

## Kadoth Ambu Nair Vs Secretary of State for India in Council

**Court:** Bombay High Court

**Date of Decision:** April 7, 1924

**Acts Referred:** Limitation Act, 1908 " Article 120

**Citation:** (1924) 26 BOMLR 639

**Hon'ble Judges:** Shaw, J; Lawrence Jenkins, J; John Edge, J; Blanesburgh, J; Ameer Ali, J

**Bench:** Full Bench

**Final Decision:** Dismissed

### Judgement

Ameer Ali, J.

This appeal arises out of a suit brought by the plaintiff in the Court of the Subordinate Judge of South Canara on November

25, 1913, as the karnavan, or Manager, of a Nair tarwad against the Secretary of State for India in Council for a declaration that certain lands

situated in the forest tracts in the Kastargod Taluk belong exclusively to his tarwad, and for an injunction restraining the defendant from dealing in

any manner with the said lands to the prejudice of the rights and possession of the plaintiff's tarwad.

2. Their Lordships will have to refer more specifically in the course of their judgment to the allegations in the plaint, but it is sufficient at this stage to

indicate the scope of the suit. The defendant denied the title which the plaintiff put forward; and the Subordinate Judge found that the plaintiff had

totally failed to establish the grounds on which he based his claim, and accordingly dismissed the suit. The plaintiff preferred an appeal to the

District Judge who came to the same conclusion as the Court of first instance and accordingly affirmed the decree of the Subordinate Judge,

dismissing the suit. There was a second appeal by the plaintiff from the decree of the District Judge to the High Court of Judicature at Madras

which, apparently being of opinion that the District Judge had not sufficiently considered the evidence of possession adduced on the plaintiff's

behalf, remanded the case for a fresh finding.

3. When the case came before the District Judge the second time he again examined the evidence thoroughly, almost meticulously, and came to the

conclusion, as on the previous occasion, that the plaintiff had utterly failed to establish the three propositions on which he based his claim: firstly,

long possession; secondly, prescription; and thirdly, recognition by the defendant of the tarwad's title working as an estoppel. He also found in

concurrence with the Court of first instance that the suit was barred under the Statute of Limitation. If the suit is barred by limitation the question of

title would not arise. But it appears to their Lordships that it will be more satisfactory to the parties that they should express their opinion on the

question of title, before dealing with the question of limitation.

4. The case then went back to the High Court and the learned Judges accepted, on January 29, 1920, the findings of the District Judge and

dismissed the suit. The present appeal is from this decree of the High Court.

5. In order to explain the nature of the present litigation and the contentions advanced on the plaintiff's behalf before the Board, it is necessary to

describe as concisely as possible the character of the lands in respect of which the claim is made and how these lands have been dealt with until

now. The district of South Canara lies to the north of Malabar and to the west of Mysore and Coorg; in the north lies North Canara and on the

west the Arabian Sea. The whole district at a short distance from the sea is covered with immemorial forests. Mr Sturrock, who was Collector of

South Canara in the eighties, describes the country thus in his Manual of the South Canara District:--

South Canara is essentially a forest district. The slope of the western ghats from north to south clothed with dense forests of magnificent timber and

the forest growths, stimulated by the heavy rainfall, approaches within a few miles of the coast.

6. The lands in suit are situated south of the Chandragiri River, and, as already stated, in the Kasargod Taluk, formerly Bekal Taluk. In the

lowlands below the forest ridges there lie the farms and holdings of the ryots, which are called "wargs." It appears from the record that the wargs

the ryots hold in their own right are called "muliwargs." These ryots and farmers, it appears, are in the habit of going upon the forest lands, clearing

a part of the jungle and raising a temporary crop on it. After the crop is reaped this patch is abandoned and some other part is taken up. For this

privilege they have been paying a small fee to the Government. These patches are called "kumries," and the lands so desultorily cultivated are

designated in the proceedings relating to the subject as "kumri lands." The wargs do not constitute a farm or an estate of a compact character, the

component parts often lying apart from each other. The plaintiff's case is that he has a number of kumri lands in the forest, attached to the various

plots or wargs which he holds and he claims that his tarwad has acquired an absolute title to these lands, partly by long possession, partly by

adverse possession against the defendant, and partly by purchase and usufructuary mortgages. He also claims that the Government recognised his

title and are now estopped from denying it.

