

(1934) 09 MAD CK 0017
In the Madras High Court

Paniyil Kalliani Amma's Thavazhi Karnavan Damodaran Nair	APPELLANT
Vs	
Valvor Tarwad Karnavan Achuthan Nair and Others	RESPONDENT

Date of Decision : 06-09-1934

Acts Referred:

Evidence Act, 1872 — Section 92(3)

Citation : AIR 1935 Mad 190 : 157 Ind. Cas. 1040 : (1935) 41 LW 318 : (1935) 68 MLJ 648

Hon'ble Judges : King, J

Bench : Division Bench

Judgement

King, J.—The jenm right in the property with which we are concerned in this appeal belongs to the Eralpad Raja of Calicut as part of his

stanom. In 1913 it was granted on two verumpattom leases to tenants of whom defendants 1 to 8 are the present representatives. These leases are

Exs. B and C, the former covering items 1 to 10 and the latter items 11 to 14 of the items in suit. In 1920 by Ex. A the then holder of the stanom

granted a " melcharth " to the plaintiff with powers to evict the Raja's tenants. In 1923 plaintiff sued on this melcharth, and obtained a decree for

eviction from the District Munsif of Palghat, which decree was reversed by the Subordinate Judge of Ottapalam. Plaintiff has accordingly appealed

to the High Court.

2. Two reasons were given by the learned Subordinate Judge for his decision and it is those reasons which have now to be considered by us. The

first was that the melcharth itself was invalid, the money borrowed under it not having been borrowed for a purpose binding upon the stanom. The

second was that the suit was premature. The defendants were entitled under their leases to remain in possession for twelve years, i.e., until 1925

and the suit was brought in 1923. On both these points, it may be mentioned the Subordinate Judge's findings differed from those of the District

Munsif.

3. The first of these reasons is not seriously sought to be supported by the learned Advocate for the respondents. The facts are that the Raja was

in urgent need of money in order to avert the sale of stanom property attached in execution of a decree against the stanom. The Subordinate Judge

does not dispute these facts but suggests that various alternative ways of raising money might have been open to the Raja. It is not disputed before

us that this finding is based wholly upon surmise without any positive evidence to support it. That being so, we must hold that the melcharth is not

invalid.

4. It is the second reason which has been the main point of contention argued before us. The learned advocate for the appellant relies very strongly

upon the ruling reported in Gangadharan Pattar and Others Vs. Patinhara Kovilakath Thazhathe Manavikraman alias Cheria Kunjunni Rajah Avl.

and Others, . This deals with a verumpattom lease, filed in this case as Ex. D executed in favour of the holder of another similar stanom in the

Zamori.n's family at Calicut, and couched in somewhat similar though in by no means identical terms with those in the leases now before us. It was

there held, following the authority of the Sadar Adawlat Court in 1856, that if a verumpattom lease did not specify the term for which it was to run,

it was to be deemed to run for a single year only. It need hardly be mentioned that the present leases (Exs. B and C) specify no term. The

argument for the appellant then proceeds on the assumption that in order to prove that their leases were to run for twelve years the respondents

must establish the existence of a custom at variance with the ordinary law, and the evidence in this case is far from sufficient to prove any such

custom. In our view, however, it is unnecessary to approach the case from this point of view, and it will be enough to consider the evidence relating

to these identical items of land. The decision in Gangadharan Pattar and Others Vs. Patinhara Kovilakath Thazhathe Manavikraman alias Cheria

Kunjunni Rajah Avl. and Others, , seems to us to amount to no more than this, that the presumption in the case of any verumpattom lease is that it

runs for one year only and that the burden is upon the lessees to show the

contrary.

5. The previous history of these items can be traced back for a generation or so, each of the two leases being in renewal of three previous leases.

Those which preceded Ex. B were executed in 1892-1893, 1897-1898 and 1902-1903 and those which preceded Ex. C in 1885-1886, 1893-

1894 and 1901-1902. Now at first sight an examination of these dates would seem to negative the respondent's contention as the intervals

between the successive leases are less than twelve years. But it is well known and has been pointed out by the Subordinate Judge that the holders

of these stanoms in Calicut succeed to their positions late in life and either by death or by what may be called "promotion" to a higher stanom

occupy them for only a short time. It is not unreasonable therefore to explain the frequency of these renewals as due to the desire of each

successive "stani" to take fresh leases and enjoy the benefit of the premiums which he then exacts from his tenants.

