

Malayandi Appayasami Naicker - - - - - *Appellant*

v.

The Midnapore Zamindari Company, Limited - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 16TH MARCH, 1921.

Present at the Hearing :

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMBER ALL.

[*Delivered by* 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.

The suit in which this appeal has arisen was brought to obtain, so far as is now material, against the Midnapore Zamindari 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.

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 connection of the respondent Company with the Palayam of Kannivadi according to the allegations in 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 the decision in I.L.R. 10, Allahabad 288, 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 Sannad 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 sannad 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 sannad 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.

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 *Naragunty Luchmedavamah v. Vengama Naidu*, 9 Moore's I.A. 66, which related to the Naragunty Palayam

in the District of Chittore 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 *Naraganty* case cited above.) The question, so far as it depends on 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, ginal 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 Dominions 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 Tinnevelly 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 Tinnevelly and to a rebellion excited and maintained in arms by Palayagars of Panchalam Kurishi and of Virupakshi and by the Sherogars of Sivaganga. 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 authorised 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 people. The Right Honourable the Governor in Council therefore orders and directs all persons possessed of arms in the provinces of Dindigul, Tinnevelly, Ramnadpuram, Sivaganga, 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 tranquility 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 authorises 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 authorised 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 Saint George aforesaid, announces to the Palayagars and to all the inhabitants of their Palayams that it is the intention of 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 possessions 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 their 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 sannad 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 Istimvari sannad 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 Istimvari sannads, and when the Palayagar of Kannivadi for the time being was willing to accept a sannad the Government refused in 1883 to grant him one. There can be little doubt that that refusal to grant him a sannad 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 Istimvari Settlement sannad. 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 *Marungabusi* case (*The Collector of Trichinopoly v. Lekkamani and others*, 1 I.A. 282), that the affirmative words of the 2nd section of Regulation XXV of 1802, “ That in consequence of the assessment the proprietary right of the soil shall become vested in zemindars, &c.,” 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 zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent settlement with them” (1 I.A., p. 306). In that case the Board approved of the opinion expressed by the High Court of 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 ” (p. 312). 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 " (p. 313). 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 sannad showing that it was so held. Only two sannads which were granted to any Palayagar of Kannivadi have been brought to the attention of this Board. They are sannads which were granted respectively on the 13th July, 1797, for the Fasli year 1207, and the 13th July, 1800, for the Fasli year 1200, to Appaya Naicker, the then Palayagar. There is nothing in either of those sannads 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 sannads 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 sannads 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.

In the Privy Council.

MALAYANDI APPAYASAMI NAICKER

vs.

THE MIDNAPORE ZAMINDARI COMPANY,
LIMITED.

DELIVERED BY SIR JOHN EDGEE.

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