7. The first question, then, that emerges from these allegations, is what is the nature of the forest tract, and secondly, what are the incidents of the

kumri lands. It has been held in two cases, (1) one decided by the Bombay High Court from North Canara under not dissimilar conditions, the

other decided by the High Court of Madras from South Canara, in both of which the identical question arising in the present appeal was involved,

that the Government had an absolute title to all the forest tracts which belonged absolutely to the Crown. Their Lordships consider it would answer

no useful purpose to travel, as they have been invited to do, in the regions of ancient history. Whatever may have been the custom in ancient India,

or under Mahomedan rule, what they have to see is how these lands were treated since the British acquired this part of the country. Ever since

1800, when South Canara was conquered from Tipoo Sultan, the Mahomedan ruler of Mysore, the British Government--in a series of documents

which have been (2) *Bhaskarappa v. The Collector for India v. M. Krishnayya*, (1905) of North Kanara ILR (1879) Mad. 452 and The

Secretary of State carefully examined in the cases referred to above--asserted and exercised their right in the forests. Their Lordships desire to

refer only to two of these documents. On May 23, 1860, by a resolution of the Government of Madras (in the Revenue Department) it definitely

pronounced in favour of checking the practice of kumri cultivation. Among the reports on which it rested its decision was a communication from

the Conservator of Forests dated August 17, 1859, in which he calls attention to what he describes as "the chief evils of this rude system of

culture," viz.--

the destruction of valuable timber at present urgently required for shipbuilding and railways, and rendering of land unfit for coffee cultivation.

8. This document also speaks of the method of cultivation in vogue on kumri lands. There were other proceedings which similarly show that the

Government claimed to exercise an absolute right in respect of these immemorial forest and waste lands, and constantly asserted its title. But the

matter was clinched in 1884 when the Governor in Council passed an order, dated August 29, 1883, finally stopping the right of the neighbouring

farmers and ryots to go upon the forest lands for the purpose of clearing patches by destroying the trees, in order to cultivate crops on the

clearings. The document is so important that it should be quoted in full.

9. After referring to the report with which it was concerned, it goes on as follows:

2. To survey and demarcate the lands in which kumri is now out and to impose upon it an acreage rate of assessment--which under the Board's

proposal is to confer complete rights of dealing with the land and with the wood growing thereon--would in the opinion of His Excellency in

Council tend to compromise the right of Government to deal with the lands as may seem advisable hereafter and to create notions of proprietary

right in the wargdara which do not in fact exist. Forest settlement will probably not be undertaken for years in South Kanara and the forest officers

cannot possibly indicate at present lands which will be wanted for reservation. Mr. Sturrock's proposed survey would doubtless cost more than

he estimates and would probably be far from accurate when finished.

3. His Excellency in Council accordingly directs that existing arrangements and restrictions (which are in fact those prescribed in G. O., 24th

October, 1861 No. 2032) in respect of the kumri cultivation in question, shall continue, with the exception of a charge of a rate of one rupee an

acre on extent actually felled. In lieu of this the Collector is authorised to compound the demand at his discretion for an annual payment not

exceeding seven times the shist and shamil in the case of a wargdar kumri, and in the case of other permitted kumri, of such amount as may seem

to him just with reference to past average charges. At the same time a register should be prepared recording as accurately as possible the

boundaries and descriptive particulars of the tracts within which each wargdar allowed to cut kumri and -during the felling season, the revenue and

forest subordinate should be on the alert to prevent felling outside the authorised limits, in virgin forests and in jungle of twelve years' growth.

