

(1951) 01 KL CK 0005
In the High Court Of Kerala
Case No : Second Appeal No. 12 of 1124

Narayanan Namburi

APPELLANT

Vs

Ouseph and Others

RESPONDENT

Date of Decision : 09-01-1951

Acts Referred:

Cochin Tenancy Act, 1113 — Section 19, 24, 25, 26, 27
Cochin Verumpattomdars Act, 1118 — Section 8(1)

Citation : AIR 1954 Ker 392

Hon'ble Judges : V.S. Subramanya Iyer, J;K.T. Koshi, J

Bench : Division Bench

Advocate : M. Narayana Menon and V. Sankara Menon, for the Appellant; C.T. Peter, for Nos. 2 and 16, T.M. Mahalingam Iyer, for No. 4 and M. Raman Pillai, for No. 17, for the Respondent

Judgement

Subramonia Iyer, J.—The Plaintiff who is the karnavan of a divided branch of a Nambudiri Illom whose suit for redemption filed on the 24th Karkatakam 1119 numbered as O.S. 746/1119, District Munsiff's Court, Irinjalakuda and the appeal filed by him in the District Court of Anjikaimal (A.S. 404 of 1121) were dismissed, has come up before us in second appeal.

2. The property sought to be redeemed covers an extent of 2 acres and 88 cents of paramba out of a larger area of 3 acres and 60 cents from out of which an extent of 72 cents was assigned by the Plaintiff to a stranger.

The entire extent of 3 acres 60 cents was demised to the 1st Defendant by the Plaintiff's Illom on the 13th of Kanni 1084 under Ex. 11 which is called a "Kozhuvirakka Panayadharam". The 1st Defendant on even date executed an "ethir" deed in favour of the Plaintiff's illom which is Ex. A. At a partition between the 1st Defendant and Ors. (Ex. C), the property was allotted to other parties thereto and the 1st Defendant having retained no part of it, remained ex parte in the case. The allottees at the partition transferred their parcels and Defendant's 2, 3, 4 and 17 were the owners at the time of the suit interested in

various parcels. They contested the suit by three separate written statements.

3. The Plaintiff's case was that the transaction Evidenced by Exs. A and III is a possessory mortgage and redeemable as such. Defendants 3 and 4 in the reply to the notice issued by the Plaintiff before the suit demanding redemption, having contended that the transaction is a "kanam", the Plaintiff relied upon the specific ground that the property is required by him for construction of an illom, that is a new house, for his residence to enable him to get the redemption sought even on the basis that the transaction is a kanam.

The contentions raised in the case were that the transaction is a kanam and is therefore irredeemable and that the claim to redeem the property for purposes of constructing a house for the Plaintiff's residence cannot be allowed because, though the Plaintiff got no house in the partition in his illom and wanted a house, that necessity no longer existed, the Plaintiff having constructed a house in Anr. item of property which he had and is residing in that new house with family.

In the event of a decree for surrender, value of improvements was also claimed.

4. The Courts below have concurrently found that the transaction evidenced by Exs. III and A is a kanam notwithstanding the fact that in Ex. III the name given thereto is a "Kozuvirakka Panayadharam" or possessory mortgage. Several circumstances including the one that Ex. III itself is a renewal of an earlier demise, which on the evidence was found to be a kanam, were relied upon in support of this conclusion.

Mr. Narayana Menon, the learned Counsel for the Appellant did not canvass before us the correctness of this conclusion come to by the Courts below and rightly so, because giving of the name "possessory mortgage" to a document which otherwise satisfies the requirements of a kanam and which is itself a renewal of an earlier demise which is a kanam cannot operate to convert the transaction into a possessory mortgage.

The only point urged by him before us is that the Courts below erred in not decreeing redemption because u/s 25(1)(a), Cochin Tenancy Act, 15 of 1113, the kanamdar is liable to eviction if the holding is required by landlord for the bona fide purposes of building a new house for his residence. The learned Munsiff found that there was a partition in the Plaintiff's family in the year 1118 evidenced by Ex. B, that at that partition the Plaintiff got no house for his residence and that he, therefore, wanted to put up a new residential house, but found that the Plaintiff was residing in Anr. house after the partition and concluded.

From the mere fact that the plaint property which measures 2 acres, would be more convenient for the purpose of putting up a building, it cannot be said that the Plaintiff requires the same for building an illom, so long as a building, can be conveniently put up in the property wherein he is now residing. I accordingly find that the plaint property is not required by the Plaintiff for putting up a building

for his residential purposes, and this issue is, therefore, found against the Plaintiff.

