

(1958) 05 KL CK 0005

In the High Court Of Kerala

Case No : A.S. No's. 158 and 195 of 1956 (E)

Nani Kunjukrishnan

APPELLANT

Vs

Padmanabha Pillai Krishna Pillai
 Padmanbha Pillai
Krishna Pillai Vs Nani Kunjukrishnan

RESPONDENT

Date of Decision : 16-05-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Limitation Act, 1908 — Article 120, 148
Transfer of Property Act, 1882 — Section 76
Travancore Limitation Act, 1908 — Article 109, 136

Citation : AIR 1959 Ker 38

Hon'ble Judges : T.K. Joseph, J;Sankaran, J

Bench : Division Bench

Advocate : T.R. Subramonia Iyer and S. Bhagavathi lekshmi Ammal, in A.S. 158/56 and G. Vishwanatha Iyer, in A.S. 155/56, for the Appellant; G. Vishwanatha Iyer in A.S. 158/56, S. Bhagavathilekshmi Ammal, for Respondents 1 and 2 in 195/56 and M.P. Ramakrishna Pillai, for Respondents 7 and 11 in 195/56, for the Respondent

Judgement

T.K. Joseph, J.—These appeals arise from O. S. No. 68 of 1121 of the District Court of Trivandrum which was a suit for redemption of mortgages. The properties described in the plaint schedule are Kypallivilagom comprising three plots and Alummoodu Purayidom, These originally belonged to two families, Kypilli find Attoor houses on Service Inam Tenure. The mortgages and purakkadoms sought to be redeemed are Exhibits A, B, C, D, E and F. According to the plaintiff one Mary Beemer took Kypallivilgom on mortgage from the owners in 1043 under Ext. A. This was followed by another mortgage Ext. B of the year 1053 in favour of Mary Beemer's husband Joris Beemer for Alummoodu Purayidom. Mary Beemer in whom the mortgage rights ultimately vested bequeathed the same to her original Tar-wad known as Varuvilagon under a Will which though contested has been upheld by the Court. Defendants 1 to 40 are members of Varuvilagon Tarwad consisting of 4 branches, all of which are

represented in the suit. Defendants 41 to 44 are the children of one Mathevan Kumaran, deceased younger brother of the 1st defendant and defendants 45 to 47 are the children of the 1st defendant.

The 48th and 49th defendants were impleaded as persons in possession of certain plots or building in the properties. The 50th defendant was stated to have a hypothecation right over the property. Defendants 51 to 54 are members of Kypalli family who sold the equity of redemption to the plaintiff. On the strength of such purchase the plaintiff instituted this suit. According to the plaintiff defendants had committed waste in the property and a sum of 1,500 fanams was claimed by him as damages. The plaintiff also claimed arrears of Michakaram at the rate of 20 fanams per annum from the date of Ext. B which provided for payment of the same.

The plaintiff's case was that the defendants were liable to remove the building erected by them on the property. He also offered to pay a sum of 2,000 fanams as compensation for the buildings in case defendants were unwilling to remove the same.

The plaintiff stated that he was willing to pay compensation for trees, if any, planted by the mortgagees. A sum of Rs. 1,000 per annum was claimed as mesne profits. The plaintiff prayed for a decree for recovery of possession of the properties on payment of the mortgage money and value of improvements, if any, deducting therefrom damage on account of waste and arrears of michakarom.

Defendants 8, 9, 16 to 21, 23, 24, 33, 41, 42, 48 49, 56 and the guardian of minor defendants filed written statements disputing the plaintiff's claim. The main contentions were that defendants 51 to 54 were not competent to sell the equity of redemption to the plaintiff, that Michakarom was not in arrears, that the suit was barred by limitation, that the allegation of waste was not true, that the defendants were entitled to the value of improvements, that the claim for mesne profits should not be allowed and that the rate at which the same was claimed was excessive. Defendants 16 to 21 further contended that Ext. A comprised only the middle plot of Kypallivilagom and not the plots lying north and south of it.

According to them Survey Nos. 169 and 171 alone were included in Exis. A and B and the plaintiff was not entitled to redeem the rest of the property, i.e. S. Nos. 168 and 170. The 24th defendant raised a contention that the northern plot of Kypal livilagom comprised in S. No. 169 was not included in Ext. A and that it belonged to a different family from whom her ancestress Valli Chinna had obtained it on mortgage. It was therefore contended that possession of the northern plot was not under the plaintiff's mortgages. The 49th defendant who claimed 10 cents and the building in the northern plot denied the plaintiff's claim for redemption of the said plot.

