
(1915) 09 MAD CK 0032
In the Madras High Court

Kolangorath Raman Nayar and Others APPELLANT
Vs
Kannoth alias Kandoth Vellarikka Kunhi Kolandan Musaliar RESPONDENT
and Another

Date of Decision : 22-09-1915

Acts Referred:

Evidence Act, 1872 — Section 32(2)

Citation : AIR 1916 Mad 652 : 31 Ind. Cas. 184 : (1915) 2 LW 941

Hon'ble Judges : Sadasiva Aiyar, J;Phillips, J

Bench : Division Bench

Judgement

Sadasiva Aiyar, J.—The plaintiffs are the appellants. They are the jenmies of the plaint lands, but their predeceessors-in-title had executed a

perpetual kanom (see Marupat, Exhibit A), in December 1857 in favour of the 1st defendant's ancestor for the sum of Rs. 120 reserving anominal

rent of one fanom per year. Whether this one fanom is to be treated as the agreed excess annual profits which the usufructuary kanom mortgagee is

to pay to the mortgagor, or whether a kanom mortgage being usually held to be (as a combination of a mortgage and a lease) an anomalous

mortgage, the one fanom is to be treated as rent seems to be an arguable, point. The plaintiffs treat the 1st defendant in the plaint as both

mortgagee and lessee, and contend that the lease has been forfeited because the 1st defendant denied in a reply notice, Exhibit F (alleged to have

been signed and sent by him), dated January 1908 that he was a tenant under the plaintiffs. (See paragraphs 4 and 5 of the plaint which does not

refer to any other denial of title before the date of suit.) The plaintiffs did not treat the kanom of 1857 in the plaint as a perpetual kanom, but as an

ordinary kanom for the customary period of 12 years and contended in their

plaint, paragraph 6, that the cause of action arose on the 26th

December 1869. They also gave another date for the cause of action namely, the date of Exhibit P (18th January 1909).

2. The District Munsif found (a) that the kanom was not one for 12 years as alleged in the plaint, but an irredeemable kanom (see paragraph 10 of his judgment).

(b) That the 1st defendant did send reply, Exhibit F, though he denied having sent it.

(c) That the 1st defendant forfeited his irredeemable kanom, tenure by reason of the plaintiffs' title in the letter Exhibit F.

3. On these findings he gave judgment for the plaintiffs for redemption of the kanom.

4. The learned Subordinate Judge on appeal agreed with the District Munsif that the reply notice, Exhibit F, was proved to have been sent by the

1st defendant, but held on the strength of *Raman Nair v. Vasudevan Namboodripad* 27 M.k 26 that a perpetual kanom is not forfeited by denial

of the landlord's title. He, therefore, dismissed the plaintiffs' suit reversing the District Munsif's judgment. The contentions before us in second

appeal are-

(1) That the clause in the Marupat, Exhibit A, against surrender is a clog on redemption, invalid in law and as such inoperative. (See 2nd ground of second appeal memo.)

(2) That the perpetual right must be held to have been forfeited on the ground of the denial of the landlord's title, the case of *Raman Nair v.*

Vasudewan Namboodripad 27 M.k 26 not being applicable to the facts of the present case. (See the 5th ground of second appeal memo.)

5. As regards the first contention, the mortgage now in question is dated in 1857. this Court in several cases see for example *Venkatasubbayya v.*

Venkayya 1 M.L.J. 677 and *Neelakandhan v. Ananthakrishna Aiyar* 6 M.L.J. 462 : 1 M.L.T. 426 has followed the ruling of their Lordships of the

Privy Council in *Thumbusawmy Muodelly v. Hoosain Rowthen* 2 I.A. 241, which held that the law of India was not the law of the English Courts

of Chancery in respect of stipulations in documents of mortgage restricting the right of redemption, that the Indian Courts, when they applied the

rules of the English Chancery Courts in such cases, assumed the functions of the

Legislature, and that, as regards mortgages made before 1858

when the erroneous course of decisions began in Madras, the intentions of the parties to the mortgage should be carried out without reference to

the decisions of the English Courts of Equity.

6. As regards anomalous mortgages executed after the Transfer of Property Act came into force, also the provisions for perpetual renewal are

valid according to the opinion of the present Chief Justice found in *Gopalan Nair v. Kunhan Menon* 30 M.k 300 : 17 M.L.J. 189.

