

(1922) 01 MAD CK 0037
In the Madras High Court

P. Ayyakkutti alias Venkatachalam Pattar	APPELLANT
Vs	
P.S. Krishna Paiter and Others	RESPONDENT

Date of Decision : 27-01-1922

Acts Referred:

Citation : (1922) ILR (Mad) 394 : 65 Ind. Cas. 942 : (1922) 15 LW 650

Hon'ble Judges : Walter Salis Schwabe, C.J;Venkatasubba Rao, J;Phillips, J;Oldfield, J;Devadoes, J

Bench : Full Bench

Judgement

Wallis, C.J.—Speaking for myself, I do not as at present advised, differ from the judgment prepared by Sadasiva Jyer, J., but in view of the importance of this question, the conflict between Achutha Menon v. Sankaran Nair 12 Ind. Cas. 1007 and Zimorin Rao Avergal of Calicut v. Untkat Karnavat (sic) Nair 65 Ind. Cas 380 and the fact that the members of the Bench are not in agreement on all points, I think that it will be better before disposing finally of the reference to call for a finding from the Subordinate Court as to whether in 1859 and 1867, the dates mentioned in the revised judgment of the Subordinate Judge, lands granted on the tenures known as Santhathi Brahmaswom and Adimayavana were inalterable as between the grantor and the grantee; and, if so, whether on alienation by the grantee, the grantor was entitled to resume the lands and re-enter. Fresh evidence may be taken. The finding will be submitted by the Subordinate Judge of Ottappalam within 6 months, and 10 days will be allowed for filing objections. Mr. Justice Abdur Raham who has left the Court concurred in these questions.

Oldfield, J.

2. I agree with the terms of the reference proposed and reserve further observations.

Coutts Troiter, J.

3. I agree and, like Oldfield, J., wish to reserve any expression of opinion at

present.

Sadasiva Iyer, J.

4. The question before the Full Bench is, whether land held on the Karamkari or the Santbathi Brahmaswom tenure is liable to forfeiture and resumption on alienation by the tenant.

5. The referring order shows that Mr. Madhavan Nair for the appellant admitted (and properly admitted) that a lessee holding lands either under the Karamkari tenure or under the Santbathi Brahmaswom tenure is under no obligation to perform any service to his landlord.

6. To avoid confusion, I would here remark that the question, before us has very little to do with the incidents of service tenures, Service tenures, (that is, involving performance of future service) connected with, enjoyment of lands are usually of two kind: (1) where the income of the land enjoyed is intended to be the emolument of the servile and the land is enjoyed by, the servant merely in order that the income; thereof might be reserved by him as emoluments; (2) where the lands themselves have been granted to be owned by the tenant, the tenant being merely obliged to perform some service by himself or by a deputy, the income being enjoyed by the grantee in, his status as power thereof. The decisions dealing with the question of the distinction between these two classes of service tenures are, in my opinion, irrelevant for the decision of this case. The decision in 29 Travencore Law Reports 25, quoted by Mr. Anantha Krishna Iyer, related to a permanent tenure burdened with an obligation of salam service in a temple once a month, that service being one for the performance of which proper and adequate provision could be made through a deputy. That case and similar cases which held that lands held on service tenure of that kind are alienable the alienor being merely bound to make provision for the performance of the service, are not helpful for the decision of the question before us. The case in Durgadut Singh v. Rameshwar Singh 4 Ind. Cas. 2 , quoted for the respondent, has also no relevancy as it related to the alienability of land granted for the maintenance (on Babuanagrants) of a junior male member and his descendants in a Raj family, the lands having been granted with the incidents of an impartible tenure and there being no incident of inalienability attached to impartible tenures except by statute law in some provinces.

7. I have had the advantage of studying the valuable opinion prepared in this case by Mr. Justice Seshagiri Iyer and I might at once state that I respectfully agree through-out with that opinion. As the question, however, is of far reaching importance. I might be permitted to add some thing in my own language, though I understand that that opinion might be attached to the report of this case.