The Munsiff passed this judgment in Mithunam 1121. In Thulam 1122 a Pull Bench of the Cochin High Court in-Chakko v. Kuttan 1122 MAD 233 (A) considered the provisions of Section 8(1)(f) of the Cochin Verumpattamdars Act,"VIII of 1118 which reads:

8(1) No suit for eviction of a "verumpattamdar" from his holding or any portion thereof shall lie except on the following grounds:

* * *

(f) that at the end of the agricultural year the "jenmi" or any intermediate landlord requires the holding or part thereof, except the "kudiyiruppu", bona fide for building residential quarters for the use of himself or for any member of his family or "tarwad" or "thavazhi" who has a beneficial or proprietary interest therein.

and came to the conclusion that to satisfy that Sub-section, necessity need not be proved. The learned Chief Justice observed:

The Court is not to decide whether the land is really necessary for the landlord or not but must allow the decision of the landlord to prevail if that decision is real and genuine.

He added:

For instance, out of a number of available sites for building, the landlord might choose one which he considers suitable. But he is not to be overruled by the Court, which may for better and more valid reasons perhaps consider that some other site would be better and more suitable or that the landlord has already in his possession a sufficiently commodious building and it is, therefore, unnecessary for him to build Anr. .

This decision was relied upon by the Appellant in the Court below and the learned Judge who was bound by it quoted extracts therefrom and stated:

In the present state of law as discussed above the landlord can, if he desires to put up a house for his own residence in any particular place without any mala fide or fraudulent intention to evict the tenant, he is entitled to get the surrender prayed for.

He did not, however, follow this up by a decree in favour of the Plaintiff because: There is only one sentence in para 8 of the plaint and that is (original in Malyalam-Ed.) and (2) that

the Plaintiff Appellant who has admittedly assigned away a portion of the plaint item to a Christian according to the Respondent's advocate is enough to show that the Plaintiff Appellant had not any intention of using the plaint property for the construction of an Illom.

The learned Judge proceeded and stated:

Taking into consideration all the facts and circumstances of the case, I am inclined to think, that the Appellant has no real necessity for getting surrender of the property in question for residential purposes.

In this last sentence the learned Judge was inconsistent with himself because a few lines before, he had, accepting the correctness of the aforesaid Full Bench case, himself held that the landlord need not show that the land is really necessary for him.

Regarding the two grounds mentioned by the learned Judge, Mr. Mahalinga Iyer, the learned Counsel for the Respondents fairly conceded that he does not rely upon the first ground which refers to the claim being mentioned in a single sentence. The ground is obviously bad. The other ground relied upon by the learned Judge is without foundation. The learned Judge appears to be under a mistaken impression that what has been assigned by the Plaintiff to a Christian is a part of the plaint property. It is not. The Plaintiff's branch got, as already observed, the entire property covered by Exs. III and A with an extent of 3 acres and 60 cents. Out of this, 72 cents having been assigned away, the remaining extent of 2 acres 88 cents is the extent sought to be, redeemed and recovered in the suit. This is mentioned in the plaint itself.

When the Plaintiff was examined in the case as P.W. 3 the contesting Defendants in their cross-examination questioned him about the aforesaid transfer with a view to make out that had he required the property for purposes of building a residential house, he would not have given the assignment of a part of the property. His answer was that he assigned away a portion as the remaining extent would be enough for him for the purpose of building a new residential house.

5. The only grounds relied upon by the learned Judge being found to be unavailable to sustain his decree, Mr. Mahalinga Iyer, the learned Counsel for the Respondents raised three points to support the decree of the Court below.

The first point was based on Section 36, Cochin Tenancy Act, 15 of 1113. It was stated that within the meaning of that section, the Kanamdar must be deemed to have obtained a renewal. The second point was that the Plaintiff has not shown whether he required the whole extent sought to be redeemed for purpose of building a new house for him and the third was that Defendants 5 to 15 were admitted in the plaint to be kudikidappukars in the property and that under the Cochin Proclamation dated 18th Edavam 1122, suits for eviction of kudikidappukars shall be stayed.

