

PRIVY COUNCIL.*

APPAYASAMI NAICKER (PLAINTIFF),

v.

MIDNAPORE ZAMINDARI COMPANY, LIMITED
(DEFENDANTS).1921,
March 19.[On Appeal from the High Court of Judicature
at Madras.]*Palayam—Unsettled Palayam—Alienability—Land held on service tenure—
Abolition of service—Police duties of land-owner—Effect of sanads.*

A Palayam in the Madura district was held originally on military service tenure and subject to the payment of a tribute to the paramount power. It was contended that it was also held on condition of rendering police service to the State. In support of that contention reliance was placed upon sanads granted in 1797 and 1800, by which the Palayagar was bound to protect the inhabitants from robberies and to deliver up murderers and deserters. In 1895, the Palayagar mortgaged villages of the Palayam for debts incurred by him prior to that date, and in 1900 the villages were bought by the mortgagees at a sale under a mortgage decree. No permanent settlement had been made with the Palayagar, but in 1905 one was made with the alienees.

Held, that the Palayam was not by reason of its tenure inalienable, since military service was abolished in the Madura district by a proclamation in 1801, and since even if it could be inferred from the sanads that the Palayam was held on a tenure of rendering police service to the State (which it could not) such police duties by land-holders were abolished before the alienation; and that the alienees obtained a good title.

[Judgment of the High Court approved.]

APPEAL No. 80 of 1919 from a judgment and decree of the High Court (SIR JOHN WALLIS, C.J. and SPENCER J.) (8th February 1918) reversing a decree of the District Judge of Madura.

The suit was instituted by the appellant and his brother (who was not a party to the Appeal) against the respondent Company and other defendants, claiming possession with mesne profits, of certain villages appertaining to the Palayam of Kannivadi in the Madura district. The claim was based upon the contention that the Palayam was inalienable. The

* Present:—Lord BUCKMASTER, Lord DUNEDIN, Lord SHAW, Sir JOHN EDGE and Mr. AMEER ALI.

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facts appear from the judgment of the Judicial Committee and from the report of the Appeal to the High Court in I.L.R., 41 Mad., 474.

The plaint alleged that the Palayam was an ancient impartible estate descendible to a single heir according to the custom of primogeniture, that it was originally conferred in the sixteenth century upon an ancestor of the appellant as a military fief, and had been since held subject to the obligation to render military and police services to the rulers of the country, that it had never been enfranchised by the Government from these conditions, that having regard to these conditions, and to the family custom, which came into existence in consequence of them, the properties of the Palayam were inalienable by the Palayagar beyond the term of his own life, and that consequently the appellant was not bound by the mortgage or sale, and was entitled to recover the properties.

The respondents by their written statement pleaded (*inter alia*), that under British rule the Palayam had always been held on ordinary zamindari tenure subject only to the payment of a fixed Government revenue, and in every respect on the same terms and conditions as those contained in the sanad granted by Government to the Bank in 1905, that the Palayam had always been alienable in the same way as permanently settled estates, and was in any case so alienable at the time of the alienations in question, and they further submitted that the appellant was bound by the debts and incumbrances created by his father and grandfather and could not in any case recover the Palayam properties without paying such debts in full with interest down to the date of payment.

Among numerous issues settled, the following alone were material to the Appeal :—

(10) Whether the plaint mentioned zamindari is inalienable either by custom or by virtue of its tenure? (22) Whether the zamindari was held by the ancestors of the plaintiff's on the tenure and conditions alleged in paragraphs 4, 5 and 6 of the plaint? (23) Whether the estate was held, or continued to be held, on condition of military service and police duties as before on the establishment of British rule as alleged in paragraph 5 of the plaint, or whether as alleged in paragraph 18 of the first

defendant's written statement it was held on ordinary zamindari tenure on the same conditions as are contained in the sanad of 1905 ?