8. The historical tradition is that the Nam badri Brahmins had the Jeom or birth - right in the ownership of the soil of the whole of the Malabar lands, the tradition being that the country itself was created for the (sic). The land revenue given to the Rules was considered merely as remuneration given by the Jenm (or birth-

right) owners of the land for the protection afforded by him; it was a "Kavaili" or "protection tax. The Rijths of Malabar, (she (sic) having been at one time their chief) and members of royal families (many of them being Stanees had Janmam rights in what are called "Chenkal" lands. The (sic) were granted Jenmam rights in Davswom lands. The Rajahkkanmar (Ruling Princes) had the right to require military assistance and contributions for military necessities from the two other classes of Jenmies, viz, , (sic) buries and Dawaswons. We might take it that these three above mentioned persons and institutions were the only three classes of landlords who were for a long time considered to be entitled to be Jenmies or owners in fee simple of lands in Malabar. Ordinary Nair families were attached to one or other members of the three classes of Janmies and looked upon them as their Fudal Liege Lords. A Jenmi even when in distress would not part with the entire ownership in any of his Jenmam lands and he always resorted to Kanom and other expedients and desperately along to the last shadow of his Jenmam rights.

9. Putting aside, then, the tenure of a person who had been granted lands out of a portion of whose income provision could be properly made for the performance of periodical services (especially temple services) through deputies, the incident of inalienability and the right of the landlord to forfeit and to resume, on alienation were attached to the other permanent tenures in Malabar created by Jenmies on favourable rents (usually very favourable rents) according to the opinion of all the authorities who have considered the matter. The Sadar Court came to that conclusion after two years' enquiry in 1855 and the Cochin and Travencore Minuials state the same. Mr. Justice Benson and Mr. Justice Sundara Aiyar whose knowledge of Malabar tenures was profound were of the same opinion in *Achutha Menon v. Sankaran Nair* 12 Ind. Cas. 1007 . The laboured attempt of Mr. Anantakrishna Aiyar to argue that the decision in *Achutha Menon v. Sankaran Nair* 12 Ind. Cas. 1007 was based on the express terms of the particular document of lease failed in my opinion, the terms prohibiting alienation relied upon being merely the statement by way of excessive caution of what was already involved in the name and nature of the created tenure. The incident of inalienability and liability to forfeiture on alienation with the right of re-entry in the landlord are attached to these tenures, not by usage (which implies the gradual growth as the result of convenience or practice in mercantile and similar transactions, the growth being spread over a long period of time, or being confined to particular trades or localities or families or institutions) but by the immemorial law of Malabar, a law more analogous to the immemorial Marumakkathayam Law prevailing in the west coast, in the matter of inheritance and succession, than to mercantile and other usages or to ordinary customary law. Such law may, of course, be also tailed custom or customary law. It may be that the word "usage" is also not wholly inappropriate but I should like the latter word to be confined to practices which the parties in certain particular places or engaged in particular trades or business "are presumed to have in view when entering" into certain classes of contracts and with reference to which the terms,

