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(1954) 05 MAD CK 0011

In the Madras High Court

Case No : Appeal No. 39 of 1948

Kunhi Kalanthan and Others — APPELLANT

Vs

P. Madhavi Amma and Others — RESPONDENT

Date of Decision : 03-05-1954

Acts Referred:

Madras Hindu Religious Endowments Act, 1926 — Section 29, 76
Transfer of Property Act, 1882 — Section 60

Citation : AIR 1955 Mad 260

Hon'ble Judges : Rajagopala Ayyangar, J;Panchapakesa Ayyar, J

Bench : Division Bench

Advocate : K. Kuttikrishna Menon and C.K. Viswanatha Iyer, for the Appellant; M. Ramachandran and O.T.G. Nambiar, for the Respondent

Judgement

Panchapakesa Ayyar, J.—This is an appeal against the Judgment and decree of the Subordinate Judge of Tellicherry in O. S. No. 86 of

1944 granting the plaintiffs, the ''melkanomdars'', a decree for redeeming all the fourteen Items of ''kanom'' properties involved in the suit and

granting them possession, together with arrears of rent as claimed in the plaint, conditional on payment of the value of the defendants''

improvements, as found, along with the ''kanom'' amount.

The facts are briefly these. The 30th defendant, Chirakkal Kovilakath Rama Varma Valiya Raja Avergal, is the ''Jenmi'' in respect of items 1, 4, 5,

9, 10 and 13 to 14. Of the remaining items, Nos. 2, 3, 6, 8 and 11 belong in ''jerim'' to the Kalarivathukkal Devaswom under the management of

the 30th defendant as the sole ''ooralan'' or trustee. Item 7 belongs in ''jenm'' to the Naniyur Devaswom, likewise under the sole management of the

30th defendant as the sole ''ooralan'' or trustee. The consolidated ''kanom'' for all

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these fourteen Items was granted by the 30th defendant in favour

of one Abdul Khader, the late ''karnavan'' of the ''tarwad'' of defendants 1 to 9, and was renewed on 16th January 1929, under Ex. P-2, for ten

years. The total ''kanom'' amount was Rs. 9728-4-0. The items were separately described and the ''jenm'' right of the two devaswoms and the

Kovilagam were shown against the items; but the ''kanom'' amount it-self was not split up between the various items. Ex. p-2 would normally

expire on 16-1-1939. It was not renewed in favour of the then '' kanomdars''.

On 29-8-1943, the 30th defendant granted these fourteen items in ''melkanom'' to the plaintiffs, item 7, belonging to the Nainyur devaswom being

given only for five years, and the other 13 items being given for 12 years. The Government had, u/s 3(a) , Madras Hindu Religious Endowments

Act, exempted the Kalarivathukkal devaswom and its endowments from the operation of the provisions of Section 76 of the Act requiring the

previous sanction of the Hindu Religious Endowments Board for all leases above five years, mortgages etc. Of course, a ''kanom'' and ''melkanom''

will come under the head of ""mortgages"" under the rulings, as admitted by both sides. The fact that item 7 was granted only for five years will not,

therefore, make any difference, as the ''melkanom'' was not a lease but a mortgage. The ''kanom'' amount was also split up between the various

items for the first time, under Ex. P-1. Rs. 6412 was settled as ''kanom'' amount of items 1, 4, 5, 9, 10 and 12 to 14 belonging to the ''Kovilagam''

itself. Rs. 2958-4-0 was fixed as ''kanom'' on items 2, 3, 6, 8 and 11 belonging to the Kalarivathukkal Devaswom, exempted u/s 3(a), and Rs.

458 was fixed as ''kanom'' on item 7 belonging to the Naniyur Devaswom not exempted u/s 3(a) from the operation of Section 76.

2. The plaintiffs'' suit was contested on various grounds which will appear from the issues. The following issues were framed:

1. Is the ''melcharth'' of plaintiffs valid u/s 76 of the Hindu Religious Endowments Act?

2. Is plaintiff entitled to claim eviction?

3. Is the agreement to renew true, and does it afford a defence to the suit? 4. What is the value of improvements, if any, payable to and to which of

the defendants? 5. Have the defendants changed the nature of the holding?

