
(1929) 04 MAD CK 0046
In the Madras High Court

Thiruthiyil Unniri Kutti

APPELLANT

Vs

Narayana Chettiar and Others

RESPONDENT

Date of Decision : 30-04-1929

Acts Referred:

Citation : AIR 1929 Mad 777

Hon'ble Judges : Pandalai, J

Bench : Division Bench

Judgement

Pandalai, J.—This second appeal is from a decree of the learned Subordinate Judge allowing respondent 1's (plaintiff's) suit for specific

performance of an agreement dated 30th May 1922 between him and respondents 2 and 3 (defendants 1 and 2) whereby the latter agreed to

grant the former a lease or kanom of their shop which was and is still in the occupation of the appellant (defendant 3) as a yearly tenant. The

District Munsif found all the original defences to the suit on the merits against the defendants but during the trial raised at the request of defendants

an additional issue (issue 5) whether plaintiff is entitled in law to specific performance. On this issue he held against the plaintiff on the ground that

the bargain was for a kanom which is virtually a mortgage and that the plaintiff lender cannot get specific performance of a contract to borrow. He

relied on Meenakshisundaram Mudaliar v. Ratnasami Pillai. The Subordinate Judge confirmed all the findings of fact arrived at by the District

Munsif but took the view that the bargain was not one of forcing a loan on respondents 2 and 3 (defendants 1 and 2.) He said:

It is usual for jenmis to grant kanoms of their properties and the tenants to get them on payment of kanom amounts. In the present case the plaintiff

is only seeking to en-force his rights to get the kanom tenure which is a peculiar holding in Malabar in respect of the suit property. After entering

into a contract with plaintiff they have turned round and given the melcharth to defendant 3. The property is usually held by kanom tenants.

Therefore the ruling in Meenakshisundaram v. Ratnasami [1918] 41 Mad. 959 cannot be said to be exactly applicable to the present case.

2. Respondents 2 and 3 (defendants 1 and 2) have not appealed. But defendant 3, the yearly tenant of the shop who has been found by both

Courts to have taken,, after the agreement sued on and with knowledge of the same, a kanom from respondents 2 and 3 is the appellant. His

learned advocate argues that the rule that specific performance of a contract to lend or borrow will not be enforced applies to this case and relies

on the above cited decision and on Vadavendra Bhatta v. Srinivasa Babu AIR 1925 Mad. 62 and Galim v. Sadarijan Bibi [1916] 43 Cal. 59 and

on the English decisions cited therein which establish the rule. Were this contract substantially one for lending or borrowing as distinguishable from

a contract for a well known tenure of land prevalent in a part of the Presidency and subject to well recognized incidents, the appellant's argument

would succeed. But if the contract was really and substantially not for lending money but for a tenure in land the fact that one of the incidents of the

tenure is that the kanom tenant advances money to the jenmi and that there are stipulations for the return of the sum or such portion of it as is left

after settling of arrears of rent at the termination of the tenure, is not in my opinion sufficient to make the contract one of borrowing or lending. By

Section 12 (c), Specific Relief Act, the Court may enforce specific relief if the act agreed to be done is such that pecuniary relief would not afford

[adequate relief and the explanation says [that a breach of contract to transfer immovable property shall be presumed to be [one not capable of

adequate relief by compensations in money. To those conversant with the system of property holding in Malabar, including in that expression the

whole of the Malayalam speaking country, it would certainly come as a startling surprise to learn that a bargain for a kanom was one for money

and not for land.

3. In the States of Travancore and Cochin, the State has intervened by legislation to confer on the holders of this tenure rights of permanent

occupancy which were imperilled by the development of the notions of mortgage and redemption and second mortgage introduced by modern

Courts interpreting western jurisprudence. It is matter of public knowledge that similar legislation is on foot in this Presidency. Lawyers are familiar

with the early controversies as to whether a kanom is a lease or mortgage. The decisions on this topic which will be found set forth in Moore's

Malabar Law were that the kanom is a lease or a combination of a lease and mortgage. The modern doctrine, the result partly of legal analysis and

partly of considerations of convenience is that it is an anomalous mortgage. But to give it a legal label which really means that the so called

mortgage is liable to incidents in it by custom or by contract that do not fit in with any of the recognized forms of mortgage only emphasises that

that description alone cannot be a guide in deciding whether the transaction is substantially one of borrowing land lending money or one by which

the kanom tenant bargains for a substantial interest in the jenmi's property for the purpose of occupation, cultivation and improvement. I have no

doubt that it is the latter and think that the rule against granting specific performance of contracts to lend or borrow money has no application to

this case even if it should be held that the contract between the parties was one to grant a kanom in the legal sense.

4. But there is good reason to think that the contract Ex. A is an agreement for a lease in the legal sense, rather than one for a kanom in the legal

sense. I have read the Malyalam original. No doubt the word ""kanom"" and ""purappad"" are used in respect of the proposed document. But

admittedly the appellant was in occupation only as an ordinary lessee and the word ""charthu"" is used in respect of that lease as well as in respect of

the proposed document to respondent 1. The property concerned is a shop and not agricultural land. If, as seems likely, what was intended was to

give respondent 1 a lease of the shop for 12 years the objection to granting specific performance on the ground of lending and borrowing

disappears.

5. On the whole, I think the decree of the Subordinate Judge was right and dismiss the second appeal with costs.

6. The appellant's advocate asks for leave to appeal. Seeing that the parties primarily affected i.e., respondents 2 and 3 have not even appealed to

this Court and that the document has already been executed in execution of the decree of the lower Court, I think that this is not a fit case for appeal. Leave refused.