

KERALA HIGH COURT

Parameswaran Embranthiri

Vs.

Narasimha Nambudiri

S.A. No. 522 of 1957 from A.S. 39 of 1957

(Mr. S. Velu Pillai, J.)

13.10.1961

JUDGMENT

Mr. S. Velu Pillai, J.

1. The short question arising for decision in this second appeal is, whether the otti evidenced by Ext. B5 dated March 25, 1943, sought to be redeemed, is really a kanam under which the defendants are entitled to fixity of tenure, or not. The first court has held that it is not a kanam, there being no provision in it for the payment of michavaram so as to satisfy the definition in the Malabar Tenancy Act, 1929, and rejected the defendants' claim for fixity of tenure; on appeal the Subordinate Judge has held, that the stipulation in Ext. B5 for the payment of revenue to Government is tantamount to a provision for the payment of michavaram, but concurred with the trial court in rejecting the claim for fixity of tenure by applying Section 21 of the Malabar Tenancy Act as the kanartham exceeded 40 per cent of the jenmi's interests. The aforesaid Act having been repealed by the Kerala Agrarian Relations Act, 1960 (Act IV of 1961), the ground relied on by the Subordinate Judge can no longer avail the plaintiffs. Nevertheless, Ext. B5, has to satisfy the definition of kanam in the later enactment. It is, therefore necessary to consider whether the stipulation in Ext. B5 that the first defendant shall be in possession of the properties, and shall pay revenue out of the income thereof and appropriate the balance towards interest on the amount of the advance, is a provision for the payment of michavaram, which is also one of the essential features of a kanam as defined by Act IV of 1961. That Act has defined michavaram in Section 2, sub-section (29) as "whatever is agreed by a kanamdar to be paid periodically as residual rent, in money or in kind or in both to, or on behalf of, the landlord, but does not include customary dues". Apart from the use of the term 'residual rent', the definition of michavaram is practically the same as in the Malabar Tenancy Act. It is sufficient to consider, whether the payment of revenue by the first defendant pursuant to the stipulation in Ext. B5, can be deemed to be a payment on behalf of the plaintiffs who are the assignees of the interests of those who granted the demise. Under section 76(c) of the Transfer of Property Act, the duty to

pay revenue for the mortgaged property is cast on the mortgagee, in the absence of a contract to the contrary. This is also the general rule as held by the Privy Council in *Mirza Abid Hussain Khan v. Mt. Kaniz Fatima*¹). But this is a rule, which operates as between the

¹ A.I.R. 1924 P. C. 102

mortgagor and the mortgagee. The contract in Ext. B5 is in accordance with this rule. Therefore it was contended that the mortgagee making payment of revenue does so on his behalf and not on behalf of the mortgagor. I cannot accept this contention, for as between the Government to whom the revenue is payable and the pattadar, the primary liability is on the latter. This is the view which was accepted by a division bench of the Madras High Court in *Sankunni Variar v. Tavazhi Karnavan and Manager Neelakandhan Nambudiripad*² where Leach C. J. after adverting to the definition of the term 'michavaram' in Section 3(q) of the Malabar Tenancy Act observed that,

"the jenmi under the revenue law is assessed and is made liable for payment of the land revenue. Therefore when a kanomdar undertakes to pay the land revenue, he undertakes to pay it on behalf of the jenmi and what is so paid is michavaram"

Counsel for the plaintiffs attempted to distinguish that case as the kanam deed has set out an estimate of the gross rent of the properties. But the learned Chief Justice himself observed, that this did not affect the provision for the payment of revenue contained in the document. Section 76 of the Transfer of Property Act was also adverted to. My attention was drawn to the judgment of a learned single Judge of this Court in S. A. 81 of 1955(M) in which the facts appear to be slightly different. There the mortgage was of the kanam interest and contained a stipulation for the payment of jenmi's dues by the mortgagee and it was held, that the provision was not for the payment of michavaram to the mortgagor. His Lordship expressed himself thus:

"What is mortgaged is the property subject to the jenmi's dues and therefore the jenmi's dues cannot be characterised as rent payable to the mortgagor under the mortgage transaction..... The paramount rent payable by the mortgagor to the jenmi cannot be rent accountable to the mortgagor by the mortgagee."

