

(1906) 03 MAD CK 0013
In the Madras High Court

V. Vythilingam Pillai and Others

APPELLANT

Vs

Kuth iravattath Nair Avergal and Others

RESPONDENT

Date of Decision : 28-03-1906

Acts Referred:

Citation : (1906) 16 MLJ 358

Judgement

1. This is a suit for redemption of certain land. The plaintiff is the Kuthiravattath. Nair. The second and third defendants are the present appellant

and third respondent. They are in possession and they alone contest the plaintiff's right to redeem. They claim under Exhibit IV, which is an

assignment obtained by them in 1896 from certain persons who had obtained an assignment in 1871 under Exhibit I, from the (Tarwad family) of

the first defendant. The 1st defendant's family held the land under an instrument which is not produced but of which Exhibit A is the Kaichit or

counterpart. It was executed by the 1st defendant and another member of his family in favour of the plaintiff in 1866. The defendants also relied on

Exhibit II which purported to be a grant from the Zamorin in 1862. The Zamorin claimed to have an undivided half share in the land, but this claim

was negated in recent litigation between the plaintiff and the Zamorin and Exhibit II has been held by both the Courts below in the present suit to

be a forgery. The second and third defendants' title, then depends on Exhibit A and the chief question in this suit is as to the extent of the grant

evidenced by it. The 2nd and 3rd defendants contend that it evidences a permanent irredeemable tenure, while the plaintiff contends that it is

nothing more than an ordinary Malabar Kanom redeemable on the expiration of the usual Kanom period of twelve years. It recites that the plaintiff

grants to the 1st defendant's family "a renewed writing" on a stamp paper of one rupee in respect of certain land and adds, "The rent due by us

(1st defendant's family) for holding the land on lease is 55 paras of paddy. The prior Kanom and the value settled for the reclamation effected

hitherto in the said property and credited to our accounts is 700 fanams. The amount allowed for interest thereon (on the said 700 fanams) is 35

paras of paddy and the amount allowed for anubhavam is 5 paras of paddy. The total amount of the two items is 40 paras of paddy. The balance

left after deducting these "40 paras of paddy from the aforesaid rent of the 55 paras of paddy is 15 paras of paddy" and the tenant agrees to pay

rent calculated in the usual way on this 15 paras. Now this instrument has all the elements of a Kanom. The reference to "the prior Kanom" of

which this is "a renewed writing," the addition of the value of reclamations by the tenant to the prior Kanom amount so as to make up the new

Kanom amount, and the manner in which the rent is calculated, all indicate that it is a Kanom demise and the Courts below have construed it as an

ordinary Kanom, neither more nor less.

2. The defendant, however, contend that the words "the amount allowed for anubhavam is 5 paras of paddy" have the effect of converting the

Kanom into a perpetual tenure. We cannot for a moment accede to this argument. The word anubhavam or anubhogam is a Sanskrit word, and

literally means "enjoyment." In grants, however, it ordinarily implies hereditary, and therefore, perpetual enjoyment; and when used as descriptive

of a tenure of land it implies an hereditary tenure; but the word may also be used with reference to an allowance of money or grain which is to be

deducted from the rent due to the grantor. In such a case though the allowance may be perpetual or may operate as a rent charge on the land, it by

no means follows that the tenure is irredeemable. Whether the word implies an irredeemable tenure or only a perpetual rent charge of grain or

money must depend on the language of each document. This two-fold use of the word is supported by authority, and it is sufficient, we think, to

explain and reconcile the several cases that have been relied on by either side in the argument before us. In Grame's Glossary, which is a standard

authority with regard to the meaning of the legal and revenue words and phrases in Malabar, this twofold use of anubhavam is clearly stated as "A

deed of gift of land as a reward for service, performed, answering, other perhaps, to Inam land. The holder cannot be deposed and the right is

hereditary, but if the grantee or any of his descendants die without heirs, the land reverts to the Janmi, and on the succession of heirs the Janmi is

entitled to Purushantaram :-Succession duty : literally, the death of the man. Sums varying (from 120 to 1,200 fanams, levied by Rajas from

Naduvalis, Desavalis, heads of commercial corporations from the holding of lands in free gift or under conditional renure, and generally all persons

holding Sthauam, Manam, or official dignities in the state. They also, in common with other Janmis or private proprietors, levied Purushantaram

from their tenants as a fine of entry upon the decease of a proprietor or tenant. - Grceme's Glossary. In some instances a trifling payment of one or

two fanains is made by the grantee to the Janmi in token of acknowledgment of proprietorship.

3. An hereditary grant of Anubhavam of the purapad or residue of purapad after deducting mortgage interest, which remains in the hands of a

mortgagee, is sometimes made to the mortgagee himself or to some other person not connected with the land to whom the mortgagee is required

to pay it.

4. In Second Appeal No. 1877 of 1891 (unreported), Muthusami Iyer and Wilkinson, JJ., had to consider a document very similar in its essential

terms to the present, and they then said, ""The main question to be determined is. whether the Kanam created by Exhibit VII is perpetual and

irredeemable. The material words in the document to which our attention is drawn are these, ""the balance of Michavarom due to me, namely, 118

parahs and 6J Edangazhies of paddy, I make over to you and your sons to be enjoyed as anubhavam for ever and ever with a liability to pay me 2

fanams a year as anubhavam Kacha."" The document is termed Ubhaypattola Karnam, which means, as explained by Graeme, a Kanom deed.