of such classes of contracts have to be ascertained and to the usages governing the succession to the trusteeship of particular local temples or local Mutts or governing particular families and so on, and not to fairly widespread rules governing tenures and legal rights with referenda to which well-known and defined nomenclatures have been immemorially employed. To all perpetual leases of the lands now under consideration, namely, Anubhavam, Adimayavana, Santhathi Brahmasam and Karankari were attached these conditions against alienation, the dignity and status of the grantee and his family or the dignity and status of the grantor and his family (or both) having been considered to be closely wound up with such conditions. Section 10 of the Transfer of Property Act allows a landlord who has leased his property, even for a term of years, to insert it condition for the benefit of the landlord restraining the leases from alienating the lease-right on pain of forfeiture and resumption. I do not, therefore, see anything against public policy or anything unreasonable in the condition attached to these ancient tenures granted permanently as a matter of favour by the landlord (who was usually the manager of an Illom, a Kovilagam or a Davasvam with limited powers of alienation) the condition, namely, that no alienation should be made by the lessee on penalty of forfeiture and reversion to the landlord. These grants, though against the pecuniary interests of the grantor, whether Stanom or Devasvam or Karnavan and Illom, have been recognised by Courts, [See *Mana Vikraman, Rajah of Calicut v. Sundaran Pattar* 4 M. 148] because they were customary and they aided to the dignity of the family or Devaswom or Stanom, and also because there was this right reserved of resumption on alienation or on failure of heirs in the grantee's family, and hence there was a chance of revision to the grantor's Illom or Devasvam or Kovilagam. The Courts have, therefore, allowed such onerous tenures of a permanent character to be created by Illoms, Sthanis and by Devasvams so as to be binding upon succeeding Karnavans, Urallars and Stances. To hold that the above ancient law governing these tenures prohibiting alienation on pain of forfeiture and reversion has been abrogated by custom or usage would require, in my opinion, proof of an almost conclusive character extending over several decades and accepted as law by the landlord and I am very doubtful whether such a custom, even if, could be proved, involving as it does injury to the rights of religious trusts like Devasvams, would be legally valid. The law applicable to these ancient tenures can, of course, be changed by Statute. If it could be changed, by the growth and establishment of a contrary custom, the establishment of that custom should not be treated as proved except on very conclusive evidence. Courts usually, holding that evidence to establish an alleged new custom contrary to what has been recognised as an old established custom should be much more cogent than even the proof considered usually necessary to establish a custom contrary to general law. That there is no Statute changing the law of these tenures is admitted. As regards the creation of a subsequent contrary customary law, there is nothing except the opinion of the Bench which decided *Zamorin Raja Avergal of Calicut v. Unikat Rarnavan Samu Nair* 65 Ind. Cas 380 and the evidence adduced in that case. But in that case the learned Judges held, not that the old law attaining well

known incidents to these tenures had been changed by subsequent custom, but that there never was any law or custom attaching such incidents to these tenures. In expressing that opinion, they (if I may say so with great respect) not only went against the law till then settled, but even against the opinion of the Judge of the lower Court (in that case) who held that till 1896 the custom (or what I would rather call the law) attaching the incident of inalienability was clearly established and did prevail. As regards cases of alienation after 1896, the lower /Appellate Court in that case said that subsequent to that year, in a particular area called Manbalur Cherkakal there have been a number of instances of alienations " evidences the growth of a usage which has effected a breach in the wall of custom and that, so far as this Cherakkal is concerned, one of the prime requisites of custom, its continuity and concordance, is not established in this case by the plaintiff. " In fact, the Subordinate Judge's view was that there was a custom but it had "fallen into desuetude" after 1896 and that there have been inroads into that custom so as to shake its continuity and uniformity and that the process is going on."

10. The learned Judges who decided *Zamorin Raja Avergal of Calicut v. Unikat Karnavan Samu Alair* 65 Ind. Cas 380. threw the onus of proving the custom of inalienability even before 1896 on the landlord and, in my opinion, with the greatest respect, they were in error in doing so. So far as "(sic)" after 1896 is concerned, the fact that many lands held on such tenures have been alienated after that date and that in some cases the landlord accepted rents from the alienees (it may have been on payment of a consideration for such recognition) cannot be accepted as proving a valid custom superseding the ancient law without further and cogent proof that the landlords had notice of the alienations and accepted the position that such alienation did not give them the legal right to resume the lands. Without proving such a consciousness on the part of the landlords that the immemorial law had been superseded by a newly established custom mere evidence of alienations by tenants is of very little value. I find, on going through the printed papers in that case, that two important witnesses therein, namely, one Mr. T. V. Venkateswara Aiyar, a practising Vakil of 40 years standing, and one Mr. Ralu Eradi, also possessing very great experience, gave evidence that in their opinion the old immemorial law of inalienability persisted up to the date of their giving evidence. That the Jenmi landlord's rights have been attempted to be encroached upon during two or three decades past by all binds of tenure-holders under them is well known, but such attempts cannot be said to have established a new custom changing the old law as regards the tenures in question. The rather motioned attempt on the part of all kinds of tenants during 20 or 25 years past may have been partly the natural result of the oppressive conduct of many Malabar Jenmies in the matter of the grant of Melcharths over the heads of tenants of long standing, and it was probably also due to the change of general attitude on the part of tenants towards Jenmiee, an attitude which was formerly (even in the case of Kanana tenants) that of a social inferior to an acknowledged social superior, but is no longer so in most cases", a