3. After discussing the entire evidence, the learned Subordinate Judge held that

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the ''melcharth'' or ''melkanom'' to the plaintiffs was valid u/s 76,

Hindu Religious Endowments Act, except as regards item 7, Regarding item 7, he rightly held that it was a mortgage and required the sanction of

the Hindu Religious Endowments Board before a ''melkanom'' of this item could be validly granted to the plaintiffs.

On issue 2 he held that the plaintiffs were en titled to redeem all the fourteen items. The Malabar Tenancy Act, which was urged before him to be a

bar to eviction, was held by him not to be a bar, as, u/s 17 of the Act, where the ''kanom'' exceeded 40 per cent of the ''jenm'' value, the provision

regarding the prohibition be eviction would not apply, and, he found the ''kanom'' in this case to be worth Rs. 9728-4-0 as against the ''jenm'' value

of Rs. 12,336, i.e., to amount to far more than the 40 per cent, required u/s 17. He also considered that though the plaintiff''s had not got a proper

''melkanom'' title to item 7, still they could redeem the entire mortgage when the thirteen other items were covered by valid title. In that view, he

found issue 2 in the affirmative regarding all the four teen items.

Issue 3 was not seriously pressed before him and was virtually given lip. So he found Issue 3 in the negative. On issues 4 and 5 he found that the

defendants had not effected the numerous improvements they claimed, had not dug up and improved the land and made it fit for paddy cultivation,

had not removed the silt at any great expense and had only done such ordinary acts of husbandry regarding these matters as would not entitle them

to any sum as compensation for improvements. But he granted them the cost of some improvements effected, namely, a drainage channel worth

Rs. 28-8-0, and also the value of a shed and of some trees planted in the normal course of husbandry, without detriment to the paddy fields, and

necessitated by the silting and the formation of the new ridges in consequence. He directed all the parties to bear their own costs. He granted six

months'' time for redemption and allowed mutual set-off of claims. Only defendants 2, 3 and 6 to 11 have appealed,

4. We have perused the entire records and heard the learned counsel on both sides. Mr. Kuttikrishna Menon, the learned counsel for the

appellants, raised four main contentions, more or less the same contentions'' as were raised before the lower Court. The first was that the

''melkanom'' or ''melcharth'' under Ex. p-1 was invalid ''in toto'' because of three

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reasons: firstly, because the kanom amount had been split up

between items belonging to the ''Kovilagam'', and the Kalarivathukkai and the Naniyur devaswoms without obtaining the sanction of the Hindu

Religious Endowments Board; secondly, because item 7 had been granted on ''melkanom'' mortgage against the provisions of Section 76 and

without obtaining the sanction of the Hindu Religious Endowments Board even though there was no exemption by Government of this Devaswom

and its endowments u/s 3(a) from the provisions of Section 76; find, thirdly, because a partial redemption of a mortgage was riot possible,

especially by a person not having title to one out of the fourteen items.

We are satisfied, after hearing the learned counsel on both sides, that the grant of item 7 in ''melkanom'' to the plaintiffs, under Ex. P-1 will be

invalid. Under the old section, it was stated as not valid and operative, and under the present Section 29, to be ''null and void''.'' There is no doubt

whatever in our minds that the plaintiffs have not got a valid ''melkanom'' title to item 7, But there is equally no doubt in our minds that the plaintiffs

have got a valid title to all the other thirteen items. The learned counsel for the plaintiffs, Mr. Jagadisa Aiyar, conceded that partial redemption

could not be granted, but expressed the willingness of the plaintiffs, his clients, to pay the whole mortgage amount and the cost of the improvements

on the thirteen items and get redemption of only thirteen items, leaving item. 7, the fourteenth item for appropriate future proceedings

Mr. Kuttikrishna Menon urged that if this redemption is allowed it will be tantamount to the court''s creating ''a new contract'' in favour of the

plaintiffs in the place of the old contract under Ex. P-1. We cannot agree. It is only the old. contract under Ex, P-1 which the plaintiffs are allowed,

to enforce to the extent possible under the law. Such cases are of frequent occurrence even in other domains of law. Thus, a person who has

bought joint family properties from the father and manager of a joint family can, even when the sale deed is found to be not binding on the sons, opt

to have the father''s share alone in the properties for the entire consideration paid by him, reserving his other remedies to future appropriate

proceedings.