This view of the deed is strengthened by the expression used in the mstument ""interest on the Kanom amount advanced to me."" The contention that

the terms ""anubhavam"" ""you and your sons"" and ""for ever and ever"" operate to render the Kanam irredeemable cannot be supported. The deed

must be looked at as a whole. The primary intention of the parties was to create a mortgage and we are not at liberty to ignore it and to treat the

document as if it evidenced a sale, the consideration for which consisted of the Kanom amount and past services. Reading the document as a

whole, the intention appears to us to have been to combine in one instrument two independent transactions, viz., a mortgage and a gift of a certain

amount of purapad to the demisee and his sons. In this view the gift cannot in any way operate in restraint of the right of redemption any more than

if the Kanom were granted to one party and the anubhavam right to another.

5. In Second Appeal No. 867 of 1893 (unreported) Collins, C.J., and Shephard, J., state that the instrument was not unlike that in the case just

quoted (S.A. 1877) and that it must receive a like construction, and did not operate to give the lessee a perpetual right to the land but only to the

30 paras of paddy.

6. In Second Appeal No. 1169 of 1894 (unreported), Collins, C.J., and Parker, J., held that a document similar to the present "is clearly a

renewal of a previous Kanom document and the contention of the defendants that the land No. 1 is held by their tarwad on Anubhogam right is

untenable. The real question is whether defendants have a perpetual Anubhogam right in 30 paras of paddy from that land. The contention that

plaint cannot redeem the Kanom is untenable" and after a reference to the District Judge, the learned Judges held that the defendants had "an

irredeemable Anubhogam right to 30 paras of paddy from the land." It will be observed that in all these cases the Court held that an Anubhavam

grant of paddy did not create an irredeemable tenure of the land in favour of the grantee. The Vakil for the defendants however strongly relies on

the observations of this Court in the case of Thayyan Nair v. The Zamorin of Calicut I.L.R(1903) M. 202. But the decision in that case, if rightly

understood, is in no way inconsistent with the decisions already referred to. In that case the words of the document were "The rent of 29 items is

160 paras of paddy, being the rent due exclusive of allowance for Adima Yavana as heretofore." The Court there explained that. Adima meant a

servant" and Yavana "enjoyment," the whole expression implying an allowance given for service, and it added that there was judicial authority for

holding that when it applied to a tenure of land it prima facie imported a permanent tenure just as Anubhavam implied a permanent tenure. It further

pointed out that in that case there were reasons why the grant must be held to

have been made for services already rendered and that the amount of the grant, not being specified, must be the produce of the land after deducting the rent settled as reserved for the landlord, The Court therefore held that the instrument created an irredeemable tenure in favour of the grantee. That conclusion is, we think, obviously correct. The grantor reserved a rent of 160 paras of paddy for himself and it had been paid without alteration from time immemorial. He granted the rest of the produce as a permanent allowance for the services rendered. That is just the converse of the present case, where the allowance in favour of the granted is fixed at so many paras of paddy and the land is held on Kanom tenure, implying the right to redeem the land after 12 years, or to renew the Kanom with a readjustment of the rent. The point to be borne in mind with regard to ""Anubhavam"" is that it may be used with reference to tenure of land and it will then prima facie import an irredeemable tenure, or it may be used with reference to a specified money or grain rent charged on the land, and in that case it will not imply any tenure in favour of the grantee. But if the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as ""Anubhavam"" or ""Yavana"", then it may well be that the Court will treat it as creating as irredeemable tenure, so as to secure to the grantee the benefits intended for him by the grant.

7. In the present case, we hold that no irredeemable tenure was created but that defendants Nos. 2 and 3 are still entitled to recover 5 paras of paddy annually from the land if the plaintiff redeems the Kanoin.

8. The defendants Nos. 2 and 3 further rely on Article 134 of the Limitation Act as a bar to the whole suit. We, however, agree with the Courts below that that article has no application to the present case. In order to have the benefit of that Article the purchaser must show that he is the purchaser of an absolute title, but Exhibit I under which defendants Nos. 2 and 3 claim refers to the title of the 1st defendant's family as a Kanom and Anubhavam right, and hands over the title deeds on which chat right was claimed. Exhibit A was therefore no more than an assignment of those rights. To borrow the language of the Privy Council in *Radanath Doss v. Gisborne* (1871) 14 M.I.A. at p. 19 when dealing with the corresponding provision of the law under the Act of 1859, ""we can find in this

deed no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the property was a property which the vendor claimed to hold by what we should call in this country a fee-simple title," and we therefore think that the first requisite in the law of limitation is not made out, and that the appellants have not shown that they are purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon, a contract by the vendor to convey the property to them as an absolute property.

9. We therefore dismiss the second appeal with costs. The decree will be without prejudice to the right of the defendants Nos. 2 and 3 to their charge of the land.