6. This circumstance coupled with the fact that there has been no eviction since the time when these leases began makes it impossible for us to take

the dates as in any way conclusive _ against the respondents.

7. Now this is not the first time that the tenants of this land have set up a right to remain in possession for twelve years. Suits were filed to evict

them by a melchartdar in 1906 when the immediately preceding leases were in force. The District Munsif then held that the suits were premature,

and both first and second appeals against his decree were unsuccessful. The second appeal was prosecuted by Plaintiff's mother to whom the

melcharth had been assigned. Again in 1916 plaintiff's mother herself brought suits to evict the tenants who of course were then holding under the

present leases. One of her complaints has been filed here as Ex. VII and she there refers to the previous litigation which began in 1906 and states that

the twelve years' period of the demise of 1902 had expired in 1914, and that her cause of action dated from 1914. She does not mention the

present lease of 1913 in her complaint. Plaintiff's mother succeeded in the Munsif's Court but failed on both first and second appeals to establish the

validity of her own melcharth. It was held by the High Court that an argument that the demise of 1902 did not enure for twelve years could not be

allowed to be raised as the suits had been brought on the assumption that it had

enured for that period. There have thus been two previous attempts to evict Defendants or their predecessors from these lands through the Courts. In the first attempt it was definitely held that Defendants had a right to remain in possession for twelve years under the lease of 1902 (which is in no way distinguishable from the present leases) and in the second it was naturally enough assumed that they had that right. The results of this litigation are no doubt not binding upon the Plaintiff but they afford strong evidence of the fact that Defendants are now putting forward a true and valid claim.

8. The next part of the evidence relates to the payment of an "avakasam", a kind of premium or renewal fee by the defendants. D. W. 1 who is a "Kariasthan" employed by the present Eralpad Raja says speaking generally that in leases like these "avakasams" for twelve years are usually demanded and paid. D. W. 2 speaks to the actual payment of Rs. 400 odd as "12 years" avakasam" by the karnavan of the tarwad of the present Defendants at the time when the renewals evidenced by the Exs. B and C were granted.

9. Now it is argued in second appeal that this evidence of D.W. 2 is inadmissible, and in support of this argument the ruling reported in Krishnayya v. Mohamad Galeb Saheb (1929) 58 M.L.J. 240 is quoted. There it is laid down that "it is not open to a party to a document to prove by oral evidence a variation in the amount of consideration for the document." Very little thought is however required to perceive that that ruling cannot be applied to the facts of the present case. The consideration for a lease is the rent to be paid, and the payment of the "avakasam" is clearly in the nature of a condition precedent evidence as to which is permitted by proviso 3 to Section 92 of the Evidence Act.

10. This evidence therefore cannot be excluded, and we are bound by the finding of the Subordinate Judge accepting it as true. It follows that the agreement between the jenmi and his tenants must have been that the latter should remain in possession for twelve years, and that the finding of the Subordinate Judge that the suit was premature must be upheld. Gangadharan Pattar and Others Vs. Patinhara Kovilakath Thazhathe Manavikraman alias Cheria Kunjunni Rajah Avl. and Others, where there was no positive evidence of the payment of any "avakasam", cannot be

resorted to as a final authority on the facts of this case.

11. One last argument was addressed to us on behalf of the appellant. It was urged that although the suit might have been premature in 1923, it

could nevertheless be decreed by any appellate Court giving its decision after 1925 when the twelve years" period under the leases had expired,

and we have therefore been asked to allow the appeal on this ground. No doubt it is competent to us to do so, and in appropriate circumstances

suits premature in their inception have been eventually decreed. Several instances of the exercise of this discretion have been brought to our notice.

But in exercising this discretion we must be guided by one very clear principle, vis., that we do no injustice to the Defendants. Now in the present

case if a suit were to be instituted to-day to evict the defendants it is true that they could no longer plead that the suit was premature, but they

would have a still stronger ground" of defence in setting up the rights conferred upon them by the Malabar Tenancy Act. That being so, it would be

a very grave injustice to accede to this request to exercise our discretion on behalf of the appellant, and we cannot do so.

12. In the result therefore this appeal fails and is dismissed with costs.