7. In the case of *Kottal Uppi v. Edavalath Thathan Nambudiri* 6 M.H.C.R. 258, a perpetual kanom, was recognised by this Court and relief was

granted against the forfeiture of the perpetual term incurred by the breach of the stipulation in the kanom-deed that forfeiture would be incurred by

non-payment of rent regularly.

8. This contention, again, about the perpetual term being illegal, was not put forward in the plaint which relied only on the forfeiture by reason of

the denial of title in the notice, Exhibit F. I would, therefore, reject this contention.

9. Coming to the second contention, the respondent's learned Vakil attacked the finding of the lower Courts, namely, that the 1st defendant signed

and sent the reply, Exhibit F, as not supported by any legal evidence. Neither Court refers to any positive evidence that the 1st defendant signed

and sent Exhibit F. The District Munsif presumes that the 1st defendant must have signed and"" sent it because in two previous documents, Exhibits

K and M, he had set up kudima jenm title. The Subordinate Judge says without reference to any evidence whatever, ""I find that the reply, Exhibit

F, is proved to have been sent by the 1st defendant."" The fact that Exhibits K and M are genuine is not legal proof that Exhibit F is genuine. The

only evidence in the case on the plaintiff's side about Exhibit F is that the plaintiff's kariyasthan was told by the writer of Exhibit F that the writer

wrote it at the request of the 1st defendant. That statement of the writer who is now dead, made to the plaintiff's kariyasthan is not alleged to have

been made in the ordinary course of the writer's business. That statement, therefore, does not come u/s 32, Clause, 2 of the Evidence Act and

cannot prove that the 1st defendant did ask that writer to write Exhibit F. That is the only denial of title relied upon in the plaint. Mr. K.P.M.

Menon, the learned Counsel for the appellant, relied upon the denial of title in Exhibits K and M. But apart from the fact that these alleged denials

are not relied upon by the plaintiffs in the plaint, I think that assertions of title as owner by a person having rights in lands of a very substantial kind

should not necessarily be treated as denial of the title of a landlord whose rights are of a very attenuated character see also *Abbakka Shetihi v.*

Seshamma 25 Ind. Cas. 944 : 16 M.L.T. 442 : (1914) M.W.N. 915 decided by Napier, J., and myself as to the caution required to be exercised

by Indian Courts in applying the doctrine of forfeiture of denial of title.

10. Further, I am prepared to follow the decision of Boddam, J., and Bashayam Aiyangar, J., in *Raman Nair v. Vasudevan Namboodripad* 27

M.k 26 that such denial by a mortgagee within the period of his contractual mortgage term does not work a forfeiture of the term. It was argued

that *Raman Nayar v. Kandapuni Nayar* 1 M.H.C.R. 445 and *Mayavanjari Chumaren v. Nimini Mayuran* 1 M.H.C.R. 109, which the learned

Counsel contends are in his favour, have not been considered in *Raman Nair v. Vasudevan Namboodripad* 27 M.k 26, I cannot accept this

argument, as the Vakils who argued that case (Messrs. Sankaran Nair and Sundara Aiyar) were two of the most eminent Vakils of this Court. Sir

Bhashyam Aiyangar (one of the learned Judges who decided that case) and those two learned gentlemen (who also became learned Judges of this

Court afterwards) possessed quite exceptional knowledge of Malabar Law, including the case-law.

11. Further, the judgment in *Raman Nair v. Vasudevan Namboodripad* 27 M.k 26 does refer to decisions cited by the respondents' Vakil and

states the effect of those decisions. I am quite satisfied, therefore, that these two cases must have been cited before the learned Judges who

decided *Raman Nair v. Vasudevan Namboodripad* 27 M.k 26. That case clearly decided that while the customary period of 12 years for an

ordinary kanon cannot be availed of by a mortgagee who denied his mortgagor's title within that period, such a denial of the mortgagor's title does

not make the mortgagee liable to forfeit the term contracted for between the parties. As the term contracted for in this case is a perpetual term, it

cannot be forfeited by denial. I am not inclined to question the correctness of the decision in *Raman Nair v. Vasudevan Namboodripad* 1

M.H.C.R. 445 after this length of time, though the distinction made between the case of a customary term and a contractual term in that decision

may be rather fine (see also the criticism of this decision in Moore's Malabar Law, pages 229 and 230).

12. In the result I would dismiss the second appeal with costs.

Phillips, J.

13. I concur.