

**(1961) 08 KL CK 0036**  
**In the High Court Of Kerala**  
**Case No : A.S. No. 420 of 1958**

Sukumara Kurup and Others

APPELLANT

Vs

Velayudhan Pillai and Others

RESPONDENT

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**Date of Decision :** 07-08-1961

**Acts Referred:**

**Citation :** (1961) KLJ 1104

**Hon'ble Judges :** P. Govinda Menon, J; M.S. Menon, J

**Bench :** Division Bench

**Advocate :** K. Kuttikrishna Menon, for the Appellant; V. Balakrishna Eradi and P.K. Krishnankutty Menon for Respondents 1 and 2, for the Respondent

**Final Decision :** Allowed

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## Judgement

M. S. Menon, J.—The plaintiffs in O. S. No. 19 of 1956 of the court of the Subordinate Judge of Ottapalam are the appellants before us. They and defendants 3 and 4 are the members of a Nair tarwad. The 3rd defendant is the mother of the 4th defendant and of plaintiffs 1 to 7. Plaintiffs 8 to 12 are the children of the 3rd plaintiff and plaintiffs 13 to 20 are the children of the 4th plaintiff. The suit which has been dismissed with costs was for the recovery, with mesne profits, of the two items of property specified in the schedule to the plaint. Those items were the subject of a demise in favor of the 1st defendant under Ext. A1, a lease deed executed by the 3rd defendant to the 1st defendant on 3 - 3 - 1947. The rights of the 1st defendant have been assigned to the 2nd defendant.

2. One of the contentions urged on behalf of the appellants is that the lease offends section 33(1) of the Madras Marumakkathayam Act, 1932 (Act XXII of 1933). Section 33(1) reads as follows:

Except for consideration and for tarwad necessity or benefit and with the written consent of the majority of the major members of the tarwad, no karanavan shall sell immovable property of the tarwad or mortgage with possession or lease such

property for a period exceeding twelve years.

It is common ground that if the period granted by Ext. A1 exceeds twelve years, the section is attracted and the demise has to be considered as not binding on the tarwad. The only question, therefore, as far as this contention is concerned, is whether such is the case.

3. The relevant passages in Ext. A1 read as follows:

4. What section 33(1) of the Act strikes down, among other things, are leases under which a tarwad on its own volition cannot recover possession at least at the end of twelve years from the commencement of the demise. The effect of the paragraphs extracted above, as we understand them, is to grant a lease in perpetuity subject to forfeiture if the renewal fee is not paid as provided at the close of every cycle of twelve years.

5. That a lease does not cease to be a lease in perpetuity because there is a clause for forfeiture is a proposition beyond dispute. In I. L. R. 34 Calcutta 358 the court had to deal with a lease which provided:

If you do not pay the rent according to the different installments every year, the mukarari will be cancelled at the end of the year.

Rampini, J. said:

It would seem to me that the clause referred to merely provides for the forfeiture of the mukarari tenure, if the annual jama is not paid, but that it does not affect the permanency of the tenure, as long as the annual rent is paid.

The actual decision in the case was reversed by the Privy Council in A. I. R. 1917 P. C. 163; but the reversal had nothing to do with the passage extracted above.

6. In A. I. R. 1925 Madras 919 the court had to deal with a lease which provided:

If you do not act in the above said manner, if you make any delay and if you fail to measure outha grain to me on Sivaratri day in any year, I shall take possession of my land immediately without obtaining your consent and lease out the land for cultivation to persons to whom I am pleased to lease out the same.

Madhavan Nair J. said that what was created was a permanent lease in favor of the lessees which could be put an end to in one circumstance, namely, the non-payment of rent by them.

7. In A. I. R. 1940 Patna 24 the court had to deal with a lease which provided that in the event of default of two consecutive installments "the lessor or his heirs and representatives, shall have the power to realize the arrear rent with interest thereon and dispossess the lessee by taking proceedings in Court." The clause did not prevent Fazl Ali J. from holding that the lease was permanent or interminable.

8. A lease in perpetuity is unknown to English law, and the English cases and text

books cited on behalf of the respondents afford no guidance for the determination of the controversy before us. In India leases in perpetuity can be created by an express grant and may be presumed if the necessary conditions are established. A permanent tenancy in this country may also be acquired by prescription and by estoppel.

9. It has also to be remembered that item I of Ext. A1 is a forest tract of 500 acres and that the main purpose of the lease was to empower the lessee to develop a regular plantation. It is unthinkable that in such a case the parties to the transaction contemplated only a duration of six or twelve years as contended by counsel for the respondents.

10. The other contentions urged on behalf of the appellants - apart from the lack of the "written consent of the majority of the major members of the tarwad" - are that Ext. A1 was not executed by the karanavan, that it was not justified by tarwad necessity or benefit, and that it offended section 3(1) of the Madras Preservation of Private Forests Act, 1946. It was agreed that if we came to the conclusion that the period of the lease exceeded twelve years and that Ext. A1 was not binding on the tarwad for the lack of the "written consent of the majority of the major members of the tarwad" - as we have done - these questions need not be considered by us, and they are not considered in this judgment.

11. Two further questions that arise relate to the value of the improvements, if any, effected by the 1st and 2nd defendants (respondents 1 and 2) and the benefits, if any, available under the Kerala Agrarian Relations Act, 1960 (Act IV of 1961). It was agreed that these questions may be left open for future determination. We do so. The appeal is allowed as above. The respondents will pay the costs of the appellants here and in the court below.