

(1922) 03 MAD CK 0032
In the Madras High Court

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

Date of Decision : 01-03-1922

Acts Referred:

Citation : AIR 1922 Mad 274 : (1922) 43 MLJ 1

Hon'ble Judges : Walter Salis Schwabe, J;Venkatasubba Rao, J;Seshagiri Aiyar, J;Phillips, J;Oldfield, J;Devadoss, J

Bench : Full Bench

Judgement

Walter Salis Schwabe, Kt., C.J.—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.

2. 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 (1911) 36 Mad. 380. 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 of Calicut v. Unikat Karnavan Samu Nair (1919) 38 M.L.J. 275. That case 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.

3. The question to be decided in this case is whether a grant of land as a Santhathi Brahmaswom 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 such 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 by 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.

4. 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 the forfeiture of such a grant as this on alienation by the tenant. Reliance was mainly placed on the reports of proceedings of the Sudder Court which are added as an appendix to the notes on the draft of the bill relating to Malabar Land Tenures by Sir Charles Turner, Chief Justice of this Court, published in 1885. The report of the proceedings of the Sudder 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 of tenure the statement is only contained as a sidenote, but the Sudder 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 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. Charless 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 resumable. 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 seems 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

5. Passing to the verbal evidence and accepting 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 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 the proper way to prove which would be by production of the records, and not by mere statements of the vakils engaged in the case to the effect that he

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 anything 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 the recognised rules.

6. 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.

7. I agree.

Phillips, J.

8. 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.

Devadoss, J.

9. I agree.

Venkatasubba Rao, J.

10. I agree.

11. With the kind permission of the Chief Justice, the following opinion prepared by Seshagiri Iyer, J., as a judgment to be delivered before he resigned his office as a judge of this Court is appended as a foot note.

Seshagiri Aiyar, J.

12. The question referred for decision is whether land held on the Karamkari or Santhathi Brahmaswom tenure is liable to forfeiture on alienation. We are concerned in this reference only with the rights interse between the grantor and the grantee. We have not got to decide whether as between the grantee and his heirs on the one side and the alienees and those claiming under them on the other, the transaction would be null and void. Nor have we before us any question relating to a special contract, - as is alleged there is in this case - which may have the effect of superseding or varying the general incidents of such tenures. My remarks, therefore, relate solely to the rights which the grantor and his heirs possess in case the grantee and his heirs alienate the property to a stranger.

13. From the learned arguments addressed to us by. the Advocate General, it is

clear that until the decision in *Zamorin of Calicut v. Samnair* (1919) 38 M.L.J. 275 it was understood by writers on Malabar Law and by Courts that such a tenure would be forfeited if there was an alienation. In the Minute of Sir Charles Turner appended to the report of the Commission on Malabar Tenures, Appendix No. 16, the various Malabar tenures are defined. We are only concerned with four of them, namely, Anubhavam, Adimayavana, Santhathi Brahmaswom and Karamkari.

14. As regards Anubhavam, it is distinctly stated that on alienation the property would revert to the grantor. From this, Mr. Ananthakrishna Aiyar founded an argument that Sir Charles Turner was of opinion that in the case of tenures like Adimayavana and Santhathi Brahmaswom no forfeiture would be incurred by alienating the property. This inference seems to me to be farfetched. The learned Chief Justice was not defining the exclusive characteristics of each of the tenures, He was indicating their general nature and prominent features. As a matter of fact some of the characteristics mentioned as regards the Adimayavana tenure are common to all the other tenures and vice versa. The same observations apply to the question from Graeme's Glossary at page 39, In the proceedings of the Sadar Court dated 1856, it is stated with reference to all these four tenures, "all the above mentioned tenures appear to be inalienable, but resumable by the grantor on failure of heirs in the grantee's family". These proceedings were passed after evidence had been directed to be taken by the Zilla Judges and after the Court had an opportunity of examining that evidence. From the decision of the Cochin High Court 3 Sel, cas p. 176, it is clear that in that state these tenures would revert to the grantor on alienation. From the language used by the learned Judges, it seems clear that it was a well-recognised and well-established custom in that state that the property reverts to the grantor on alienation. "I the Cochin and Travancore Manuals of Administration support this view. Mr. Moore and Mr. Wigram, both Judicial officers of great experience in Malabar, considered that, on alienation, the grantee forfeited his rights in such tenures. It is clear from what I have stated that these tenures have from the earliest times been clothed with certain attributes which have been tacitly accepted by all the Malayalam speaking peoples (in British India and in the Native states) as binding on the parties. As pointed out in 10 Halsbury 460. "custom, being in effect local common law within the locality where it exists, can only be abolished or extinguished in the same manner as other laws can be abolished, namely by Act of Parliament."