Points 2 and 3 may be disposed of first. The Plaintiff claimed redemption of an extent of 2 acres 88 cents shown in the schedule to the plaint for purposes of building a new house for his residence. The Defendants contended that the purpose relied upon is not true and that redemption is not necessary as the

Plaintiff had Anr. house. No plea was raised to the effect that in the event of a decree for surrender, the entire extent claimed should not be decreed as the whole is not necessary for the Plaintiff. That plea not having been raised, there was no issue about it nor was there any consideration by either of the Courts below as to the quantum of the property required for constructing a new residential house. It is a question of fact and in the absence of a plea raised in the Courts below, the Respondents cannot be allowed in second appeal to raise the plea which would lead to the raising of a new issue and remanding the case for consideration of that new issue afresh. We must also mention that no request was made before us for amendment of the written statement by including a plea that the entire extent claimed should not be decreed.

Mr. Mahalinga Iyer, raised the argument that the entire extent is not necessary as though the plea was there on record. On examination of the pleadings it is found that the plea is not there and we, therefore, are not inclined to consider the argument raised as one arising for decision in the case. The third point has also no foundation because the Proclamation referring to kudikidappukars only directs that no suit for eviction shall be instituted against a kudikidappukaran and "all suits filed on or after 5th Vrischigom 1122 corresponding to 20th November 1946 and appeals, reviews, revisions, decrees and applications in execution in respect of "such suits" seeking eviction of kudikidappukars which are now pending in our Courts shall, so far as they relate to the prayer for such eviction, be stayed". The suit out of which the second appeal arises having been filed in the year 1119, the Proclamation is obviously inapplicable and the contention raised based on the Proclamation, has to be rejected.

6. The first point may now be considered. Mr. Mahalinga Iyer relies upon Section 36, Cochin Tenancy Act, XV of 1113 which reads thus:

If no renewal is effected in the manner hereinbefore provided, the tenant shall, notwithstanding anything contained in Section 19, be deemed to have obtained a renewal on the previous terms for 12 years from the termination of the previous kanam, original or renewed and the landlord shall be entitled to the renewal fee as on renewal.

The demise in question was dated 13th Kanni 1084. The first cycle of 12 years ended on 13th Kanni 1096 and the second cycle on 13th Kanni 1108. u/s 36, the tenant shall be deemed to have obtained a renewal on the previous terms for 12 years from the termination of the previous Kanam, original or renewed, that is, from 13th Kanni 1108 whose period will end only 13th Kanni 1120. The suit was filed in Karkatakam 1119. It is therefore contended that the suit is not maintainable because it is one filed during the currency of the said renewed lease. Referring to Section 25 of the Act, Mr. Mahalinga Iyer contended that redemption during the currency of the lease is permissible only under Clauses (b) and (c) of that section relating to wilful denial of the landlord's title and to wilful commission of acts of waste by the tenant. He contended that eviction on the ground of the requirement for the purposes of building a new house can be only

on the expiry of the demise.

If the argument is accepted, the landlord's right to evict the tenant for purposes of extending his own residential house or building a new house for his residence u/s 25(1)(a) would be rendered nugatory because that right can be exercised only on the expiry of the demise and on the expiry, Section 36 will come into play and direct that the tenant shall be deemed to have obtained a renewal for Anr. period.

Anticipating this difficulty and admitting the impropriety of the construction of a statute so as to make any of its provisions ineffectual, Mr. Mahalinga Iyer stated that to avoid the operation of Section 36, the landlord should have, before the expiry of the term, sent a notice stating his desire to evict for purposes mentioned in Section 25(1)(a) on the expiry and contended that if no such notice is sent, Section 36 will operate on the expiry.

Section 36 starts by stating "if no renewal is effected in the manner hereinbefore provided". Provision is made in the Act in the earlier sections for two kinds of renewals, (1) outside Court by, agreement of parties and (2) through Court in a suit u/s 29. A period of three years is fixed by Section 35 from the expiry of the demise for the suit u/s 29.

