
(1948) 02 MAD CK 0030
In the Madras High Court

Verkattil Unnyethamma's son Raman Nambiar and Another APPELLANT
Vs
K.K. Govindan Nayar RESPONDENT

Date of Decision : 26-02-1948

Acts Referred:

Citation : (1948) 61 LW 646 : (1948) 2 MLJ 381

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—The first defendant was one in whose favour an othi demise had been executed. The plaintiff was the mortgagor. Defendants 2 and 3 were described as sub-kanomdars of the first defendant. The plaintiff filed a suit to redeem the mortgage, whereupon defendants 2 and 3, supported by the first defendant, filed an application for stay of the suit u/s 4(1)(a) of the Madras Act XVII of 1946, stating that they were tenants of the land within the definition of "tenant" in Section 3(v) of the Malabar Tenancy Act, and that the suit was one in which their eviction was involved. The Court below held that the first defendant was an othidar and was not therefore a tenant. Defendants 2 and 3, it thought had no higher rights than the first defendant.

2. The word "tenant" in the Malabar Tenancy Act includes certain persons who have agreed to pay rent or other consideration, for being allowed to enjoy the land of another. If, however, they are in enjoyment of the land as security for the sum advanced by them, they would not be covered by this definition. Moreover, othis are well-known in Malabar law, and the omission of othidar from the category of persons included within the definition of "tenant" is significant and almost conclusive that the Legislature did not intend to include othidars within the definition of "tenant."

3. The learned advocate for defendants 2 and 3 has, however, drawn my attention to certain clauses in the othi deed which suggest that it was more of the nature of one of the tenures referred to in Section 3(v) of the Malabar Tenancy Act than of a usufructuary mortgage as generally understood. For

example, the othidar was said to have been granted possession and enjoyment in othi kuzhikanom, and it is therefore suggested that the deed in question participated of the nature of kuzhikanom. Kuzhikanom is however primarily a grant of land rent free, in order that the land might be improved by growing trees. That this deed does not resemble a kuzhikanom is indicated by the fact that 1100 fanams were borrowed, and that although it was contemplated that more trees might be grown, the grant was in no way dependent upon the further development of the land, because the mortgagor covenanted to pay to the mortgagee the value of any new trees grown, if any be so planted there.

4. An expression relied on as indicating that the deed in question was something more than an othi is the use of the word "Kaividugai otti" which in the glossary in Sundara Aiyar's Malabar and Alayasanthana Law is defined as "othi irredeemable except when the othidar refuses to make further advance "; but in Appendix III to Moore's Malabar Law and Custom it is said:

In the first edition of this work Mr. Wigram defined a " Kaividugai othi" as " a tenure higher than othi which leaves to the Janmi merely nominal rights." In 1884, however, the High Court in Kundu v. Impichi ILR (1884) Mad. 442. held that a " Kaividugai othi" was redeemable. It cannot be said that there is at the present time any real difference between " Kaividuga othi and an ordinary othi.

I therefore find no reason for thinking that the suit othi was more of the nature of one of the tenures referred to in the definition of " tenant " in the Malabar Tenancy Act and not an othi in the ordinary sense of a usufructuary mortgage. Although it has been said that othi and kanom are very similar, the only difference being that in the case of an othi a much larger amount is paid; yet a kanom has always been considered to be partly of the nature of usufructuary mortgage and partly of the nature of a lease, whereas it has never been said of an othi that it in any way participates of the nature of a lease.

5. It is however argued that even though the first defendant is not a tenant by virtue of his being an othidar, yet he is a tenant because he is an " intermediary " within the meaning of Section 3 (j) of the Malabar Tenancy Act and therefore a tenant, because intermediaries are tenants within the meaning of Section 3(v) of the Act. A usufructuary mortgagee is certainly a person who satisfies the definition of " intermediary " in Section 3(j) of the Act; and it has been so held by Wadsworth and Patanjali Sastri, JJ., in Ranga Aiyar Vs. Lingappa Gounder's son, Subbayya Gounder and Others, . The further question however is whether all intermediaries are tenants within the meaning of Section 3(v). If they were, it would lead to the anomalous position that a person who was not a tenant could make himself a tenant by parting with some measure of his interest in the land, in the present case by the creation of a sub-kanom. The word " intermediary " has to be read with the other parts of the definition; and in my view the intermediary referred to must be an intermediary who pays rent or other consideration for his being allowed by another to enjoy the land of the latter. If the intermediary is one who had taken land as security and has not paid

consideration or rent so that he may be allowed to enjoy possession, then he is not a tenant within the meaning of Section 3(v).

6. It is further argued that, whatever may be the case with regard to the first defendant, defendants 2 and 3 are tenants. It would be strange indeed if defendants 2 and 3 had any stronger right to continue in possession of the land than the person from whom they derived their interests; and I do not think that the definition of "tenant" in Section 3 (v) permits of the interpretation that their learned advocate seeks to place upon it. The tenant is the person who enjoys the land of the person who has allowed him to enjoy the land. The land is not however the land of the first defendant but the land of the landlord, the mortgagor-plaintiff. Section 4 of Act XVII of 1946 also indicates that the Legislature was concerned with persons who were liable to eviction by their landlords or persons who put them into possession. Section 3(a) distinctly says that "no tenant....shall be liable to be evicted by his landlord...." and the suits referred to in Section 4 are suits by landlords to evict their tenants. If the tenant is entitled to retain possession by virtue of this section, then the sub-tenants, who would be ordinarily entitled to similar relief against their landlords, would of course be able to retain possession too; but if the person from whom they held is not a tenant and is liable to be evicted, the so-called sub-tenant of a person who is not a tenant would have no right to remain in possession.

7. The petition fails and is dismissed with costs.