

(1936) 02 MAD CK 0041
In the Madras High Court

Thazhe Nelloli Pazhe Peringati Athiramankutti and Another	APPELLANT
Vs	
(Thazhe Nelloli Pazhe Peringati) Uppari and Others	RESPONDENT

Date of Decision : 24-02-1936

Acts Referred:

Citation : 168 Ind. Cas. 101

Hon'ble Judges : Venkataramana Rao, J

Bench : Single Bench

Judgement

Venkataramana Rao, J.—The question raised in this second appeal is whether the defendants are holding the suit lands on a perpetual or saswatham tenure. It is found by both the lower Courts that, Ex. 1, the original demise, was granted to the defendants' predecessor-in-title. The document provides for the payment of a kanom of Rs. 50 and there is a significant provision at the end of it, viz.,

At, the end of very twelve years a renewal should be taken charging the sail aura of Rs 50 as kanom and you may enjoy the same without surrendering or causing it to be surrendered."

2. On April 27, 1995, there was another deed of demise, Ex. A, in and by which the suit property was demised.

for a period of twelve years on Kuzhikanom right and for carrying on trade, fixing rent of Rs. 10 for each shop;

and there is the following stipulation thereon, viz.,

you may hold in possession the said properties as hitherto....

3. It appears that there was a melcharth granted by the predecessor-in-title of plaintiff No. 1 in 1903 to one Mammad who filed a suit in 1908 for recovery of the arrears of rent. In that suit it was held that the defendants were holding the property on saswatham tenure. The said finding may not have been necessary for that decision in that suit, but the question was raised and there was an

adjudication. The present suit is brought both by the plaintiff No. 1 who is a jenmi of the suit properties and by plaintiff No. 2, who is a melcharth holder under a deed dated December 7, 1927, for redemption and possession. The same defence is again raised, viz., that the defendants are holding under a perpetual tenure. Both the Courts have concurrently found that the defendants have been holding under a saswatham tenure. The learned District Munsif found it on the ground that, at any rate, since the adjudication in 1908 the defendants must be deemed to have been holding the property under a saswatham tenure and acquire a title by adverse possession. The learned Subordinate Judge confirmed his decision. Mr. Sridharan contends that Ex. 1 cannot be considered to be a perpetual tenure or grant and the provision relating to renewal and non-surrender must be considered to be a clog on the equity of redemption. He relies upon the ruling in *Neelkandhan v. Anantha Krishna Iyer* 30 M 61 : 16 M.L.J. 462 : 1M.L.T. 426, which supports him. But I find in a later decision in *Raman Nayar v. Kunhi Kolandan Mudaliar* 2 L.W. 941 : 31 Ind. Cas. 184 : AIR 1916 Mad 652 : (1915) M.W.N. 793, that Sadasiva Iyer, J. holds that a perpetual kanom is permissible under the customary law of Malabar. He was considering the document which is dated December 1857, admittedly prior to the Transfer of Property Act.

4. In a later decision reported in *Kuttikatta v. Kanhikavamma* 7 L.W. 119 : 43 Ind. Cas. 989 : AIR 1918 Mad 509 : (1918) M.W.N. 235 : 28_M.L.T. 67, *Bakewell and Philips, JJ.*, held that a document dated July 30, 1897, was a perpetual kanom deed, and valid under the Transfer of Property Act. Incidentally they observe at p. 237* that a perpetual kanom was recognized by this Court so long ago as 1871: vide, *Kottal Uppi v. Edavalath Thathan Nambudri* 6 M H C R 258, and was held to be valid in *Raman Nayar v. Kunhi Kolandan Mvdaliar* 2 L.W. 941 : 31 Ind. Cas. 184 : AIR 1916 Mad 652 : (1915) M.W.N. 793. In dealing with *Neelakandhan v. Anantha Krishna Iyer* 30 M 61 : 16 M.L.J. 462 : 1M.L.T. 426., they observed that the document in that case was executed before the Transfer of Property Act, and they do not say that the decision was wrong. But one may gather that the view of the learned Judges in *Kuttikatta v. Kunhikavamma* 7 L.W. 119 : 43 Ind. Cas. 989 : AIR 1918 Mad 509 : (1918) M.W.N. 235 : 28_M.L.T. 67, was that a perpetual kanom is permissible in Malabar. The question now arises if the perpetual kanom is permissible and if the defendants were holding under Ex. 1. though unregistered, the defendants could be deemed to have been holding on a saswatham tenure, under the original grant or have acquired right thereto by adverse possession. Mr. Sridharan laid considerable stress on Ex. A, the deed of 1895, which says that the kanom demise is for a period of 12 years. He contends and not without force, that the reference to 12 years and the payment of money for the improvements is inconsistent with a perpetual grant. But there is the provision that the property must be held as "hitherto" which can only mean as under Ex. 1.

5. It may be that a provision was made for payment for improvements in case the demisee chose to surrender at any time after the period of 12 years. If really

the defendants have been holding on a saswatham tenure it cannot be said that they have lost their right merely by taking the deed, Ex. A. Mr. Sridharan relied on the ruling in Mohammad Mumtaz Ali Khan v. Mohan Singh 50 I.A. 202 : 74 Ind. Cas. 476 : AIR 1923 P.C. 118 : 21 A.L.J. 757 : 45 A 419 : 26 O C 231 : 45 M.L.J. 623 : 9 O & A L.R. 901: 10 O L.J. 383 : 19 L.W. 283 39 C.L.J. 295 : 28 C.W.N 840 : 33 M.L.T. 321(PC), for the proposition that the mere assertion in a judicial proceeding that a tenant, is holding under a perpetual tenure will not confer on him a title by adverse possession. I quite agree that if the terms of a tenancy are known, a mere assertion by a tenant cannot convert the nature of his tenure, but where either the origin of the tenancy is not, known or a document purporting to confer a permanent tenure is invalid for want of registration or otherwise and the defendants have been holding for a period of 12 years in assertion of the permanent right, they would certainly acquire a right by adverse possession. Further in this case it was not mere assertion in a judicial proceeding but there was an adjudication. In the view I have taken of this case following Raman Nayar v. Kunni Kolandan Mudaliar 2 L.W. 941 : 31 Ind. Cas. 184 : AIR 1916 Mad 652 : (1915) M.W.N. 793, that by Ex. 1 it was intended that the defendants should have a perpetual tenure, the decision of the lower Courts upholding their claim, is correct. In the result the second appeal fails and is dismissed with costs. Leave granted.