This led Mr. Mahalinga Iyer to admit that the operation of Section 36 cannot start on the expiry of the demise but has to wait for the three years provided for by Section 35. It was argued that if no suit be filed within that time, then the landlord is without any remedy for eviction until after the expiry of Anr. period for 12 years. The argument raises a conundrum. It can be solved-by reference to the sections of Chapter III of the Cochin Tenancy Act, 15 of 1113 in which, Section 36 occurs. That Chapter relates to "Creation and Renewal of Kanams and Evictions". Sections 19 to 22 provide for the form for creation or renewal of kanams after the date of the Act, that is, 15th Makaram 1113. Section 23 provides that the provisions contained in Sections 24 to 36 both inclusive shall apply to kanam tenants who by themselves or through their predecessors-in-interest have uninterruptedly held "the holding under kanam tenures created on or before 8th day of Thulam 1090. Section 24 provides for surrender of the holding by the Kanam tenant and Section 25 provides for eviction of kanam tenants. These sections read as follows:

24. A kanam tenant may, after the original term of the kanam, surrender the holding to his landlord by a registered document provided:

- (1) three months" notice of his intention to do so has been given in writing to the landlord;
- (2) no portion of the holding is excluded except as the result of irresistible force;
- (3) the renewal fee, if any, the arrears of michavaram and other accrued dues are tendered;

(4) the value or utility of the holding has not been materially and permanently impaired during the tenancy by acts of waste;

(5) in case the kanam includes nilam, the surrender is made within a month of the date on which michavaram is due.

The landlord may, within the period of three months mentioned in Sub-clause (1), give notice in writing to the tenant that he will not accept the surrender. If such notice is given the tenant shall retain the holding without payment of renewal fee, michavaram or other dues but shall be bound to pay the taxes due on the land.

If no such notice is given by the landlord, he shall accept the surrender but shall not be bound to refund the kanam amount and puramkadam, if any, or to pay the value of improvements which he would otherwise be bound to pay under this Act.

Nothing in this section shall enable the kanam tenant to terminate the tenancy so as to prejudice the claims of his sub-tenant or any person having an interest in the holding as his mortgagee, attaching creditor or otherwise.

25(1) On the expiry of the demise, the kanam tenant shall be liable to eviction from the whole or a portion of his holding as the case may be, for any of the following causes:

(a) If the holding or a portion thereof is required by the landlord for the bona fide purposes of extending, his own residential house or building a new house for his residence:

Provided that, if the landlord fails to extend his residence or build a new house for his residence within a period of three years from the date of eviction, the previous tenant shall be given the option to hold the same on the original tenure.

(b) If the kanam tenant wilfully denies the landlord's title

Explanation: A denial of the landlord's title under a bona fide mistake of fact is not wilful within the meaning of Clause (b).

(c) If the kanam tenant intentionally and wilfully commits such acts of waste as are calculated to materially and permanently impair the value and utility of the holding.

A suit for eviction on the ground stated in Clause (c) should not be entertained unless the landlord has served a notice on the tenant specifying the particular act of waste complained of, and when the waste is capable of remedy, requiring the tenant to remedy the same and in any case to pay reasonable compensation for the waste, and the tenant has failed to comply within a reasonable time, with that request.

(2) During the currency of the lease, the kanam tenant shall also be liable to eviction under Clauses (b) and (c) in the foregoing Sub-section (1) of this section.

Then Section 26 provides:

Subject to the other provisions of this Act, it shall be obligatory on the part of the landlord to give and of the kanam tenant to accept a renewal of the tenancy at the expiry of 12 years-from the date of the last demise and thereafter at the end of every successive period of 12 years.

Exception: When the period of the kanam is other than 12 years, such other period shall be read in lieu of 12 years in "applying this section.

Sections 27 and 28 provide for payment of michavaram, other dues and renewal fee at the time of renewal. Section 29 provides for a suit by the kanam tenant or the landlord for the execution of a renewal deed. It also provides for the various matters to be considered and decided by the Court in connection with the renewal deed and in connection with payment of arrears of michavaram and renewal fees. Section 30 provides for a decree for the payment of the amounts under the preceding section and for execution of a deed of renewal. It also provides for the Court executing the deed in default of the parties complying with the decree.

Section 31 provides for the terms to be contained in the deed of renewal. Section 32 provides that the deed of renewal shall have the same effect as if it were executed by the landlord or the tenant respectively. Sections 33 and 34 provide for the enhancement or reduction of michavaram at the time of renewal. Section 35, as already mentioned, provides for the time within which the suit u/s 29 is to be brought. Section 36, as already mentioned, provides that if no renewal is effected, the tenant shall be deemed to have obtained a renewal on the previous terms and the landlord is entitled to the renewal fee as on renewal. Section 37 which is the only remaining section in the Chapter is as follows:

37. At the expiry of the said renewal period and of every successive period of the same duration, the rule stated in the preceding section shall be applied "in the same manner as if the last renewal period were the original period of the kanam".