fairly large proportion of Kanamdars and other tenure-holders and assignees from such tenure-holders being in recent times recruited from influential legal practitioners, Government servants and business men who of course cannot look upon themselves as holding a position of undue dependence on their landlords in the matter of dealings with the land held by them. In a recent Privy Council case *Rao Kishore Singh v. Muiammal Gahenabai* 53 Ind. Cas 630 : 28 Bom, L. R. 507 the Judicial Commissioner's Court had held as regards an old family custom of inheritance varying from the ordinary Hindu Law (which custom stands on a distinctly inferior position to the custom of inalienability of the tenures (sic) consideration) that that family custom though case existential and operative had (sic) to be so, " either because the primitive condition out of which it (sic) had ceased to exist and, therefore, cessat ratio cessat lux," or " because owing to the improvement is education and the spread of socialistic opinion consequent thereon, the custom has been so gradually but steadily and persistently encroached upon that it has, as it were, been eaten away and has ceased to be observed or applied...." But their Lordships of the Privy Council observe (page 740#) that where a custom has up to quite recent times outlived the condition of things which gave it birth the principle embodied in the expression cessat ratio cessat let does not apply. "" The Judicial Commissioner's Court had further observed that " the advance of socialism in the family due to education and the evanescence of all real authority is the head " and the assertion of a right on the part of a younger member of the family to what used to be granted to him " as a favour " might change the family custom of inheritance long prevailing. Their Lordships say, as regards the above reasoning,--"it is unnecessary for their Lordships to determine whether this reasoning would be sound as applied to any case, " thus indicating grave doubts as to the soundness of such reasoning. The family custom in that case was a matter of a few sentries whereas the law of the tenures in this case is one which had prevailed for at least ten centuries before the date (1896) referred to is the judgment in *Zamir v. Avergal of Calicut v. Unikat Karnnan Samu Nair* 65 Ind. Cas 380,. Their Lordships of the Privy Council, while indicating the trend of their opinion, decided on the facts of that case that the old family custom had not been changed notwithstanding that in January 1815 the members of the family including the head of the family had acted in a manner which contravened the family custom and that the junior members in the family for several generations had enjoyed properties and other allowances independently of the head of the family to which they respectively belonged and notwithstanding that the Government had made settlements in 186 with the head of the family and a junior member (sic) cannot be claimed according to the family custom. If the transition, dating about 60 years before the suit was filed, contravening the family custom could not be held to destroy that custom. I think it follows a fortiori that a general territorial custom which remained in force for several centuries could not have been abrogated on the date this suit was brought. The defendant's written statements in the present suit do not admit the existence of the custom at any time and its abrogation by a contrary custom which has invariably prevailed afterwards but deny vaguely that

the tenures are inalienable it would, therefore, answer the reference (following Mr. Justice (sic) Iyer's opinion) that lands held under the Karankavi or Santhathi Brahma-swam tenure are liable to be forfeited on alienation if no valid contract to the contrary binding on the grantor or his successors is established, and that the lands held thereunder can be (sic) by the grantor or his successors and re-entered upon the alienation by the tenant without the landlords' consent.

11. In compliance with the order contained in the above judgment the Subordinate Judge of (sic) submitted the following

12. FINDING.--These appeals have been remitted to this Court by their Lordships of the Full Bench for a finding on the following issue:

Whether in 1859 and 1867, the dates mentioned in the revised judgment of the Subordinate Judge (in revised Appeal Suits Nos. 770 and 771 of 1913 on the file of the Court of the Temporary Subordinate Judge of Palghat at Calicut), lands granted on the tenures known as "Santhathi Brahma-swam and Adimayavana" were inalienable as between the grantor and the grantee, and, if so, whether on alienation by the grantee the grantor was entitled to resume the lands and re-enter?