She is the widow of one Thanuvan Kumarukutty, the last surviving member of Attoor family. She and her husband were residing together in the said plot and

after her husband's death she mortgaged the same to the 59th defendant. This plot was not included in, the plaintiff's sale deed and his right to redeem this plot was denied. The plaintiff filed a replication denying the material allegations of the defendants and reiterating the averments in the plaint. The trial Court found that Ext. A comprised only the middle plot of Kypallivilagom, that the northern and southern parts of the said Purayidom were not included in Ext. A, that the suit for redemption of Ext. A was barred by limitation and that the plaintiff was entitled to a decree for recovery of the northern and southern plots of Kypallivilagom as well as Alummoodu Purayidom.

The suit was dismissed as regards the plot of 10 cents claimed by the 49th defendant and the middle plot of Kypallivilagom. The claim for damages for waste was upheld. Michakarom was allowed to be recovered from the date of the sale deed obtained by the plaintiff. Thus the suit was allowed in respect of the northern and southern plots of Kypallivilagom as well as Alummoodu and dismissed as against the middle plot of Kypallivilagom and the 10 cents in the northern plot.

As the value of improvements on the middle plot was not separately ascertained, provision was made in the decree for deciding that question later. The two appeals have been filed by the defendants and the plaintiff respectively objecting to the decree in so far as the same partly disallowed their claims. (2) The defendant's appeal A. S. No. 158 may be considered first. The first point raised is that a decree for redemption of the northern and southern plots of Kypallivilagom should not have been given. It was contended that the principle on which such a decree was given by the lower Court was not applicable to the facts of this case. It is true that the learned Judge treated this case as one for redemption of an unspecified mortgage of these plots which was acknowledged in the purakadom deeds Exts. D and E.

The argument advanced on behalf of the appellants was that the suit being one for redemption of two specific mortgages Exts. A and B, there is no justification for treating this as a suit for redemption of a mortgage of which particulars were not given. It is unnecessary to rely on this principle as the decree can be well supported on another ground. Exts. D and E no doubt refer to a prior mortgage under which these properties were held. It was found by the trial Court that the prior mortgage Ext. A did not include these plots. Assuming that this finding is correct it follows that Exts. D and E have to be viewed as independent transactions. Both Exts. D and E provide for additional terms in consideration of the respective sums advanced under the deeds.

Thus Ext. D provided for a further term of 12 years, such period to commence from the expiry of the period under Ext. D. Admittedly the northern and southern plots are covered by Exts. D and E and the suit is to redeem the purakadoms also. Even if these plots were not included in any prior mortgage the plaintiff is entitled to redeem Exts. D and E and recover possession of these plots. The decree given for recovery of these plots is therefore correct.

3. Argument was advanced that the plaintiff's vendors had no title to the northernmost plot in Kypalli Purayidom. A contention was raised by the 24th defendant at the far end of the case that this plot belonged to a different Tarwad from whom her ancestress Valli Chinna obtained it on mortgage in 1056. None of the other defendants had raised this contention and it was not denied that possession passed under Exts D and E executed long after 1056. There was no case that Exts. D and E were vitiated by fraud. Ext. XIX was produced as the mortgage deed obtained by Valli Chinna and it appears to have been marked without proof.

The Lekkom of the property included in Ext. XIX is different. On account of the late production of the document the plaintiff did not get an opportunity to offer his explanation regarding it. In the circumstances we are unable to hold that the northernmost plot of Kypallivilagom belonged to strangers or that redemption of the said plot was wrongly allowed by the lower Court.

4. Another point raised by the appellants relates to the award of compensation for waste. It was argued on behalf of the appellants that the claim on account of waste was in respect of trees which had disappeared on account of old age and that compensation was not awardable for the same. There is no evidence of any active waste committed by the persons in possession but that fact alone cannot absolve them of liability to account for the timber of the trees which had fallen down during the period of their possession.

The mortgagees were bound to inform the mortgagors if trees had fallen down due to natural causes and if thereafter the mortgagors had failed to remove the timber, the mortgagees could not be held answerable for the same. There is no evidence in this case that the mortgagees ever informed the mortgagors that any tree had fallen down due to natural causes. They are therefore liable to account for the timber value of trees which were in existence when the mortgagees got possession and which are now missing. This is what has been awarded and this part of the decree does not therefore call for interference.

5. The last point urged was in respect of improvements. This is raised as a supplementary ground and is based on The Travancore-Cochin Compensation for Tenants Improvements Act (X of 1956.) which provides for computation of compensation for trees, on three-fourth of the capitalised net income for 20 years. Until this Act was passed on 31-10-1956, there was no statute law in Travancore governing the award of such compensation, but according to judicial decisions the practice was "to capitalise the income for 8--1/3 years in the case of cocoanut trees, jack trees, etc., to deduct one-fourth of the same for tax and maintenance and another one-fourth as the share of the owner of the land and to award the balance to the mortgagee or tenant as value of improvements.