15. Coming to the cited cases, *Manavikrama v. Sndaram Pattar* ILR (1881) Mad. 148 the question related to this very same property. It appears from the report that this property was originally granted on an Adimayavana tenure. The grantee alienated it to a Brahmin. The grantor recognised the alienation. There are observations in the judgment which show that the Adimayavana grant as well as the Santhathi Brahmaswom would revert to the grantor if it was alienated. In *Madhavan v. Athi Nangiar* ILR (1891) Mad. 123 this principle was assumed as correct with reference to the Anubhavam tenure. 7 M.L.J. 317 is another decision

to the same effect. In ILR 27 M. 202 the Judges expressly point out that tenures of this description in Malabar are forfeited on alienation. Then we have the considered judgment by Benson and Sundara Aiyar, JJ. both of whom had considerable experience of Malabar, that karamkari tenure is forfeited on alienation. In 27 I.C. 10, an Anubhavam tenure was held to have characteristics of a Karamkari tenure and as such reasonable on alienation. Mr. Justice Sadasiva Aiyar who had considerable experience of Malabar Law as Chief Justice of Travancore was a party to this decision. In 6 L.W. 114, Ayling and Napier, JJ., enunciated the same principle as regards the Adimayavana tenure. Then we come to Zamorin of Calicut v. Samu Nair (1919) 38 M.L.J. 275. It was in this case for the first time that the learned Judges thought that it was open to parties to adduce evidence to show that such tenures had ceased to have the characteristics of inalienability.

16. The practical effect of this decision is to permit each grantee of a tenure to adduce evidence of inalienability. No one decision would be even evidence regarding a similar grant in the same locality. Each decision would depend upon the resources and capacity of the grantee in his case and to a certain extent upon the leanings of the court. In a litigious district like Malabar this would afford opportunities for perjury and forgery of a serious kind. If only for this reason the procedure adopted by the learned Judges should be discouraged. But on higher grounds the view taken by the learned Judges seems untenable. Where a particular view of a custom has been current for a considerable time and has been recognised by Courts and by text-writers, it is not desirable, without the intervention of legislature, that Judges should countenance a sudden departure from it.

17. Mr. Ananthakrishna Aiyar contended that the custom which required the grantee to restore the property to the grantor if he alienated it is unreasonable and opposed to public policy. I see no force in this contention. Prima facie such grants are benefits conferred by the grantor. Ordinarily no question of consideration arises. Prima facie therefore, such limitation on the power of alienation should be construed as securing a further benefit to the grantees' heirs. There is nothing against public policy or unreasonable in imposing such a condition. Moreover we are not dealing with the case of a contract. None of the cases quoted by Mr. Ananthakrishna Aiyar shows that such a condition as this would be regarded as unreasonable in a custom. As was pointed out by the learned Advocate-General the legislature in Bengal has recognised the principle that in certain circumstances a permanent right of occupancy should not be transferred. Other illustrations of similar legislative recognition can be quoted, but it is unnecessary to refer to them at any length.

18. My answer to the reference is that the Karamkari or Santhathi Brahmaswom tenure is liable to be forfeited on alienation if there is no contract to the contrary.