* * * * * 30. I would return an affirmative finding on both parts of the issue.

13. These Second Appeals came on for hearing on the 25th and 26th January 1922:

Mr. K. Srinivasa Iyengar, (with him Messrs. A. Krishnaswamy Iyer, T. S. Narayana Iyer and K. P. Ramakrishna Iyer), for the Appellants.

Mr. C. V. Ananthakrishna Iyer, (with him Messrs. S. Bangaradhiyar, N. F. Naranmhaiyer, A. V. K. Krishna Menon, A. Vatudeva Menon, N. R. Setha Aiyar), for the Respondents.

OPINION.

Schwabe, C.J.

14. This is a case of importance and of some difficulty. It has been very fully and ably argued before us and, I think, we are in a position to give our judgment without reserving it further.

15. The matter has been referred to the Full Bench by reason of a difference of opinion among the Judges who had to consider the same matter before. In the case in *Achutha Menon v. Sankaran Nair* 12 Ind. Cas. 1007 *Benson and Sundara Iyer, JJ.*, took the view that in holdings of the nature in question in this case there was no right of alienation and that on alienation the landlord had a right to re-enter. The wording of the document in that case differs from the wording in this case in that it expressly forbids alienation, but the judgment does not go on that ground alone but also on the ground that alienation necessarily involves a

right on the part of the landlord to re-enter. The other case is *Zamorin Raja Atergal of Calicut v. Unikat Karnaian Samu Nair* 65 Ind. Cas 380. That matter came before Ayling and Krishnan, JJ., and was sent back by them for further enquiry as to the alleged custom. After further enquiry it was held by them that such grants did not involve forfeiture on alienation. In that case the grant was of a somewhat different character and of a more recent date.

16. The question to be decided in this case is, whether a grant of land as a *Santhathi Brahmasam* to be held by the grantee for all time without power of surrendering and "without being dispossessed", or possibly without vacating" instead of "without power of surrendering" is inalienable, and if inalienable, whether there is a right of re-entry in the landlord on alienation. The question whether such a grant is alienable or not is one which it is unnecessary for us to decide, if we come to the conclusion that on alienation the landlord has not the remedy of re-entry because in this case the question is, whether the tenant having made the alienation the landlord can re-enter, I am not prepared myself to say on the materials at present before us whether alienation is or is not forbidden by the grant or by custom. The question whether it is forbidden by the grant turns on the translation of words which might mean "'without power of surrendering" and might also mean "without vacating." Whether there is a custom in regard to sash grants against alienation is a difficult question and there is undoubtedly evidence before the Court that such a custom exists. Whether that evidence is sufficient is a different matter on which I do not desire to express an opinion. It has also been pressed upon us that, if there is such a custom, it is a custom which has become part of the common law of Malabar and as such is fixed and cannot be altered by any means except Statute. I am not prepared to assent to that proposition and I think that it is a matter which would require very careful consideration. But in the view that I take of this case it is not necessary to express a definite opinion on that point.

17. This matter came before this Court and was referred back to the Subordinate Judge to ascertain whether this alleged custom against alienability and in favour of forfeiture on alienation existed or not and we have his report before us. He has found that at the date of this grant, i. e., 1860, there was a custom against alienation and a custom in favour of the landlord's power of re-entry upon alienation. This is a question of mixed law and fact. As far as the facts are concerned, I think we are bound by his finding of fact provided, of course, there was some evidence to support that finding; but whether, taking those facts as found by him, they amount to sufficient evidence of custom is a question of law,-- a question on which it is open to us to review his decision and to express our own views. The facts as found by him are very fully set out in his findings and report and his decision is based on two lines of evidence; first, the written evidence from books in the nature of text-books, reports and so on; the other, the oral testimony given before him. Taking first the text-books and other documentary evidence on which it is clear he mainly bases his view, these books on examination do not in my view show that at any time it was part of the