It was urged by Mr. Kuttikrishna Menon that the Hindu Religious Endowments Board, now represented by the Commissioner, would be by-

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passed -by allowing the plaintiffs such a remedy. We do not see how these appellants are interested in the-Hindu Religious Endowments Board or

the Commissioner, Hindu Religious and Charitable Endowments. Anyway, their rights will not be prejudiced by any order passed in this appeal to

which they are not a party. The splitting up of the ''kanom'' amount may not bind the two temples. But as the whole ''kanom'' amount is being paid

by the plaintiffs, the point loses its importance and relevancy in this appeal. As item 7 is given up now, and left to future appropriate proceedings,

that point also goes.

5. The second main contention of Mr. Kuttikrishna Menon was thai the plaintiffs had not . stated in the lower Court that the properties now

admitted to belong to the two ''Devaswoms'' be-longed to ''public Devaswoms'' of which the 30th defendant was only a trustee, and that they had

tried to play a fraud on the ''Devaswoms'', and that, the ruling of a Bench of this Court, consisting of Sir A. J. H. Collins and Handley J., in --

''Konna Panikar v. Karunakara'', 16, Mad 328 (A) would apply and prevent the plaintiffs from redeeming the kanom as a whole, We have

looked into that ruling and are satisfied that it will not apply to the present case. There the properties of the devaswom were not specifically

described as such, and no person was Impleaded as representing the ''devaswom'' in question, and, ''during the entire trial in the first court'' there

was no admission of the title of the ''devaswom'' to the properties belonging to it, and there was a collusive attempt to defraud the ''devaswom''.

But, here, the plaint itself stated that the 30th defendant, was a trustee in respect of the properties of the two '' devaswoms '' which were named.

Even, Ex. P-1 described the items as belonging to the ''devaswoms''.

Perhaps in the initial stages of the trial in the lower court there might have been an argument that the 30th defendant, as the Raja of the ''Kovi-

Jagam'' and the sole trustee, could do what he liked with the ''devaswom'' properties of these temples, attached to the ''kovilagam'' and would not

be bound by the provisions of Section 76. Probably such an argument was also the result of the grant of the previous ''kanoms'' to the appellants

without taking any permission of the Hindu Religious Endowments Board u/s 76. It will be remembered that Ex. P-2 was of the year 1929, after

the Hindu Religious Endowments Act had come into operation, and Section 76

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had come into force. Whatever it be, during the final hearing and

trial it is admitted even by Mr. Kuttikrishna Menon that the plaintiffs stated that these two temples were public temples and that the 30th defendant

was only a trustee. The lower Court in consequence held that the ''melkanom'' was a mortgage, and that item 7 could not be validly mortgaged to

the plaintiffs in ''melkanom'' as the sanction of the Hindu Religious Endowments Board had not been obtained u/s 76. So the facts of this case are

radically different from the ruling relied on, which will have no application here.

6. Mr. Kuttikrishna Menon relied on the judgment of our learned brother Krishnaswami Nayudu J, in -- ''Adam Kutty v. Pullia Veettil parnamma'',

A. S. No. 2 of 1946, D/- 28-4-1934 (Mad) (B). In that case, the learned Judge, after hearing the arguments of both Mr. Kuttikrishna Menon and

Mr. Jagadisa Aiyar, the learned counsel on both sides, on similar points, but in a case with somewhat different facts, held that the plaintiff therein, a

''melkanomdar'', like the plaintiffs here, could not redeem and recover possession of the suit properties. But, there, ten out of the twelve items

belonged to the ''devaswoms'', and no sanction of the Hindu Religious Endowments Board had been obtained u/s 76 regarding any of them. We

do not also see from the judgment whether the plaintiff in that case was willing to pay the entire mortgage amount and allowed to redeem only 2 out

of the 12 items. So, there are two vital differences between that case and this. The first is that, here, only one of the 14 items is vitiated by lack of

sanction u/s 76, whereas, there, 10 out of 12 items were vitiated. Mr. Kuttikrishna Menon urged that, on principle, there can be no difference

between 1 and 10. We cannot agree, This difference which exists outside law courts, has been applied also inside the law courts, and has affected

decisions.