The suit was transferred for trial to the District Judge of Madura, before whom a large body of evidence was adduced ; the plaintiff's case was based, not upon custom, but upon the nature of the tenure. The learned Judge, by his judgment delivered on 11th September 1916, found that up to the time of British rule the estate was held subject to military and police services, and that that tenure was continuing at the date of the purported alienation, no permanent settlement having then been made. He accordingly held that the estate was not alienable beyond the life of the holder, and made a decree in favour of the present appellant.

The respondents appealed to the High Court, which reversed the decree of the trial Judge and dismissed the suit. The judgment of the Court (Sir JOHN WALLIS, C.J., and SPENCER, J.) was delivered by the Chief Justice, and is fully reported at I.L.R., 41 Mad., 744. Shortly stated, it was held, as had been decided in previous cases, that lands held on service tenure were inalienable beyond the life-time of the holder ; that the authorities also showed that when the holders of an estate were freed from the liability to perform services, the reason for the inalienability ceased, and the land became subject to the ordinary laws of descent, and that an unsettled Palayam in the Presidency of Madras resembled a zamindari in its character, and was alienable for the debts of the holder, or of previous holders, so as to bind the successors. There was no doubt, their Lordships said, that the Palayam was held before British rule on a military service tenure, but the proclamation of 1st December 1801 unconditionally suppressed military service in connexion with the holding of land in Southern India ; the view of the trial Judge that the effect of the proclamation was to abolish military service only upon a permanent settlement being made was dissented from. It was also held that the performance of police service by holders of lands was abolished pursuant to Madras Regulations XXV of 1882 and XI of 1816, Act XXIV of 1859, Act XVIII of 1862, and Madras Act III of 1895.

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Dunne, K.C., and *Narasimham*, for the appellant.—The estate was inalienable beyond the life-time of the holder by virtue of its being held for military and police services. The inalienability of lands so held is well established: see *Mayne's Hindu Law*, 8th Edition, article 338, and cases there cited. The judgment of the Board in *The Collector of Trichinopoly v. Lekkamani*(1) laid down no general rule as to the tenure of an unsettled Palayam, but stated that in each particular case its nature depended upon the evidence. It was found by both Courts in the present case that the Palayam of Kannivadi was held at the commencement of British rule for military and police services, and the trial Judge rightly held that that tenure was continuing at the date of the purported alienation. The true effect of the proclamations of 1799 and 1801 was that military service was abolished if, and from the date when, a permanent settlement was made. In this case the alienation was in 1895, and no permanent settlement was made until 1905, when it was made with the alienees. The Madras Legislation abolishing private police service did not alter the tenure upon which the Palayam was held. The evidence shows that after 1801 military services were required of the Palayagar and were rendered. In India the existence of a particular office has never been held as necessary in order to establish that a tenure is a service tenure. Upon the view of the law held in Madras prior to *Sartaj Kuari v. Leoraj Kuari*(2) it was never necessary to raise the present contention with regard to a Palayam, hence the absence of any case analogous to the present one. [Reference was also made to *Naragunty Latchmedawumak v. Vengama Naidoo*(3) and to Madras Regulation XXV of 1802.]

De Gruyther, K.C., and *Kenworthy Brown*, for the respondents, were not called upon.

The JUDGMENT of their Lordships was delivered by

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Sir JOHN EDGE.—This is an Appeal from a decree, dated the 18th February 1918, of the High Court at Madras, which reversed a decree dated the 11th September 1916, of the District Judge of Madura.

(1) (1874) L.R., 1 I.A., 282.

(2) (1888) I.L.R., 10 All., 272 (P.C.); s.c., L.R., 15 I.A., 51.

(3) (1861) 9 M.I.A., 66.

