

Sakkarai Chettiar and ors. Vs. Chellappa Chettiar and anr.

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Court : Chennai

Decided On : Nov-09-1936

Reported in : AIR1938Mad374

Appellant : Sakkarai Chettiar and ors.

Respondent : Chellappa Chettiar and anr.

Judgement :

Burn, J.

1. This was a suit for rent Under Section 77, Madras Estates Land Act. The fact have been clearly and fully sat out in the judgments of the learned Deputy Collector and the learned District Judge and need not be repeated in detail now. The lauds on which rent was claimed are situated in the village of Sinnayaviduthi and its hamlet Krishnapuram in the Neduvasal Zamin. The principal points in dispute between the plaintiff who was the landholder, and the defendants, related to 1 1/4 veils of land which the defendants claimed to be holding rent free as umbalam lands and 5 velis of land which they claimed to be holding under a permanent cowle at the rate of Rs. 5 per veli. The learned Deputy Collector found against the land-holder on both these points. On his appeal the learned District Judge found in favour of the tenants with regard to the umbalam lands and in favour of the landholder with regard to the cowle. The tenants preferred this appeal.

2. A preliminary objection was raised with regard to the maintainability of this appeal. The appeal was preferred by defendants 2, 3 and 4 who were the only defendant interested and after the appeal was filed defendant 4 died. No application was made to bring his legal representatives on record within the time allowed and a belated application for that purpose was dismissed. The appeal of defendant 4 therefore abates, and it was contended on behalf of the respondent that since defendants 2, 3 and 4 claimed to be jointly interested in the lands, being undivided brothers, the appeal as a whole must be held to have abated. Order 22, Rule 3, Civil P.C. was quoted in support of this contention and the ruling in *Aminchand v. Baldeo Sahai Ganga Sahai* A.I.R. (1934) Lah 206 was relied upon as well as the cases in *Balaram Pal v. Kanysha Maahi* : AIR1919 Cal410 and *Saru Khan v. Jan Muhammad* A.I.R. (1928) Lah 43. Whatever may be the views of other High Courts upon this question, the view of this High Court is against the contention of the respondent. In *Somasundaram Chettiar v. Vaithilinga Mudaliar* A.I.R. (1918) Mad 794 a Bench of this Court held that the provisions of Order 41, Rule 4 enabled the Court to vary the decree as a whole even though the appeal of one of the appellants might have abated by reason of death. This case was followed by Spencer J. in *Chengamma Naidu v. Gangulu Naidu* : AIR1925 Mad235 and the judgment of Spencer J. was confirmed by a Bench of this Court in L.P.A. 96 of 1924. These cases were followed by Curgenven and Sundaram Chetty JJ. in *Chenchuramayya v. Venkatasubbayya Chetti* : AIR1933 Mad655 This matter is therefore settled against the contention of the respondent so far as this High Court is concerned.

3. Mr. A.V. Viswanatha Sastri for respondent then points out that, in any case it is a question for the discretion of the Court to exercise its power to refuse to exercise its power Under Civil P.C.O. 41, Rule 4. That is so and the present case is, I think, 'a fit one for the exercise of this discretion in favour of the appellants. I therefore overrule the preliminary objection.

4. Naduvasal Zmmin is one of the estates scheduled under the Madras Impartible Estates Act and it was contended on behalf of the landholder that the cowle as well as the grant of the umbalam lands rent free would be prohibited by Section 4 of that Act, The learned District Judge agreed with the learned Deputy Collector