The portion underlined (here in " ") is significant and supports our view of Section 36.

7. Irredeemability is created by Section 26 by making it obligatory upon the landlord to give and the tenant to receive a renewal of the tenancy at the expiry of 12 years from the date of the last demise. The exception to that section provides for a case where the period fixed by the kanam is other than 12 years in which event, the period fixed would be the period of renewal. This section starts thus: "Subject to the other provisions of this ACT".

Section 25 provides for eviction of the tenant either during the currency of the lease or on the expiry of the demise. The obligation to grant a renewal cast upon the landlord u/s 26 is subject to his right of eviction of the tenant u/s 25. If, therefore, the landlord requires the holding or a portion thereof for the bona fide purpose of extending his own residential house or building a new house for his

residence, u/s 25(1)(a), the obligation to grant a renewal will not arise.

The only restriction to the exercise of the landlord's right for eviction on this ground is that the term of the kanam should have expired, that is to say, it cannot be during the currency of the lease. During the currency of the lease also, eviction is available on the grounds mentioned in Clauses (b) and (c) of Section 25(1). Of these, regarding eviction on the ground of waste provided for in Sub-clause (c), the statute provides for a notice specifying the waste and requiring the tenant (if it is repairable) to repair the same, or otherwise requiring him to pay reasonable compensation for the waste. No notice is provided for eviction under Clauses (a) or (b).

The reason is obvious. No purpose is to be served by issuing a notice to the tenant if the landlord requires the premises for purposes mentioned in Section 25(1)(a). The tenant has only to surrender if the requirement u/s 25(1)(a) exists. Even so, in the case of wilful denial of the landlord's title u/s 25(1)(b). Wherever a notice is necessary either in connection with a surrender of the holding by a tenant or eviction of the tenant by the landlord, the Legislature has expressly made provision for it. The Respondent's contention that even for eviction u/s 25(1)(a) a notice is necessary cannot be accepted. If no notice is necessary, Mr. Mahalinga Iyer does not contend that Section 36 can be construed as operating on the expiry of the demise so as to render Section 25(1)(a) nugatory. Bona fide requirement of the landlord u/s 25(1)(a) is an answer to a claim by a tenant for renewal. Bona fide requirement is a subjective state of the landlord's mind. It should exist and whenever it arises and so long as it exists, it would give a recurring cause of action for the landlord to evict the tenant if the time at which he seeks eviction is not within the period covered by an actual demise or renewal.

The Legislature significantly confined the operation of Section 35 to a suit u/s 29 and did not extend it to a suit for eviction u/s 25. Section 36 is confined in its operation to a case where a period of twelve years or other period fixed by the demise expires without there having been an actual renewal. The period thus uncovered by an actual renewal is the period for which provision is made by Section 36. That section retrospectively regulates the relationship of the parties during that period and enables the landlord to recover renewal fee as on renewal. This is the only operation of Section 36.

The argument of Mr. Mahalinga Iyer that the landlord's suit to evict the tenant u/s 25(1)(a) would be barred by the limit of time provided in Section 36 is unacceptable. The period fixed thereby is not a period of limitation. It fixes a condition to the entertainment of a suit for renewal which is specially provided for the first time by Section 29 of the Act. The period fixed is 2 years from the date of the passing of the Act which was on 15th Makaram 1113 or three years from the date of expiry of the period of demise whichever is later. That period has nothing at all to do with the eviction of a kanam tenant on any of the grounds mentioned in Section 25. The period fixed is one for the enforcement of

the obligation to grant accept renewal which obligation, as already mentioned would attach only to the holding or that part of it which is not subject to eviction under any of the provisions contained in Section 25 . The first ground by Mr. Mahalinga Iyer in support of the decree of the Court below is thus without foundation.

8. The decrees passed by the Courts below have therefore to be reversed and the suit decreed with costs throughout.

9. The trial Court has fixed the value of improvements payable to the 2nd Defendant at Rs. 220-0-9 and that payable to Defendants 4 and 17 at Rs. 1,086-14-9. We fix the aforesaid amounts as value of improvements payable by the Plaintiff in connection with redemption besides the proportionate kanam amount of Rs. 12-11-11/2. The decree passed by the Munsiff for the michavaram will stand. The Plaintiff will also have a decree for future michavaram at the rate at which the Munsiff decreed the michavaram for the year 1119 with interest from the respective due dates at 6 per cent. The value of paddy will be fixed as on the due dates by the executing Court.