The suit in which this appeal has arisen was brought to obtain, so far as is now material, against the Midnapore Zamin-dari Company, Limited, hereinafter referred to as the respondent Company, a decree for possession of the properties specified in schedules A and C of the plaint, and for mesne profits. The properties claimed were villages of the Palayam of Kannivadi. The suit was brought by two brothers, sons by different wives of the late Malayandi Appaya Naicker, a Hindu, one of whom only could have obtained a decree if their case had been proved. The first plaintiff on the record was Malayandi Appayasami Naicker, who was the son of Malayandi Appaya Naicker by his first or senior wife; he is the appellant here, and will be hereafter referred to as the appellant. The second plaintiff on the record was the son of Malayandi Appaya Naicker by his second or junior wife, and is by date of birth the elder of the two brothers. They were obviously joined as plaintiffs owing to some doubt as to which of them was entitled on the death of their father in 1911 to succeed to the Palayam by the custom of primogeniture applicable in the family. The second plaintiff did not appear, and was not represented in the High Court, and he is not a party to this Appeal, so need not again be referred to.

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In the plaint it was alleged that the Palayam of Kannivadi is an ancient impartible Palayam, descendible to a single heir according to the custom of primogeniture; that the Palayam was conferred as a military fief by a Nayak Ruler of Madura about A.D. 1500 upon an ancestor of the appellant who was placed in charge of one of the principal bastions of Madura Fort; that the Palayagar was by virtue of the tenure liable to be called upon to render military service by furnishing men and other aid, and for police duties and to pay annual tribute to the State; that the Palayam continued to be held by the appellant's family under the same conditions of tenure and service after the assumption of the Dindigul country by the British; and,

“That the said Kannivadi Palayam is inalienable beyond the life of the Palayagar for the time being, both by reason of the tenure and according to the custom of the family, which custom came into existence in consequence of the character of the tenure.”

Briefly stated, the connexion of the respondent Company with the Palayam of Kannivadi according to the allegations in the

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plaint is as follows:—The grandfather and father of the appellant in 1895 mortgaged the Palayam to the Commercial Bank, Limited, of Madras, in respect of debts of theirs which were not binding upon the appellant or upon the Palayam; on that mortgage the Bank obtained a decree, and in execution of that decree brought the Palayam to sale at auction, and at the sales purchased the estate in 1900, and on the 8th January 1909, conveyed all their rights under the decree and under the auction sales to the respondent Company, who have since then been in possession.

Various other matters were alleged in the plaint as to which no arguments were addressed to their Lordships by either side.

The respondent Company in their written statement admitted that the Zamindari of Kannivadi was at the time of the sale to the Bank impartible and was descendible to a single heir according to the custom of primogeniture, but they denied that it had been conferred upon an ancestor of the appellant "for being in charge of a bastion of the Madura Fort"; denied that the estate had been granted or was ever held subject to any obligation of rendering military or police service, or was inalienable, or that the Zamindar had ever held any office by virtue of which he was under any obligation to perform military or police duties; denied that there is any family custom or anything in the tenure of the Kannivadi Zamindari which rendered it inalienable beyond the life of the Palayagar, and alleged that in law the Zamindar for the time being of the Kannivadi Zamindari always possessed an absolute interest in it with full powers of alienation. The respondent Company in their written statement pleaded several other matters, which in the view that their Lordships take of the case are not now necessary to be considered.

There were 27 issues fixed for the trial of the suit, but in their Lordships' opinion the tenth issue was in the circumstances that upon which the decision of this appeal depends. It was:

"X. Whether the plaint mentioned Zamindari is inalienable either by custom or by virtue of its tenure?"

If it was not inalienable either by custom or by reason of its tenure the Palayagar for the time was entitled to mortgage or to transfer absolutely every village in the Palayam according to

his pleasure. That is the result of the decisions of the Board in cases of impartible estates in India which descend according to a custom of primogeniture. Until the law on this subject was placed by decisions of the Board beyond a doubt, there was a current of judicial decisions in the Presidency of Madras to the effect that a holder of an impartible estate which descended by a rule of primogeniture could not transfer except for his own lifetime any part of the estate unless possibly for necessity.