The additional ground has been raised to take advantage of the new Act. This claim is objected to by the plaintiff-respondent on the ground that the suit was disposed of by the trial court before the new Act was passed. The suit no doubt

was disposed of before Act X of 1956 came into force but the fact that the appeal was pending when the new legislation was passed is relied on by the appellants in support of their claim. The appellants rely on Rule 33 of Order XLI of the CPC which provides as follows:

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."

Under this rule the appellate court has power not merely to pass any decree which ought to have been passed by the lower court but also to pass such decree as the case may require. Mulla in his commentary on this rule, states:

"The power of the appellate court is not limited to determining the question whether the original court was right according to the law in force at the time of its judgment: it may pass such decree as is in accordance with any later enactment which came into operation subsequent to such date."

This principle is supported by numerous decisions given in the foot note on page 1229 of the commentary. It is not disputed that if the suit were pending in the trial court at the time Act X of 1956 came into force that court would have been not merely competent but also bound to apply the Act in fixing the value of improvements. Rule 33 of Order 41 is based on Rule 4 of Order 58 of the Judicature Rules of England and Courts in India have followed English decisions on the question of powers of the appellate court. Lord Gorell in delivering the judgment of the House of Lords in *Attorney-General v. Birmingham, Tame and Rea District Drainage Board* 1912 AC 788 (A), observed:

"Under the Judicature Acts and Rules the hearing of an appeal from the judgment of a Judge is by way of rehearing, and the Court has power to give any judgment and to make any order which Ought to have been made, and to make such further or other order as the Court may think fit (see Order LVIII, Rules 1 and 4).

The Court also has power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought (see Order LVIII, Rule 4). It seems clear, therefore, that the Court of Appeal is entitled and ought to rehear the case as at the time of rehearing, and if any authority were required for this proposition it is to be found in the case of *Quilter v. Mapleson* (1882) 9 QBD 672 (B). In that case an action of ejectment has been brought under a proviso of re-entry for breach of a covenant in a lease, and Lord Coleridge C. J. gave judgment for the plaintiff.

The defendant appealed and obtained a stay so that the plaintiff did not get actual possession. After the decision and before the appeal was heard the

Conveyancing and Law of Property Act, 1881, came into operation, under which power to relieve against a forfeiture was given, and the Court of Appeal, consisting of Jessel M. R. and Lindley and Bowen L. JJ. reversed the decision, and granted the relief sought for by the defendant holding that on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance.

In my opinion the Court of Appeal was entitled to make such order as the Judge could have made if the case had been heard by him at the date on which the appeal was heard".

In (1882) 9 QBD 672 : 52 LJQB 44 (B), Bowen L.J. held :

"The rules were intended to enable the Court of Appeal to do complete justice. If the law has been altered pending an appeal, it seems to me to be pressing rules or procedure too far to say that the Court of Appeal cannot decide according to the existing state or the law. I think that such is not the true construction of the rules, for Order 58, Rule 5, does not merely enable the Court of Appeal to make any order which ought to have been made by the court below, but to make such further or other order as the case may require."

6. This principle was followed by the Madras High Court in *Gorakala Kanakayya v. Janardhana Padbi* ILR Mad 439 (FB) (C) and *Muthusami v. Kalyani* AIR 1918 Mad 1299 (D). *Ram Ratan Sahu v. Bhishnu Chand* 11 CWN 732 (E); *Narayan v. Mt. Tulshi*, AIR 1925 Nag 104 (F) and *Pandurang v. Bayaja* AIR 1925 Nag 251 (G) are cases in which it was held that as a general rule, a Court of Appeal in considering the judgment of the court below, will confine itself to the state of the case at the time such judgment was rendered but that in exceptional cases the court will depart from this rule and take cognisance of facts which have arisen later especially whereby so doing it can shorten litigation and best attain the ends of justice.

We are of opinion that this is a case in which we are not merely competent to take notice of Act X of 1956 but that it is our duty to do so, as the appeal was pending when the new Act was passed. The only decree in the case will be that passed on appeal and in passing such decree, the provisions of the Act cannot be ignored. The appellant is therefore entitled to have the value of improvements fixed according to the new Act. However it has to be pointed out that though an additional ground has been raised the appellants have not valued the same or paid the requisite court-fee. They are directed to do the same so as to entitle them to have the improvements assessed on the basis of Act X of 1956.

