demise, the subsequent demise could not be impugned merely on the ground that it was made before the subsisting demise had expired. But in *Kunhammad v. Kunhunni* 1920 Mad. 161 a Bench of this Court took the opposite view and held that a melcharth granted before the expiry of an existing demise was not good in law except for absolute necessity. In the present case there is a finding that there was no necessity for the meleharth Ex. B, and that finding of fact is not contested. Another unreported decision in S.A. No. 1147 of 1917 approved of the decision in S.A. No. 774 of 1917. These were both cases of a sthani granting a melcharth before the expiry of the time. The matter has since been set at rest by the Full Bench decision in *Trivikrama Konuraya v. Sankara Narayana* 1932 Mad. 71. From this decision it is clear that where a karnavan grants a melcharth, which is not otherwise improper, before the termination of an existing demise, that is not void, per se, though it may be avoided by his successor if the latter is in office at the time of the expiry of the previous demise. It is not necessary for the purposes of the present case to go into the grounds on which the successor could avoid the melcharth because it is abundantly evident from that case that if the grantor is alive at the time when the previous demise expires, he and he only is the person who is entitled to avoid it, if it is in other respects a proper lease. The present case is much stronger than the Full Bench case, because there the karnavan who granted the second lease and who survived the expiry of the earlier lease for some months took no action one way or the other either to confirm or disown it. Anantakrishna Ayyar, J., who wrote the leading judgment, says at pp. 751 and 752:

As the transaction entered into by him is prima facie binding upon him, the argument that after the expiry of the term of the prior lease, he (the executant) should indicate, by some formal act of his, that he proposes to stand by the same, is too technical even if there is any force in it, When the question of its binding nature is raised subsequent to the executant's death by the succeeding karnavan, the circumstance that the executant karnavan was alive when the term of the prior demise expired, and could have on that date executed a document in similar terms against which nothing could be urged, is a very material point for consideration in the absence of other circumstances. Ordinarily a document being binding on the executant thereof, no further act of his would be necessary to affirm it; it is only when he wishes to disaffirm it (in cases where he could do so) that he should indicate by an overt act, his disavowal.

3. Here the executant of Ex. B has joined plaintiff 2 in filing the suit upon the meloharth. As Reilly, J., says:

If the karnavan who granted the lease prematurely is still in office when the previous term expires, no one but he has the option to avoid his grant.

4. The learned Judges of the Full Bench have discussed both *Kunhammad v. Kunhunni* 1920 Mad. 161 and S.As. 774 of 1917 and 1147 of 1917 and this matter has by this judgment been set at rest. The learned Advocate for the

respondents sought to get over the Full Bench judgment in this way. He says that one of the issues raised in the suit, Issue 1, is:

Is the McJkanom supported by consideration? Is it valid and binding upon the defendants?

and that on this issue the Court of first instance finds that it is not proved that Ex. 15 was for consideration. He argues that defendant 15 as a member of the sthanam was entitled to object to the melcharth on that ground. I may observe that while the trial Court has said something in para. 21 as to the evidence of necessity, it suddenly brings in its decision about consideration without any discussion of the grounds on which that conclusion is reached. The only portion of the judgment which deals with the matter runs as follows:

Whether the motive of plaintiff 1 was to make money for himself or to oblige defendant 10 it is not necessary to go into the evidence as to necessity adduced is unsatisfactory, improbable and mutually contradicting. The plaintiff's witnesses themselves destroy the case and I must hold that it is not proved that Ex. B was supported by consideration and was executed for sthanam necessity on the only case put forward in evidence by plaintiff 2.

5. I can find nowhere in the judgment any discussion about the question of consideration; in the Subordinate Judge's judgment, there is not a word about consideration, but the question of necessity is discussed. However the argument adduced is to my mind, fallacious. Defendant 15 was not a party to the original suit as framed and as mentioned above, in the suit plaintiff 1 supported plaintiff 2 and the melcharth, and according to the Full Bench decision, if the lease was otherwise proper, he was the only person who was entitled to avoid it, he being the sthani alive at the time when the previous demise expired. On his death during the trial defendant 15 came in as his legal representative and it is clear that he came in no other capacity whatever. He did not come in as a general member of the sthanam. That being so, he was not at liberty to depart from or contradict the position taken up by that person in the suit whose legal representative he was. If he had any independent right as a member of the sthanam under which he could impeach the melcharth as being an improper one, then he should have asked to come in that capacity, either with or without assuming the capacity of legal representative of plaintiff 1. A party who comes into the suit as the legal representative of another party cannot be allowed to depart from or vary or contradict the attitude taken up by the party whose legal representative he is; it is obvious that if he were permitted to do so, it would be impossible to conduct any litigation where legal representatives come in.

6. The present case affords an excellent illustration where two successive L.Rs. of a party (plaintiff 1) have sought to take up positions directly contradictory to that of their predecessor in law. If that is allowed who can know what plaintiff 1's case is? Therefore defendant 15 was not at liberty as the legal representative of plaintiff 1 in the suit to depart from the position of plaintiff 1. It is not disputed

that the lessee cannot question the validity of the melcharth granted by his lessor. The learned Subordinate Judge has sought to get over this difficulty by saying that defendant 15 passed his right to question the validity of the melcharth to defendant 2 by granting a melcharth to defendant 2. As I have pointed out, the only capacity in which defendant 15 could have objected to the melcharth Ex. B would have been as an ordinary member of the sthanam. I am extremely doubtful whether that right which inhered in him personally could possibly be passed on to a stranger. It is sufficient to say, as I have remarked above, that he was not a party to the suit in his capacity as a member of the sthanam. He came on the record as the legal representative of plaintiff 1, the sthanee, and therefore could not object to the lease in that capacity seeing that he was not at liberty to depart from the position of plaintiff 1 in the suit, still less could he pass on the power of objecting to it to defendant 2. In the result the second appeal is allowed with costs throughout and the case remanded to the lower appellate Court for disposal on the other issues, which remain still undisposed, including the question of the value of improvements. Court-fee stamp paid on appeal to be refunded.