The suit was tried by the District Judge of Madura. The District Judge states in his judgment that

“the plaintiffs base their case not on custom but on the military and police nature of the tenure and rely on *Sartaj Kuari v. Deoraj Kuari* (1) to establish that if such is its tenure it (the estate) is inalienable. . . . A distinction is also sought to be drawn between the present case and others, in that in them there was a permanent settlement, whereas in the present case the estate was an unsettled Palayam till the Bank obtained a Permanent Sanad in 1905 from the Government.”

The District Judge, after an elaborate consideration of all the historical references to the family to which the appellant here belonged, and of reports and proceedings of Officers of the Government, came to the conclusion that the Palayam of Kannivadi was held, down to 1816, for police as well as military service, and that although by 1816 the Government had removed from the Palayagar the duty of police services, the Government had not by the grant of a Zamindari sanad altered the tenure by which the Palayam was held. His final conclusion on the tenth issue is thus expressed :

“It seems to me, therefore, that as I have held the Palayam to have been held on a military and karal (police) tenure, that as it had never been settled and as there was no express putting an end to the military liabilities, the estate must be held to have been held on the old tenure up to the grant of the sanad in 1905 to the Bank, and that therefore up to that date the estate was inalienable. This is my finding on issue 10.”

The District Judge made a decree in favour of the appellant here, against the respondent Company. From that decree the respondent Company appealed to the High Court at Madras.

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(1) (1888) I.L.R., 10 All., 272 (P.C.); s.c., L.R., 15 I.A., 51.

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The High Court in dealing with the Appeal considered separately the question as to whether the Palayam of Kannivadi was held on military service tenure, and the question as to whether it was held on a tenure of performing for the State police duties. Their Lordships will adopt the same course in dealing with this Appeal. The learned Judges in their judgment referred to the fact that the Board in *Naraguntty Lutchmeedavamah v. Vengama Naidoo*(1), which related to the Naraguntty Palayam in the District of Chittoor in the Presidency of Madras, had accepted as correct the explanation in Wilson's Glossary that Palayagars were originally petty Chieftains occupying usually tracts of hills or forest country, subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent; but as having at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. With reference to that description the learned Judges found that

“There can be no doubt that Kannivadi was a Palayam of this nature.”

It has not been suggested at the hearing of this Appeal that that conclusion of the High Court was not correct. The High Court do not state when the Palayam of Kannivadi was first granted to an ancestor of the appellant; there was not on the record any reliable evidence on that point, but they obviously and rightly considered that the grant had been made before Dindigul, in which district Kannivadi is situated, was ceded to the East India Company by the Treaty of Seringapatam, 1792.

It may be accepted as a fact that the Palayam of Kannivadi was originally held on military service tenure and subject to the payment of a tribute to the paramount power. Where lands in British India are held on military service tenure, there is good reason for holding that

“No one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged.”

(See Mayne's Hindu Law, paragraph 337.)

"A Palayam is in the nature of a Raj, it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time."

(See the *Naragunty case*(1) cited above.) The question, so far as military service tenure is concerned, is—Did the Palayam continue to be held on military service tenure when the mortgage to the Bank was made in 1895? The High Court held that the military service of Palayagars of the Madura and Tinnevely districts was abolished in 1801 by the Proclamation of the 1st December 1801, of Lord Clive, Governor in Council.

On the 2nd October 1799, in consequence of a rebellion which had been fomented and supported by Palayagars of the Tinnevely district, Major Bannerman, as Military Commandant of the Southern Detachment, had been obliged to issue a Proclamation to the Palayagars, landholders and inhabitants of the Tinnevely district, ordering the Palayagars to destroy all forts in their Palayams and to deliver all guns, gingal pieces, firelocks, matchlocks and pikes in their possession, or in the possession of any of the inhabitants, to the Military Detachments sent to receive them. The Court of Directors in their letter of 11th February 1801, to Fort St. George (the Government of Madras), sanctioned the gradual introduction of a permanent land settlement in the Presidency, but laid down that it was of first importance that

"All subordinate military establishments should be annihilated within the limits subject to the Dominion of the Company."