There have been innumerable cases, in the privy Council and in the High Courts, where if the portion of the consideration justified by family

necessity or benefit exceeds 3/4th, the entire alienation by the manager has been held to be valid and binding on the coparceners whereas if it is

only 1/4th or 1/8th the entire alienation has been held to be invalid, and not binding on the coparceners. When 1/4th and 3/4th can make such a

difference, it is obvious that 1 and 10 must make even a greater difference. Secondly, in the case decided by Krishnaswami Nayudu J. there was

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no undertaking by the plaintiff or his counsel to pay up the entire mortgage amount and get permission to redeem only the items not vitiated u/s 76,

namely, 2 out of the 12 items. Here, Mr. Jagadisa Aiyar and the plaintiffs have expressed their willingness to pay up the entire mortgage amount

and get permission to redeem only 13 out of the 14 items, and leave the vitiated item, item 7, to appropriate future proceedings. It is obvious that in

view of Mr. Jagadisa Aiyar''s clients agreeing to pay the whole mortgage amount and redeem only 13 out of 14 items, leaving, out the vitiated item,

item 7, for future proceedings, Section 60, T. P. Act will not also be a bar.

7. The third contention of Mr. Kuttikrishna Menon was that the lower court was not justified in holding that the ''kanom'' represented more than 40

per cent of the value of the ''jenm'' of these properties and that therefore the provisions of the Malabar Tenancy Act against eviction could not be

invoked. But Mr. Kuttikrishna Menon himself admitted that on merits the lower court''s finding, regarding the ''kanom'' and ''jenm'' value, was

difficult to attack. The lower court has gone carefully into the question and acted on the report of a commissioner who gave full details regarding

the produce, the values etc.

The only evidence adduced against, it is that of D. W. 1, a most interested and unreliable witness. This man swore that the suit lands would yield

12 times the seed paddy, but he admitted cheer fully that he had represented to the karnam that the land would yield only five times the seed

paddy. Of course,"" the statement before the karnam was made to escape heavy procurement. The statement before the court was made to show

that the ''kanam'' value was less than 40 per cent, of the ''jenm'' value. It is obvious that a witness, like D. W. 1, who gives contradictory

statements at various times to suit his own purposes, cannot be given any serious weight or consideration by courts. We agree with the lower

court''s finding that the ''kanom'' value in this case exceeded far the 40 per cent, prescribed in Section 17, Malabar Tenancy Act.

8. The fourth and last contention of Mr. Kuttikrishna Menon was that the lower court was not justified in disallowing many items of improvements

claimed and in allowing only mere pittances in lieu of the vast sums spent. But, even here, he could not show us any concrete evidence in support

of the vast sums claimed, or, indeed, in support of a claim to a pie more than

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what has been allowed by the lower court. The principles acted on by the lower court were very sound. Merely clearing silt caused by ordinary floods will be only an ordinary act of husbandry not entitling the person to compensation for the improvements. So it was rightly disallowed. Creating drainage channels, planting cocoanuts trees and ridges are certainly improvements and they were allowed. The cost of creating two depressions, called tanks by the appellants, was not allowed by the lower court as the evidence showed that they were not of the least use for irrigation, and nobody could say how and why these depressions came into existence in these paddy fields. So we confirm the lower court''s findings regarding this also.

9. In the end, we modify the Judgment and decree of the lower court by directing the plaintiffs to pay the entire mortgage amount and giving them the right only to redeem and recover possession of Items 1 to 6 and 8 to 14, and that too after paying for the Improvements on those items as found by the lower court. The plaintiffs claim to redeem and recover possession of item 7 is dismissed, and the plaintiffs are left to agitate the matter in appropriate future proceedings. The rest of the lower court''s judgment and decree, including the order for coats, is confirmed. In this appeal, the appellants will pay the costs of the plaintiffs-respondents, one set, as they have substantially, failed.

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