The facts of the present case appear to be on all fours with the case decided by the Madras High Court which was not brought to the notice of the learned single Judge. I consider that on the facts, the case before my learned brother is distinguishable. I also prefer to adopt the reasoning of the Division Bench of the Madras High Court. I therefore come to the conclusion, that the payment of revenue by the first defendant is in truth and in law, a payment on behalf of the plaintiffs.

2. It was also contended, that the payment of revenue by the first defendant is not the same as the payment of michavaram under the definition of that term in Act IV of 1961, because it is not residual rent. The judgment of the learned single Judge just cited, seems to go against this contention, for, after adverting to the definition of the term 'michavaram' in Act IV of 1961, the learned Judge observed:

"Rent in this definition means the rent of the mortgaged property which represents the net income of the property which is the subject of the mortgage, and 'residual' connotes the balance of such rent after appropriation of the interest on the mortgage amount therefrom."

²(1943)2 M. L. J. 127

In other words, residual rent is what remains of the gross rent after deducting the interest on the kanam amount. There is no basis for holding, as contended, that the gross rent itself is determined after deducting the revenue. Though the definition of michavaram in the Malabar Tenancy Act did not employ the term 'residual rent,' the term 'michavaram' has always been understood to denote residual rent. In *Malabar Law and Customs* by Lewis Moore, 3rd Edition, page 419, michavaram is stated to be "the balance of pattam or rent payable to the Janmi after the interest on the money lent or advanced by the tenant has been deducted." In *Malabar and Aliyasanthana Law* by P. R. Sundara Aiyar, page 453, michavaram is stated to be "the residue payable to jenmi after deducting interest from rent." On the provisions of Ext. B, the substance of which has been set out above, there is no reason to doubt, that the payment of revenue by the first defendant is payment of residual rent. Another Division Bench of the Madras High Court in *Athinatte Manakkal Karnavan and Manager Krishnan Nambudiri's son, Itteeri Nambudiri v. Pachilangottil Narayani Amma's son Sankunni Nair*³ has held, that having regard to the definition in the Malabar Tenancy Act, michavaram includes revenue agreed to be paid by the kanamdar on behalf of the jenmi. On the facts, that case may be distinguishable for the reason, that the payment of revenue was agreed, expressly or by necessary implication, to be paid on behalf of the jenmi; but this does not affect the question. It may also be mentioned, that rent as defined in section 2, sub-section (45) of Act IV of 1961 includes michavaram. So there can be no doubt, that the residue of the gross rent after deducting the interest on the amount advanced, represents residual rent and is michavaram, the payment whereof by the first defendant being on behalf of the plaintiffs. Ext. B 5 satisfies this condition.

3. However, it was argued, that Ext. B 5 is not a transfer of the properties for enjoyment, but evidences a debtor and creditor relationship between the parties. This aspect has not been considered by either of the two courts. Though the plaintiffs have succeeded in both courts in the final result, and the plaintiffs might well have raised this point at least at the time of the argument before the lower appellate court, I do not think, that the plaintiffs can be deprived of the opportunity for raising this question, on which also depends the decision as to the character of the transaction. This question has therefore to be considered by the two courts. The other contentions between the parties which have become final by the judgment of the appellate court were not attempted to be reopened here. Subject to those findings and subject to the decision in this second appeal, that there is a provision in Ext. B 5 for the payment of michavaram, the case will go back to the first court for decision on the above question and for passing a decree on that basis. The decree now under appeal is reopened for the above purpose only and is confirmed in other respects. I do not order costs in this Court. The second appeal is disposed of as above. The

second appeal having been posted for being spoken to at the request of counsel for the appellant, I have heard him, and, I allow refund of court fee paid on the second appeal memorandum.

³ A.I.R. 1941 Mad 303