That must have meant that military service tenures should be abolished in the districts subordinate to Fort St. George.

In consequence of those orders of the 11th February 1801, Lord Clive, Governor in Council, issued the Proclamation of the 1st December 1801, which was addressed to the Palayagars of the Madura and Tinnevely districts. That Proclamation referred to a Proclamation of the 9th December 1799, of the Governor in Council of Fort St. George addressed to the Palayagars of Tinnevely and to a rebellion excited and maintained in arms by Palayagars of Panchalam Kurishi and of Virupakshi and by the Sherogars of Sivaganga.

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The following paragraphs of the Proclamation of the 1st December 1801, show clearly what the Government of Fort St. George intended :

“ Wherefore the Right Honourable Edward Lord Clive, Governor in Council, aforesaid, with the view of preventing the recurrence of the fatal evils which have attended the possession of arms by the Palayagars and Sherogars of the southern provinces and with the view also of enforcing the conditions of the Proclamation published by Major Bannerman on the 2nd October 1799, formally announces to the Palayagars, Sherogars and inhabitants of the southern provinces the positive determination of His Lordship in Council to suppress the use and exercise of all weapons of offence with the exception of such as shall be authorized by the British Government.

“ The military service heretofore rendered by the Palayagars and Sherogars having been suppressed and the Company having in consequence charged itself with the protection and defence of the Palayagar countries, the possession of fire arms and weapons of offence is manifestly become unnecessary to the safety of the people. The Right Honourable the Governor in Council therefore orders and directs all persons possessed of arms in the provinces of Dindigul, Tinnevely, Raunadpuram, Sivagauga and Madura to deliver the said arms consisting of muskets, matchlocks, pikes (to ?) Lieutenant-Colonel Agnew, the officer now commanding the forces in those provinces.

“ It is unnecessary to assure the people of the southern provinces that the Right Honourable the Governor in Council in the determination of carrying this resolution into effect can be governed by no other motives than those connected with the sacred duty of providing for the permanent tranquillity of those countries. His Lordship disclaims every wish of subjecting the chiefs and hereditary landlords to any humiliation, but the discontinuance of the general use of arms according to the prevailing habits of those countries being indispensably necessary to the preservation of peace and to the restoration of prosperity, the Governor in Council hopes that the chieftains will with cheerfulness sacrifice a custom now become useless to the attainment of those important objects.

“ With a view therefore of tempering the execution of their general resolution with as great a degree of attention as may be practicable to the hereditary customs and to the personal feelings of the chieftains, the Right Honourable Lord Clive, Governor in Council aforesaid, hereby authorizes each Palayagar or Zamindar

to retain a certain number of peons carrying pikes for the purpose of maintaining the pomp and state heretofore attached to the persons of the said Palayagars. But the said number of authorized pikemen shall be fixed and shall continue to be limited for the better execution of this intention, the said number of pikemen shall be determined by the Governor in Council of Fort St. George upon the representation of the several Palayagars transmitted through the regular channel of the Company's Collector, after proclamation of the number so fixed, the names of the said pikemen shall be registered in the public cutcherry of the Collector, and the pikes shall in like manner be publicly stamped by the Collector with a mark bearing the sanction of the British Government.