common law of Malabar that a landlord was entitled to forfeiture of such a grant as this on alienation by the tenant. Reliance was mainly placed on the reports of proceedings of the Sadder Court which are added as an Appendix to the notes on the draft of the Bill relating: to Malabar Land Tenures by Sir Charles Tamer, Chief Justice of this Court, published in 1885. The report of the proceedings of the Sadder Court referring to tenures of this description states that they are inalienable. It is not stated in very clear language and as regards one particular kind the statement is only contained as a side note, but the Sadder Court Proceedings do not state that there was any right of re-entry on alienation. Sir Charles Turner himself in his report in dealing with the particular tenure here in dispute does not even set out the law against alienation though it would look on an examination of his report that this is only a case of his having omitted to mention it, but there is not one word in his report as regards any right of re-entry. The next document we are referred to, and which is earlier in date, is Mr. Graeme's Glossary which on examination clearly shows nothing of that kind. We are then referred to the works of Mr. Wigram and Mr. Moore. These gentlemen were both Judges in Malabar and had ample opportunity of knowing what the custom was and what the practice was in Malabar at about the same time as Sir Charles Turner was making his report, and it is a very remarkable thing, if the custom alleged in this case really did exist, that neither of these gentlemen seems to have heard of it, for both state that this kind of tenure is inalienable, and both suggest that if the matter came before the Court it would very possibly refuse to hold that the grant was resamble. I refer particularly to a passage at page 143 of Mr. Wigram's book. He says:--"There is a singular absence of judicial authority in respect of these grants, and it is doubtful how far in the present day the Courts would recognise the grantor's power of resumption." That (sic) to be dealing with the power of resumption on failure of heirs in the grantee's family which he had mentioned above and does not seem to refer to a supposed power of re entry on breach of the condition against alienation. It is remarkable, in my view, that these two writers should have been silent on a matter so important if it was so certain as to become a part of the law of Malabar. Next, there is a statement in the Cochin Manual which is a more recent publication, that in Cochin, where we are told that the tenure is the same as in Malabar, there is a custom against alienation and for forfeiture on alienation. We do not think that this is a statement which we can act upon in arriving at a conclusion whether such an alleged custom exists in Malabar. The result is that, in my view, the documentary evidence of the kind I have indicated, far from Supporting the alleged custom, contains nothing which can be regarded as any evidence of its existence.

18. Passing to the verbal evidence and adapting the view of the Subordinate Judge of the accuracy of the testimony of the two learned Vakils who appeared as witnesses before him, in my judgment that testimony does not provide nearly sufficient facts on which to say that there is a definite settled custom to the effect contended for. They only gave their opinions, and for purposes of opinion

we have apparently before us as much material as they had except such recollection as they had of cases which they had been connected with. Their opinions are quite clearly based for the most part on the same documentary evidence as we have just been considering and which, in my view, does not contain the statements as to the custom which the witnesses thought it contained. The rest of their evidence is their recollection of cases in which they had been engaged. I cannot think that the Subordinate Judge attached great importance to this part of their evidence because they were dealing with cases which would be on record and which the proper way to prove would be by production of the records and not by mere statements of the Vakil engaged in the case to the effect that he remembered a case in which he had been engaged in which there was such and such a thing decided. A search has been made and no one has been able to produce any record of a case which has decided this point. We are unable to say, for we have not before us the records of those cases, whether the facts of those cases were the same as the facts in this case; we do not know what evidence was given of custom in those cases and what the grounds of decision in those cases were; and if those cases did decide any thing of the kind that in itself would not be such evidence of custom as would be enough to establish a definite custom within the meaning of recognised rules.

19. Therefore, I have come to the conclusion that neither in the written evidence nor in the oral evidence was there enough to establish a custom in favour of a right of re-entry of a landlord of such tenure on alienation by the tenant.

Oldfield, J.

20. I agree.

Phillips, J.

21. I agree and add that I am not now expressing any opinion on the other question which was referred to the Subordinate Judge, viz, the question as to alienability.

Divadoss, J.

22. I agree.

Venkatasobba Rao, J.

24. I agree.