7. Coming to the plaintiff's appeal A. S. No. 195 of 1956, the points raised are: (1) that recovery of possession of 10 cents in the northernmost plot was wrongly disallowed, (2) that the suit should have been decreed in respect of the middle plot (S. No. 169) of Kypallivilagom Puraidom also and (3) that the claim for michakarom should have been allowed in full.

8. As regards the first point, it is admitted that the plaintiff did not obtain title to the equity of redemption of the plot of 10 cents. His case was that the understanding with his vendors was that he should recover this plot also and then surrender the same to his vendors. Defendants 51 to 54 who sold the equity of redemption to the plaintiff and who are thus entitled to this plot have acquiesced in the decree upholding the 49th defendant's title to this plot.

In view of this the plaintiff is not entitled to claim recovery of this plot. Even apart from this it is clearly proved that the 49th defendant is the widow of one Thanuvan Kumarukutty, the last surviving member of Attor House. It is admitted in the pleadings that the 49th defendant was in possession of the 10 cents and the building therein. It has not been shown that her possession is under the mortgagee. The exclusion of this area in the sale deed taken by the plaintiff is also a significant fact supporting the 49th defendant's case.

While the 40th defendant has proved her possession of this plot there is no evidence that the mortgagee was ever in possession of the same. In these circumstances it must be held that the trial court rightly disallowed the plaintiff's case in respect of the plot of 10 cents and the building.

9. The next point relates to the middle plot of Kypallivilagom Puraidom (S. No. 169) in respect of which the suit was dismissed on the ground of limitation. The trial Court found that the Purakadoms Exhibits D and E were not in respect of the middle plot although the description of the properties in those deeds was such as to give rise to some confusion. According to the plaint Kypallivilagom consists of three plots. The Commissioner who was deputed to locate the several plots found: that there were three plots. Exhibit A also shows that there were three plots in 1043.

It is therefore clear that Kypallivilagom Puraidom had three plots from the year 1043 till the date on which the Commissioner inspected the property. Exhibits D and E describe the portions mortgaged-as the northern and southern plots of Kypallivilagom. This would suggest that there were only two plots at that time. But as already stated there are three plots and this description in Exhibits D and E must be due to some error. Exhibit D specially states that the property mortgaged thereunder was originally mortgaged to George Beemer.

The middle plot is included only in Exhibit A which was in favour of Mary Beemer. The description of the properties in Exhibits D and E is identical. Notwithstanding the description in Exhibit D, it has to be held that the Purakadoms were not in respect of the middle plot. Exhibit A thus stands without any acknowledgment and the suit instituted 78 years after the execution of Exhibit A must be held to be barred by limitation under Article 136 of the Travancore Limitation Act which provided a term of 50 years for redemption of a mortgage.

10. It was contended by Sri Viswanatha Iyer, learned counsel for the appellant, that the suit should be treated as one falling under Article 109 of the Travancore Limitation Act corresponding to Article 120 of the Indian Act which relates to

suits for which no period of limitation is provided. The argument" is that Kypallivilagom Puraidom was a Service Inam land which was inalienable, that Ext. A was therefore a void mortgage, that the suit was to be treated as one for recovery of possession of land on payment of the amount received and that limitation would begin to run only from the date on which surrender of possession was demanded.

In other words, the position contended for is that the period of limitation provided for a suit for redemption of a mortgage does not apply to this case, as the transaction cannot be treated as a mortgage. Reliance was placed on two decisions of the Allahabad High Court in Mahabal Singh and Another Vs. Ram Raj and Others, and Barhu Singh and Others Vs. Kharpattu and Others, . The question which arose in the former case was whether a mortgage of an occupancy holding was void u/s 5 Avadh Rent Act and whether the mortgagor could obtain possession in a proceeding instituted u/s 12 of the U. P. Agriculturists' Relief Act.

The Full Bench held that the mortgage was void and that the mortgagor was to institute a suit in the civil court for recovery of possession on payment of the amount received by the mortgagor. In the latter case it was held that a usufructuary mortgage of an occupancy holding created when the N. W. P. Rent Act (XII of 1881) was in force must be treated as a valid transaction but in a qualified sense, i. e., in the sense of subletting with a covenant that the mortgagor would not be entitled to recover possession without payment of the money received by him and further that a transfer of the occupancy holding was not created by the mortgage but a mere right to occupy the holding was created upon certain covenants.