"In the confident expectation of reclaiming the people of the southern provinces from the habit of predatory warfare and in the hope of inducing them to resume the arts of peace and agriculture, the Right Honourable Edward Lord Clive, Governor in Council of Fort St. George aforesaid, announces to the Palayagars and to all the inhabitants of their Palayams that it is the intention of the British Government to establish a permanent assessment of Revenue on the lands of the Palayams upon the principles of Zamindari tenures, which assessment being once fixed shall be liable to no change in any time to come, that the Palayagars becoming by these means Zamindars of their hereditary estates will be exempted from all military service and that the possession of their ancestors will be secured to them under the operation of limited and defined laws to be printed and published as well for the purpose of restraining its own officers to the regulations and ordinances of the Government as of securing to the people their property, their lives and the religious usages of their respective castes."

It appears to their Lordships that by that Proclamation military service tenures in the districts to which the Proclamation applied were abolished, whether the Palayagars obtained a permanent assessment sanad or not.

Following upon the Proclamation of the 1st December 1801, came Regulation XXV of 1802, under which a permanent settlement so far, if at all, as it has any bearing on this case was made with the Bank, and an Istimrari sanad was granted to the Bank on the 29th September 1805. The Palayam estate had not been previously settled. The Palayagars generally, including the Palayagar of Kannivadi, refused to accept Istimrari sanads, and when the Palayagar of Kannivadi for

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the time being was willing to accept a sanad the Government refused in 1883 to grant him one. There can be little doubt that that refusal to grant him a sanad was out of consideration for the family, as it was generally believed that it was more difficult for a creditor to bring to sale unsettled Palayams than Palayam estates which were held under an Istimrari Settlement sanad. It appears to their Lordships that Regulation XXV of 1802 does not affect the question as to whether in 1895 the Palayam of Kannivadi was alienable or not. The Board decided in the *Marungapuri* case [*The Collector of Trichinopoly v. Lekhamani*(1)] that the affirmative words of the second section of Regulation XXV of 1802,

“That, in consequence of the assessment the *proprietary right* of the soil shall become vested in zamindars, etc.”

did not either give to or take away from the former owners of lands not permanently settled any rights which they then had. It (a settlement under that Regulation) merely vested in all zamindars an hereditary right at a fixed revenue upon the conclusion of the permanent settlement with them. In that case the Board approved of the opinion expressed by the High Court, Madras :

“That the existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property.”

In the same case the Board held that

“The only difference between a polliam or zamindari which is permanently settled and one that is not, is that, in the former, the Government is precluded for ever from raising the revenue; and, in the latter, the Government may or may not have that power.”

In the present case the learned Judges of the High Court held that the tenure of military service under which the Palayam of Kannivadi had been held had been abolished and determined by the Proclamation of the 1st December 1801, and with that decision their Lordships have agreed.

It remains to be considered whether the Palayam of Kannivadi was held under a tenure of the Palayagar rendering police service to the State. The best and most reliable evidence that the

Palayam was held on police service tenure would be a sanad showing that it was so held. Only two sanads which were granted to any Palayagar of Kannivadi have been brought to the attention of this Board. They are sanads which were granted respectively on the 13th July 1797, for the fasli year 1207, and the 13th July 1800, for the fasli year 1210, to Appaya Naicker, the then Palayagar. There is nothing in either of those sanads from which their Lordships can infer that the Palayam of Kannivadi was held on a tenure of rendering police duties to the State. The conditions in those sanads by which the Palayagar was bound to protect the inhabitants by preventing as far as might be in the power of the Palayagar, robberies, depredations, etc., in their properties, to deliver up persons guilty of murder, and not to give shelter to deserters, and to apprehend and deliver them to the Collector, are similar to the duties which all landholders and zamindars in British India have to perform. Even if it were possible to infer from those sanads that the Palayam of Kannivadi was then held on a tenure of rendering police duties to the State, the police duties of zamindars in that part of the country were abolished in 1816 by the Government of Madras.

Their Lordships hold that in 1895 the Palayam of Kannivadi was not inalienable, and that the then Palayagar had power to alienate it to suit his own purposes, and they will humbly advise His Majesty that this Appeal should be dismissed with costs.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Woutner & Sons.*

A.M.T.

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