

(1939) 10 MAD CK 0051
In the Madras High Court

Kuttukken Eramullan Haji and Others	APPELLANT
Vs	
Pappinisseri Chandroth Narayanan and Others	RESPONDENT

Date of Decision : 26-10-1939

Acts Referred:

Citation : AIR 1940 Mad 453 : (1940) 51 LW 101 : (1940) 1 MLJ 165

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—The first and second respondents filed a suit in the Court of the District Munsif of Taliparamba for the redemption of a kanom on the payment of the kanom amount and the value of the improvements. The first respondent is the melcharthdar (lessee from the jenmi with power to redeem the kanom) and the second respondent is the jenmi who granted a kanom to the karnavan of the 11th respondent's tarwad on the 29th June, 1884. On 5th June, 1892, the kanomdar created a sub-kanom in favour of three persons who are not parties to the suit. In the original kanom deed, it was stipulated that the kanomdar should only be called upon to pay for improvements to the property at the rates stipulated therein. The sub-tenants of the sub-kanomdar were made parties to the suit and contended that they were entitled before ejectment to compensation on the basis of the provisions of the Malabar Compensation for Tenants' Improvements Act, 1900. The plaintiff-respondents maintained that the sub-tenants were only entitled to compensation at the lower rates mentioned in the kanom deed of 29th June, 1884. The District Munsif granted a decree for redemption on payment of the kanom amount, Rs. 2,500, and the value of the improvements calculated under the provisions of the Act. The plaintiff-respondents challenged the decision of the District Munsif that the Act applied in an appeal to the Subordinate Judge of Tellicherry. The Subordinate Judge allowed the appeal, holding that the deed and not the Act governed the position. His decision meant a reduction of Rs. 8,145-9-0 in the amount of compensation payable to the tenant defendants. Thirteen of them have filed this present second appeal.

2. The District Munsif held that the sub-tenant defendants had no notice of the terms of the kanom deed of the 29th June, 1884 and that when they entered into possession of their lands they believed bona fide that they would be paid the value of improvements under the Malabar Compensation for Tenants' Improvements Act when their sub-tenancies terminated. The Subordinate Judge did not question this finding of the District Munsif, but held that it should be presumed that all the subtenants had notice of the terms of the kanom deed. He also held that the stipulation that the jenmi should only pay compensation at the rates mentioned in the deed amounted to a covenant which ran with the land.

3. Section 19 of the Act provides that,

Nothing in any contract made after the first day of January, 1886, shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act.

4. There was a stipulation in the sub-kanom deed of 5th June, 1892, that improvements should be paid for at the same rates as those mentioned in the earlier deed. But the sub-kanom deed falls within the mischief of Section 19 and unless the provisions of the earlier deed with regard to payment of compensation amounts to a covenant running with land of which the subtenants had notice, the decision of the Subordinate Judge must be set aside and the judgment of the District Munsif restored. Section 3 of the Act defines the word "tenant" with its grammatical variations and cognate expressions, as including,

A person who as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee or sub-mortgagee of land is in possession thereof, or who, with the bona fide intention of attorning and paying the customary rent to the person entitled to cultivate or let waste land, but without the permission of such person, brings such land under cultivation and is in occupation thereof as cultivator.

5. The sub-tenants, therefore, clearly come within the definition of "tenants". Section 5 says:

(1) Every tenant shall on ejectment be entitled to compensation for improvements which have been made by him, his predecessor in interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid; and every tenant to whom compensation is so due shall, notwithstanding determination of the tenancy or the payment or tender of the mortgage money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court.

(2) A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be.

6. A sub-tenant is a person who comes within the definition of "tenant" and consequently cannot be dispossessed of the land cultivated by him unless he has

been paid the amount of the compensation allowed by the Act, if he is in possession under a contract later than 1st January, 1886.

7. Now, it is quite clear that there is in law no privity of contract or of estate between the sub-tenants and the jenmi : see *Thethalan v. Eralpad Rajah Calicut* (1916) 32 M.L.J. 442 : ILR 40 Mad. 1111 and *Ram Kinkar Banerjee v. Satyacharan Srimani* (1939) 1 M.L.J. 544 : L.R. 66 IndAp 50 : ILR (1939) 1 Cal. 283 . In the former case of which the Privy Council approved in the latter case, Wallis C.J., said:

The latter part of Section 108 shows that sub-leases and mortgages created by the lessee do not affect the rights of the lessor against the lessee, still less do they affect the rights of a lessee against his sub-lessee or mortgagee.

8. "There appears," he added,

to be no sufficient reason for supposing that it was the intention of the Legislature by this section to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor.

9. In *Ram Kinkar Banerjee v. Satyacharan Sriman* (1939) 1 M.L.J. 544 : L.R. 66 IndAp 50 : ILR (1939) 1 Cal. 283 ., the Judicial Committee held that a mortgage of a lease in any of the six forms of mortgage referred to in Section 58 of the Transfer of Property Act is not an absolute assignment under the Indian Law and does not create privity of estate between the lessor and the mortgagee. Therefore it is not open to the jenmi or the melcharthdar to claim that the appellants were privy to the contract of 29th June, 1884 or to the estate created thereby.

10. There is no reason to doubt the correctness of the finding of the District Munsif that the sub-tenants had no actual notice of the deed of 29th June, 1884, and the decision of the Subordinate Judge that they had constructive notice of it cannot be supported. Nor can support be given to his finding that the provision in the deed with regard to compensation amounts to a covenant running with the land. Mr. Kuttikrishna Menon has frankly and properly conceded that unless the provision in the deed can be regarded as falling within the provisions of Section 40 of the Transfer of Property Act his clients are out of Court. Section 40 states that where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon the obligation may be enforced against a transferee with notice, but not against a transferee for consideration and without notice of the obligation. The position then is this. The obligation must be annexed to the ownership of the property, but even then it cannot be enforced against a transferee for consideration without notice. In the present case it cannot be said that the contract entered into between the jenmi and the kanomdar under which the jenmi was only to pay for improvements at specified rates is to be regarded as an obligation annexed to the ownership of the property. It cannot be placed any higher than a personal covenant, and being a

personal covenant it cannot be enforced against the appellants. Moreover, the sub-tenants are transferees for consideration and they took their holdings without notice of the obligation under which the kanomdars had placed themselves. Therefore, even if that obligation could be regarded as an obligation annexed to the land it would still be unenforceable. It follows that the rights of the sub-tenants to compensation are the rights given by the statute.

11. The second appeal must be allowed and the decree of the District Munsif restored, with costs in this Court and in the lower appellate Court. Six months will be the period fixed for redemption.