had been any evidence in this case that it was the intention of the parties that this sale-deed, which is absolutely unqualified on the face of it, should only come into effect when in fact the consideration had been paid, no doubt any Court would have the right to give effect to such a contract and to hold that there was such an intention. The section of the Transfer of Property Act which enumerates the respective duties of vendor and vendee is expressly qualified by the words "in the absence of a contract to the contrary". The Calcutta case held, on the particular facts, that there was a contract to the contrary and that therefore clearly the consequences of the statute did not necessarily ensue.

The appeal must be allowed with costs.

AYLING, J.—I agree.

AYLING, J.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1920, January, 21.

CHERIA KUNHAMMAD AND KALLIYANI (DEFENDANTS NOS. 3 AND 4), APPELLANTS,

v.

KUNHUNNI ALIAS KIZHAKKAYIL NAIR AND ANOTHER (PLAINTIFFS AND FIFTH DEFENDANTS), RESPONDENTS.*

Malabar Law - Karnavan—Lease four years before expiry of a prior lease—No necessity or justification for such lease—Expiry of prior lease when grantor was karnavan, effect of, on subsequent lease—Lease, whether valid or binding on succeeding karnavan.

Where a karnavan granted a lease to take effect on the expiry of a prior lease whose term was to expire four years later, and it was found that there was no necessity or justification for granting the subsequent lease four years prior to the expiry of the term of the prior lease,

Held, that the subsequent lease was not valid or binding on the succeeding karnavan, even though the prior lease expired when the grantor continued to be the karnavan.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 554 of 1913, preferred against the decree of T. N. RAMASWAMI AYYAR, District Munsif of Payyoli, in Original Suit No. 432 of 1911.

* Second Appeal No. 1357 of 1918.

KUNHAMMAD v. KUNHUNNI.

Suit is by the present karnavan of a Malabar edam to recover lands belonging to the edam which were leased out by the previous karnavan (the fifth defendant) in favour of the first defendant. The property had been previously leased to the first defendant in 1891 under a lease for a term of twelve years. Four years before the expiry of that lease, namely, in 1899, the fifth defendant granted the present lease in favour of the first defendant. The interest of the first defendant in the lease was purchased in Court auction by the second defendant who transferred his interest to the third and fourth defendants. There was also a kanom in 1903 and a puramkadam in 1905 executed in favour of the third and fourth defendants by the fifth defendant. The fifth defendant ceased to be karnavan in 1907, as he then became a sthani, and the plaintiff became the karnavan of the edam from that time. The plaintiff instituted the present suit to recover the plaint properties on the basis of the prior lease of 1891 having expired, and the subsequent lease, kanom and puramkadam, not being valid and binding on the plaintiff's edam. The lower Courts held that the kanom and puramkadam were not binding on the plaintiffs' edam, and also held that the lease of 1899, granted by the fifth defendant four years prior to the expiry of the prior lease of 1891, was not for any necessity of the edam, and decreed possession of the lands in favour of the plaintiff, although the prior lease had expired in 1903 at a time when the fifth defendant was still the karnavan of the edam. The third and fourth defendants preferred this Second Appeal.

K. P. M. Menon for the appellants.

C. Madhavan Nayar for the respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Defendants Nos. 3 and 4 are the appellants. The plaintiff is the karnavan of an edam and he sued to recover the edam property which had been leased to the first defendant in 1899, to take effect on the expiry of a prior lease granted in 1891, and which would expire in the ordinary course in 1913. It was found by the lower Appellate Court that there was no necessity or justification for granting that lease in 1899, four years before the term of the prior lease expired. The question is whether in law the plaintiff who has succeeded to the karnavastanam in 1907 is entitled to treat the lease granted without

justification or necessity by the prior karnavan, fifth defendant, as not binding on the tarwad. In *Cheria Cherikandan* v. *Krishnan Nambiar*(1), SUNDARA AYYAR, J., and myself held that where a lease had been granted for five years and a melcharth was granted after three years from the beginning of the first lease and two years before the expiry of that lease term to another tenant, such a second lease was not binding on the succeeding karnavan. In that case, no doubt the second lease was granted to a man other than the person who was holding under the first lease. Mr. Menon argued that in that case we were probably led to the conclusion adverse to the second lease by a desire to put an end to the undesirable practice of karnavans granting kanoms and leases to third persons over the heads of the lessees and kanomdars in possession. But there is nothing in the judgment to indicate that the fact that the second lease was given to a person other than the original lessee influenced our opinion. I think that SUNDARA AYYAR, J., (who pronounced the judgment which I adopted) has given two reasons why such an exercise of power in anticipation by the karnavan is not binding on the tarwad. He first says:

"it is not alleged that there was any necessity for doing so or that the tarwad derived any benefit from the transaction."

