
(1936) 11 MAD CK 0046
In the Madras High Court

Viyathan Mahadevi styled Kozhikote Kishakke Kovilagath
Valia Thamburatti (deceased) and Another

APPELLANT

Vs

Punnappale Koyimmar Kurikkal's son Aydress Kurikkal and
Another

RESPONDENT

Date of Decision : 20-11-1936

Acts Referred:

Malabar Compensation for Tenants Improvements Act, 1899 — Section 19

Citation : AIR 1937 Mad 427 : (1937) 45 LW 318 : (1937) 1 MLJ 324

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—The question in this second appeal is whether the plaintiff who is a jenmi is entitled to recover the value of certain

trees cut by the defendant-tenant. The claim is made by virtue of a clause in the kychit Ex. A. The clause runs thus:

If I cut trees such as veeti teak, jack, etc., from the parambas without obtaining the written consent of the kovilagam, I shall be answerable for the

costs of such trees and shall surrender the properties irrespective of the 12 years" term if the kovilagam demands it.

2. The main defence is that the said clause is penal and unenforceable. It was found by the District Munsif that the kovilagam of the plaintiff was not

in possession of the land demised for over 100 years and the trees which are cut were aged between 10 and 20 years. He further found that the

trees were of spontaneous growth grown after the demise to the defendant, that they were tended and reared by the defendant and that they really

constituted improvements within the meaning of the Malabar Compensation for Tenants" Improvements Act. It is not disputed by Mr.

Ramakrishna Aiyar on behalf of the plaintiff that they would be improvements within the meaning of the Act. The District Munsif held that the cutting was for the purpose of making other improvements on the land demised and gave only nominal damages at the rate of 8 annas per tree. On appeal the learned Subordinate Judge was of the opinion that the clause contravened Section 19 of the Act, but gave one-fourth of the value of the trees as compensation to the plaintiff. He did not give a finding on the question whether the cutting of the trees was an improvement. In view of certain decisions of this Court I called for a finding on two questions, namely, (1) whether the cutting of the trees in question is itself an act of improvement within the meaning of the Malabar Compensation for Tenants' Improvements Act, and (2) whether the cutting of the trees was for the purpose of building farm houses or making any other improvements on the holding within the meaning of the Act. The learned Subordinate Judge answered both the questions in the negative. Mr. Ramakrishna Aiyar contends that the plaintiff is entitled to the full value of the improvements in view of the said findings and relies on two decisions of this Court one of Ramesam, J., reported in *Kelu Nair v. Valia Thamburatti* (1922) 16 L.W. 310 and another of Walsh, J., in S.A. No. 249 of 1929. Those decisions do support him. But it is contended on behalf of the defendant by Mr. N.R. Sesha Aiyar that the said two decisions are opposed to the decision of the Full Bench in *Raja of Cochin v. Kittunni Nair* (1916) 32 M.L.J. 295 : ILR 40 Mad. 603 and should not be followed. In *Raja of Cochin v. Kittunni Nair* (1916) 32 M.L.J. 295 : ILR 40 Mad. 603 a similar claim was advanced. The suit therein was for the full value of the trees based upon a clause in the lease which is almost identical with the clause in question and ran thus:

The teak, rosewood jack and such kinds of trees which now exist, and may in future be produced in the properties mentioned in the schedule, are not to be cut down and removed without the permission of the State and without paying the kuttikanam, but if they are so cut and removed, I am liable for paying up either the fine imposed by the State or the value of the trees.

3. It will thus be seen that the clause related to two sets of trees (1) trees which existed at the date of the lease and (2) trees which may be produced in future. Though the claim was made in the suit for the full value of

the trees, in second appeal it was limited to the payment of kuttikanam fee. Even then the question was raised as to the legality of the kuttikanam fee and whether the provision was not obnoxious to the Tenants' Improvements Act. The learned Judges who made the order of reference were divided in their opinion. Coutts-Trotter, J., took the view that the landlord was not entitled to claim kuttikanam fee and he observed thus: I see no answer to the arguments that to make the tenant's right to carry out an improvement depend upon his making a payment to his landlord is of necessity to put a limitation upon that right.

4. Seshagiri Aiyar, J., took a different view. According to him the provision for the demand of a moderate fee would not limit or affect the right of a tenant to make improvements upon the property. But he was distinctly of opinion that the payment of damages that may be fixed by the landlord or the value of trees would undoubtedly be penal in its character. The question referred to the Full Bench was general, namely:

Whether a provision in a Malabar lease that a tenant shall pay kuttikanam or some fee to his landlord in respect of trees cut down is contrary to the provisions of Section 19 of the Malabar Compensation for Tenants' Improvements Act.

5. The Full Bench dealt with the question on the footing that the cutting was not an improvement (vide Abdur Rahim, J. at p. 609 and Phillips, J. at p. 610). Waffis, C.J., thought that the payment of kuttikanam fee was not open to objection as limiting the tenant's rights to plant trees, still less his right to cut trees by way of clearance. He answered the reference thus:

a stipulation in a Malabar lease for the payment of kuttikanam to the landlord in respect of trees cut down is not contrary to the provisions of Section 19 of the Act.