that Section 4, Impartible Estates Act, would not prohibit either of these alienations though the learned District Judge's reasons were not quite the same as the reasons of the learned Deputy Collector. It is quite clear as Mr. K.V. Krishna, swami Ayyar contends for the appellants that Section 4, Impartible Estates Act, cannot be held to prohibit either the cowle at a favourable rate of rent or the grant of umbalam lands rent free. It is clear beyond the possibility of any doubt that the defendants held two usufructuary mortgages (Exs. C and D) of the village of Sinnayaviduthi and Krishnapuram in 1913 when the plaintiff's predecessor-in-title wished to purchase these villages. The usufructuary mortgage Ex. D had still 16 years to run and Ex. C some shorter period. It was only in consideration of the perpetuation of the grant of umbalam lands and of the cowle that the defendant's predecessor in title agreed to surrender his rights Under Exs. C and D. This is proved by the agreement (Ex. I) and the perpetual cowle (Ex. II) executed on 29th May 1913 by the zamindar Sankaranarayana Panikondar and his son Tiruvengada Panikondar. But for the surrender of the usufructuary mortgages, the zamindar would not have been able to sell the villages to the plaintiff's predecessor, in. title who Undertook the discharge of Exs. C and D as part of the purchase price. It follows from this that if the sale to the plaintiff's predecessor-in-title is valid and not prohibited by Section 4, Impartible Estates Act, the alienations of the umbalam lands and cowle also are equally valid. Mr. Krishnaswami Aiyar's contention is that if the grant of the cowle is not prohibited Under Section 4, Impartible Estates Act, there is no other provision of law which can invalidate it. On behalf of the respondent, the contention is that this cowle cannot ensure after the lifetime of Sankaranarayana Panikondar who was the zamindar when Ex. II was executed in 1913. Section 26, Estates Land Act, deals with cowles granted (i) for the purpose of clearing and bringing waste land in an estate into cultivation, (ii) or for the purpose of making any permanent improvement, (iii) or for planting trees on a holding in an estate under a contract made prior to the commencement of Act 1 of 1908 for any premium, loan or other valuable consideration. Such cowles are valid Under Section 26 (1) for the period for which the favourable rate is payable in accordance with their terms. Sub-section 3 provides that except as provided by Sub-section (1) no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of

the landholder if such rate is lower than the lawful rate payable by the raiyat before the date of the grant upon the land or upon land of similar description and with similar advantages in the neighbourhood. There is no contention on the part of the appellants that the cowle in favour of their father was a cowle for the purpose of clearing and bringing waste land into cultivation or for the purpose of making a permanent improvement or for planting trees. Their contention is that it is a cowle granted under a contract made before the beginning of Act 1 of 1908 and that it is there, fore binding for ever since it is a permanent cowle. The learned Deputy Collector accepted this contention but the learned District Judge found that the cowle came into existence in 1913 and held accordingly that it was not saved by Sub-section (1) of Section 26, Estates Land Act. It is this finding which is attacked by the appellants and which is supported by the respondents.

5. Whether this cowle came into existence in 1913 or was in existence before, is undoubtedly a question of fact and on this ground, the learned advocate for the respondents contends that the finding of the learned District Judge must be taken as conclusive and cannot be attacked in second appeal. Unfortunately, the finding of the learned District Judge on this point is, as the learned advocate for the appellants contends, in the teeth of all the evidence. The learned District Judge himself has pointed out that both Ex. I and Ex. II refer to the cowle as an old grant made to the grandfather of the present appellants. There is a distinction between the cowle and the umbalam. The umbalam is restarred to Exs. C and D, the mortgages executed in 1893 and 1909. The cowle is not mentioned in those mortgages. There he no record of payment of rent at the rate of Rs 5 per veli on these 5 velies but, as the learned District Judge himself has recognized, it is impossible that there should be any record because the villages were held by the tenant under the usufructuary mortgages. There is however a distinct reference to the cowle in Exs. I and II and there is oral evidence also to the effect that the cowle had been granted to the appellant's grandfather. There is no evidence whatever to the contrary. The learned District Judge's observation 'I do not think it is proved that the cowle was in existence before 1913,' is therefore based upon no evidence whatever. The only meaning it can have is that there was no document in existence before 1913 is the evidence shows that the grant itself had been made before 1893, i.e., long before Act 1 of 1908 or the Impartible Estates Act

came into force and in these circumstances it is obviously right to presume that the grant was supported by consideration. I therefore disagree with the finding of the learned District Judge that the cowle was not in existence before 1913. All the evidence is that it was and it is therefore not a grant which must come to an end Under Section 26(3), Estates Land Act, after the death of the landholder who was entitled to the rent in 1913. It is quite clear that the respondents' predecessor in title was aware of the existence of this cowle at the time of his purchase. There was a reference made to it in the endorsement of discharge written upon the usufructuary mortgage (Ex. D) by the defendants' father. Considered in that light the cowle is valid as an encumbrance on the estate at the time of the purchase by the landholder's predecessor-in-title.

6. Mr. Krishnaswami Aiyar attempted to argue that if the cowle did not come Under Section 26, Estates Land Act, it would be invalid and that since the defendants have been holding the 5 velies of land at the rate of Rs. 5 since 1913 they must be deemed to have prescribed for a right to hold the lands at the same rate. I do not think there is much force in this contention and I see no reason to discuss it because no foundation was laid in the written statement for any such plea nor was any such plea taken in the appeal to the learned District Judge. For the reasons already given, this appeal is allowed with costs in this Court and in the First Appellate Court. (Leave to appeal refused).