So, if such an allegation is not made and proved, it is implied in the above observation that that would be a sufficient ground for holding that the transaction would not be binding on the tarwad. Then, that ground is sought by us to be fortified by the further consideration that the karnavan who gave the second lease may be succeeded by a different karnavan even during the continuance of the term of the first lease and that

"it is impossible to countenance the proposition that the karnavan for the time being can tie down the discretion of those that are to succeed him in the management by granting leases of family lands, when there is absolutely no reason for doing so, and the lands are being held by tenants on leases which are still in force."

The judgment was pronounced on 19th July 1912. Taking advantage of this second reason mentioned in the judgment, about the danger to the rights of the succeeding karnavans, an argument was elaborately advanced in the case reported in the

(1) (1914) 27 M.L.J., 690.

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next page, i.e., *Moidin Kutti* v. *Kunhi Koyan*(1), that if the karnavan who anticipated the expiry of the first lease happened to be alive and still holding his position as karnavan when the term expired, the melkanom or melcharth already granted need not be supported by necessity or justification to be binding on the tarwad. AYLING and HANNAY, JJ., in a short judgment decided on this contention as follows :

"It is found that there was no family necessity to justify the melcharth Exhibit B ; and we must hold that the transaction is not binding on the successor of the karnavan who executed it whether the latter did or did not survive the expiry of the prior kanom. The appeal is dismissed with costs."

Mr. Menon however relied upon a yet later decision of PHILLIPS and KRISHNAN, JJ., in *Thekkel Thamarayi* v. *Kizhakkotti Aliammu*(2). In this case the decision in *Cheria Cherikandan* v. *Krishnan Nambiar*(3), is referred to and it was interpreted as implying that if the grantor lived after the term of the prior kanom expired and was thus in a position to then grant the melcharth (and provided that the grant was not of such a nature as to improperly prejudice the successor) it is valid. Somehow, reference is not made to the decision of AYLING and HANNAY, JJ., in *Moidin Kutti* v. *Kunhi Koyan*(1). A karnavan's ordinary legal right is that of management over the tarwad affairs and properties and, in my opinion, it is difficult to hold that four years before a lease expired, it is the proper thing or an ordinary incident of management to grant a second lease to begin on the expiry of the former lease. That was the principle on which *Cheria Cherikandan* v. *Krishnan Nambiar*(3), was based. It is only where proper necessity or justification can be urged to invoke what can be called the extraordinary powers of dealing with the property (which is being held by tenants under a lease which has *not expired*) that such an action can be held valid against the tarwad. It is also significant that this contention that necessity need not be shown where the karnavan continues in power at the expiry of the first lease seems not to have been argued before the lower Appellate Court but was raised for the first time in the Second Appeal memorandum. As

(1) (1914) 27 M.L.J., 691. (2) Second Appeal No. 774 of 1917 (unreported).
(3) (1914) 27 M.L.J., 690.

the lower Courts have found that there was no necessity or justification for the attempt to deal with the property before the expiry of the former term, I would uphold the lower Appellate Court's judgment, expressing my respectful dissent from the decision in *Thekkel Thamarayi* v. *Kizhukkotti Aliammu*(1), and I would dismiss the Second Appeal with costs, the contention relating to the two other documents Exhibits I and IX not being sustainable on the facts found.

SPENCER, J. SPENCER, J.—As regards *Thekkel Thamarayi* v. *Kizhukkotti Aliammu*(1) which has been quoted to us in support of the premature grant of a melcharth, if the time for the renewal of lease or kanom is anticipated by a karnavan in such a way as to have the effect of fettering his successor's management of the estate, though a renewed lease or kanom may be bad on account of such anticipation of the karnavan's powers, it does not to my mind follow that in cases where there is no successor and the same karnavan continues in office till after the expiry of the term the instrument is necessarily a good one. SUNDARA AYYAR, J., in *Cheria Cherikandan* v. *Krishnan Nambiar*(2), observed that there was no justification for the granting of a melcharth two years in advance of the expiration of the prior lease. In that case, it was not alleged that there was any necessity for it or that the tarwad derived any benefit from the transaction. *A fortiori* in the present case, where no explanation has been offered for anticipating the time of the renewal of the lease by four years, it is difficult to see how the fifth defendant's conduct can be justified. I agree that the Second Appeal should be dismissed with costs.

K.R.

(1) Second Appeal No. 774 of 1917 (unreported). (2) (1914) 27 M.L.J., 690.