6. In this opinion both Oldfield and Srinivasa Aiyangar, JJ., concurred. Abdur Rahim, J., thought that even if the cutting was an improvement the payment demanded would not be unreasonable and can be allowed. Phillips, J., dealt with the question thus:

If a tenant plants a tree he is not bound to cut it down before the end of the tenancy. If it is in existence at the end of the tenancy, he is entitled to compensation, but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of

compensation arises.... If the tenant cuts down a tree he gets the full value of it less the fee imposed, but as he need not cut down the tree the fee

imposed can in no way prevent him from growing it except possibly when the fee is unreasonably large.

7. Having regard to the terms of the reference and the answer of the majority of the learned judges the ratio of the Full Bench decision appears to

be that even in cases where the cutting of a tree is not an improvement, whether the trees were planted by the landlord or of spontaneous growth, it

will be open to the landlord to charge a moderate fee and such a provision will not be obnoxious to Section 19 of the Act, but if the fee is

unreasonably large, it would certainly contravene the provisions of the Act. But on a reference to the printed papers in the case I find that both the

District Munsif and the District Judge in the Courts below dealt with that case on the footing that the trees cut were planted by the tenant. So it may

be contended that the reference to the Full Bench and the answer given by them should be confined to the cases of trees planted by the tenant. No

doubt the law is clear that in the case of trees planted by the tenant the property therein vests in the tenant but so far as the trees of spontaneous

growth the law is not clear and the opinion seems to be divided and in *Narayani Amma v. Kunchukutti Amma* (1916) 32 M.L.J. 541 the question

was left open. But the Act for the purpose of compensation treats both; the trees planted by the tenant and the trees of spontaneous growth grown

after the demise on the same, footing. If in the one case, i.e., in the case of planting of trees a clause, which provides for the payment of the full

value of trees would be contrary to the provisions of Section 19 on the ground that it would be a fetter on his right to plant trees and make

improvements, I do not see any reason why the same principle; should not apply to trees of spontaneous growth as it may be equally said that it

would be a fetter on his right to protect and maintain them and thus make improvements Within the meaning of the Act. It would seem to me apart

from the question of ownership the same principle ought to govern both sets of trees in view of the fact that the principle of compensation provided

in the Act has reference to the labour spent by the tenant in either rearing or protecting them in both cases. And thus any provision which would

operate to prevent it will be a fetter on his right to make improvements within the meaning of the Act. In *Kelu Nair v. Valia Thamburatti* (1922) 16

L.W. 310, Ramesam, J., observes:

Where the act of felling down the trees is an act of improvement the imposition of a small kuzhikanam fee does not contravene the provisions of Section 19 of the Act.

8. For this he relies on the Full Bench decision. He again observes:

If, on the other hand, the fee imposed is the full value of the trees, it does contravene the provisions of the Act. But if it is not an act of

improvement the clause would not contravene the provisions of the Act.

and he relies on Phillips, J.'s remarks at p. 611. With great respect to the learned Judge I am unable to see how the Full Bench decision or the

judgment of Phillips, J., is an authority for this latter proposition which the learned Judge lays down. The Full Bench proceeded on the footing that

the cutting was not an improvement. Even then they considered the question whether kuttikanam fee was a reasonable fee or not. In fact the Full

Bench decision is an authority for the position that at any rate in the case of trees planted by a tenant even if the cutting is not an improvement, a

clause providing for payment of the full value of the trees would be penal but not a payment of a moderate fee. The observations of Phillips, J., are

absolutely clear on the point. He in fact distinctly observes that if the fee is unreasonably large it might be penal. Walsh, J., makes a distinction

between the trees of spontaneous growth and the trees planted by the tenant. He observed:

It is not necessary to say whether such a contract with regard to trees grown by the tenant himself would be valid. In the present case, the trees are

all of spontaneous growth.

9. And he then relies on the remarks of Phillips, J., as supporting his view that the tenant is entitled to payment of the full value of the trees. I have

already shown what the view of Phillips, J., is. I do not see how Phillips, J., can be said to be laying down a principle in support of the view Walsh,

J., was taking. I therefore respectfully dissent from the decisions in *Kelu Nair v. Valia Thamburatti* (1922) 16 L.W. 310 and S.A. No. 249 of

1929 and hold that the provision for the payment of the full value of the trees in the kychit in question is penal and contrary to Section 19 of the

Malabar Compensation for Tenants' Improvements Act. The plaintiff is entitled only to reasonable compensation and that awarded by the lower

Court is reasonable. In the result the second appeal fails and is dismissed.

10. Mr. Ramakrishna Aiyar says that his client preferred the appeal in view of the said two decisions which took the view he contended for and

therefore this is not a matter for allowing costs so far as this second appeal is concerned. I therefore direct each party to bear his own costs in this

second appeal.

11. Leave granted.