It was also held that the right of redemption of a usufructuary mortgage of this nature could not be held to have become barred by lapse of time under Article 148 of the Limitation Act and that the mortgagor could institute a suit for possession at any time on payment of the mortgage money, since his cause of action for recovery of possession would accrue only upon his demand for possession on payment of the mortgage money and refusal thereof by the mortgagee. The provision in Section 9 of the N. W. P. Rent Act was as follows:

"The right of tenants at fixed rates may devolve by succession or be transferred".

No other right of occupancy shall be transferable in execution of a decree or otherwise than by voluntary transfer between persons in favour of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein.

When any person entitled to such last mentioned right dies the right shall devolve as if it were land:

Provided that no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this clause."

On the strength of these decisions it was contended that the mortgage in this case was not a valid one as it was in respect of a Service Inam land which from time immemorial was treated in Travancore as inalienable and that Article 136 of the Travancore- Limitation Act had no application. There is force in this contention. Service Inam lands of this type have always been held to be inalienable in Travancore. The Revenue Settlement Proclamation of Travancore dated 14th Kumbhom 1061 provided for settlement of Inam lands. Clauses (6) and (7) of Section 24 of the said Proclamation provided as follows:

"(6) After the Settlement of the Inams under the foregoing Rules, the holders shall be at liberty to mortgage, sell or transfer them in any manner at their will and discretion, subject only to the payment of this quit-rent fixed.

(7) There shall be no further interference on the part of Govt. with these free-holds except such as might be necessary for the punctual realization of the quit-rent payable."

This led to some doubt as to whether these provisions applied to Service Inam lands of this nature. Another Proclamation was therefore issued on 1st Edavom 1068, Sections 1 and 2 of which provided as follows:

"1. The provisions of paras 6 and 7 of Section 24 of the Royal Proclamation dated 24th February 1886/14th Kumbhom 1061 shall not be taken to apply to Service Inams described in para 1 of the same section.

2. All alienations of Inam lands attached to specific services of any description which have been or which may hereafter be made, contrary to past usage, shall be treated as null and void. And it shall be competent to Our Government to resume the lands so alienated and re-attach them to the services."

The High Court of Travancore has consistently held that such Service Inam lands were not alienable. In Kochupilla Kalyani v. Lekshmi Thevi 25 Trav LR 26 (J), it was held that Inams attached to future services were by their nature inalienable and no right to enjoy or be in possession except possibly as lessee at will could validly be given to any person other than the one who performed the service. Even though Exhibit A cannot therefore be treated as a mortgage it can be deemed to be a lease with a covenant that possession cannot be demanded without payment of the amount received under the transaction.

This case is therefore analogous to the decisions of the Allahabad High Court referred to earlier and in our opinion the principle laid down in Barhu Singh and Others Vs. Kharpattu and Others, can be applied to this case. It has not been proved that there was a demand for surrender of possession at any time before six years of the date of institution of this suit. We therefore hold that the suit must be treated as one falling under Article 109 of the Travancore Limitation Act corresponding to Article 120 of the Indian Act and that the prayer for recovery of possession of the middle plot of Kypallivilagom Puraidom is not barred by limitation. The plaintiff-appellant is therefore entitled to succeed on this point.

11. The only point which remains for consideration is whether the plaintiff is entitled to get a decree for recovery of michakarom from the year 1053. Exhibit B provided for payment of michakarom to the mortgagor at the rate of 20 fanams per annum. The trial court allowed the plaintiff to recover michakarom only from the date of the sale deed Exhibit K taken by him. Exhibit K did not expressly convey the right of the vendors for michakarom already accrued, it can be deemed to have transferred only the michakarom accruing after the transfer.

It may also be stated that Section 5 of Act X of 1956 (T. C.) allows set off of only sums legally recoverable from the person in possession. In this view also the plaintiff is not entitled to claim the arrears of michakarom disallowed by the trial court, as the same are not legally recoverable. The decree in respect of this does not therefore call for interference.

12. In the result, A. S. No. 158 of 1956 is allowed only to this extent namely, that re-assessment of compensation for improvements will be made in accordance with Act X of 1956, provided the appellant complies with the directions to value the claim for additional compensation for improvements and pays full court-fee on the same within one month of this date. In case this direction is not complied with within the time allowed, the direction for re-assessment will not come into force. A. S. No. 195 of 1956 is partly allowed and the plaintiff-appellant is allowed to recover possession of the middle plot of Kypallivilagom Puraidom also on payment of value of improvements thereon which also will be determined in accordance with the provisions of Act X of 1956. Except to the extent indicated above, the appeals are dismissed. Respondents 7 and 11 (defendants 49 and 59) in A. S. No. 195 of 1956 will get their costs (one set only) from the plaintiff-appellant. The rest of the parties will bear their costs in both the appeals.