

MADRAS  
DEPOSIT AND  
BENEFIT  
SOCIETY,  
LIMITED  
v.  
OONNAMALAI  
AMMAL.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

*Seshagiri Ayyar and Parthasaradi Ayyanjar* for appellant.

*Ramanujachariar* for respondents.

JUDGMENT.—It is urged that, though the document cannot be used or proved as a mortgage instrument, it may be proved as containing a personal covenant to pay, and we are referred to the decision in *Gomaji v. Subbarayappa* (1). In that case, however, there was no statutory bar to receiving the document in evidence, though by reason of want of registration it could not affect the immovable property comprised therein. In the present case the document is itself excluded by the provisions of section 68 of the Indian Evidence Act, since it purports to create a legal mortgage.

Nor can the plaintiff company fall back upon the deposit of the title deeds. There was no antecedent debt to secure which the title deeds were deposited, and it is clear from the plaint itself that the intention from its inception was to effect a legal mortgage. A legal mortgage was prepared and accepted, but owing to neglect to comply with the requirements of section 59 of the Transfer of Property Act it is invalid.

We must dismiss the appeal with costs.

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## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice,  
and Mr. Justice Parker.*

OLIVER (PLAINTIFF), APPELLANT,

v.

ANANTHARAMAYYAN (DEFENDANT), RESPONDENT.\*

*Rent Recovery Act—Madras Act VIII of 1865, s. 39—Service by affixing notice of intention to sell on some conspicuous part of the tenant's land—Residence of tenant in foreign territory.*

The provision of s. 39 of the Rent Recovery Act that the notice of an intention to sell the land should be served 'at his usual place of abode' denotes some

(1) I.L.R., 15 Mad., 253.

\* Second Appeal No. 1601 of 1893.

place in the neighbourhood of the land in respect of which the patta was tendered, and does not apply when the tenant resides in foreign territory.

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SECOND APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Tanjore, in appeal suit No. 919 of 1892, reversing the decision of F. H. Hamnett, Sub-Collector of Tanjore, in summary suit No. 74 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

*Pattabhirama Ayyar* for appellant.

*Sundara Ayyar* for respondent.

JUDGMENT.—The District Judge has reversed the decision of the Sub-Collector and dismissed the suit on the ground that there was no proper tender of patta in the manner prescribed by law (sections 7 and 39, Madras Act VIII of 1865).

Defendant was a clerk in the District Court of Cochin at Trichoor and was not residing in the Tanjore district. One Ganapathi Subbier was looking after his cultivation for him in Tanjore, but had no power-of-attorney from him. Ganapathi Subbier denies that any patta was tendered to him, and though the kurnam deposed that there was, there is no finding by the Judge upon that point.

The patta tendered was stuck up on the land in the manner prescribed by section 39, and the question is whether this mode of service was justifiable when the defendant was known to be living in foreign territory and had no authorized agent on the spot.

The procedure is only justifiable when service cannot be effected on the tenant himself or on some adult male member of his family at his usual place of abode, or on his authorized agent (section 39). The section must be construed reasonably and the words 'at his usual place of abode' would seem to denote that it was contemplated that the notice would ordinarily be served upon the tenant himself, his relative or his authorized agent in the neighbourhood of the land in respect of which the patta was tendered. A tender through the post would not be effectual—see *Venkatachellam Chetti v. Kadumthusi*(1) and *Saminatha v. Viranna*(2). We do not think it could have been intended that a landlord should go himself or send an agent into foreign territory

(1) I.L.R., 4 Mad., 145.

(2) I.L.R., 13 Mad., 42.

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to tender a patta, and we, therefore, hold that the service contemplated in the first instance under section 39 could not be effected, and hence that the service by affixing a copy on a conspicuous part of the land was under the circumstances a good and valid service. The decree of the District Judge must be reversed and the appeal remanded to be disposed of on the merits. Appellant is entitled to costs of this appeal, and the costs in the Lower Appellate Court will abide and follow the result.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

KAMMARAN NAMBIAR (PLAINTIFF), APPELLANT,

v.

CHINDAN NAMBIAR AND OTHERS (DEFENDANTS), RESPONDENTS.\*

*Perpetual lease granted for consideration—Clause providing for forfeiture on rent being in arrears—Whether repayment of the consideration is a condition precedent to surrender of the lands.*

Consideration paid for a lease is exhausted by the grant of the lease, and a tenant's forfeiture of the lease cannot, in the absence of a provision to that effect, operate so as to convert the original consideration into a debt, which must be paid before the forfeiture can be enforced.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 298 of 1892, confirming the decree of K. Ramanatha Iyer, District Munsif of Cannanore, in original suit No. 35 of 1892.

The defendants in this suit held lands on a perpetual lease (*Janma kozhu*), which provided that the lease should be forfeited if the defendants allowed the rent to fall into arrears. The rent fell into arrears, but since it appeared that the plaintiff's ancestor had received consideration for the lease, the District Munsif and the District Judge decreed that, although the defendants had forfeited the lease, the forfeiture thereof could not, by analogy to the ordinary *kanom*, be enforced, until the plaintiff had repaid the consideration.

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\* Second Appeal No. 206 of 1893.