4. Under the above arrangement no measurement need be made in the current season, and no orders are required on the second of the

Proceedings above read.

10. Pursuant to the order rules were framed for the regulation of kumri cultivation, which also are important and should be set out in full:--

1. The cultivation of kumri is strictly prohibited in--

1. Virgin forests.

2. Cardamom and pepper forests.

3. Forests which have not been kumried for twelve years or upwards.

4. All forests outside the tracts recognised as kumries attached to wargs.

2. All parties contravening Rule 1 will be criminally prosecuted.

3. A Register will be prepared recording as accurately as possible the boundaries and descriptive particulars of the tracts within which each

wargdar is allowed to cut kumri. In the preparation of this Register care will be taken to exclude all tracts falling under Rule 1.

4. Every Pottail in whose village there is warg kunri will report on the 1st April of each year whether the provisions of Rule 1 have been strictly

observed in the annual fellings and all Revenue and Forest Officers will take every opportunity of checking the correctness of these reports, and

otherwise assisting the prevention of felling outside the authorised limits.

5. Assessment will be collected at a fixed annual amount, irrespective of the annual clearings which will be left to the discretion of the wargdar

concerned, subject to the provisions of Rule 1.

6. Nothing in the above rules shall be held to preclude Government from taking up for reservation under the provisions of the Madras Forest Act,

1882, any land now occupied for kumri.

11. In accordance with the Rules, notices were issued by the tehsildar apparently on all the wargdars who were in the habit of entering the forest

and making kumri cultivation. About the same time a register was opened (Exhibit F) showing the details of the boundaries, etc., of the kumri lands

with regard to which permits had been issued previous to the Government order. It shows to the wargdars, who had been in the habit of

promiscuously entering the forests and making clearings, the exact limits which they were permitted to enter for raising temporary crops.

12. It is quite clear from these records that throughout, wherever kumri cultivation was allowed, it was permissive. The people who cultivated these

patches of land had to pay a fee for the permits which they obtained for purposes of cultivation and nothing more than these fees were entered in

the registers, but. they do not indicate any right in the persons who paid fees for the permits.

13. The right of the Government has been carefully examined and precisely set forth in the two judgments to which reference has already been

made. Their Lordships, therefore, do not think it necessary to discuss further the question, beyond expressing their general concurrence with the

conclusions arrived at by the learned Judges of the two High Courts, namely, that there is an undoubted presumption that forest tracts and old

wastes belong to the Government unless that presumption is displaced by positive evidence that the right has, in any particular tract or piece of

land, been granted by the sovereign power to any individual or bodies of individuals; or rights have been consciously allowed to grow up adversely

to the Government.

14. Bearing this principle in mind their Lordships have to examine what evidence the plaintiff has adduced in this case to establish the right he

claims. The grounds on which he bases the claim of his tarwad are set out in paragraphs 4, 5 and 6 of the plaint. In paragraph 4 he says as

follows:--

That the properties particularised in the annexed schedule are ancient warg kumries situated in the villages of Panathadi and Bedadka in Kasargod

Taluk (formerly Bekal Taluk) and lying to the south of the Chandragiri River.

15. Paragraphs 5 and 6 are in these terms:--

That the plaint kumries belong to the plaintiff's tarwad, some as portions of their ancient muli wargs, some on right of purchase from their original

proprietors, some, though acquired in the first instance on mortgages from previous wargdars, now belong to the tarwad on muli right acquired by

prescription and a few on mortgage right.

That the plaint kumries have been in the exclusive possession and enjoyment of the plaintiff and his predecessors in interest for more than a century

on their own proprietary or warg right.

16. In other words he bases his title to the plots of land in respect of which the suit is brought on long enjoyment as parts of his muli wargs;

secondly, on rights acquired by purchase and mortgage; and thirdly, on adverse and exclusive possession for more than a century in proprietary or

warg right. In paragraph 9 of the plaint he puts forward a claim by estoppel against the Government: his statement is to the effect that the lands in

suit have been acknowledged to be warg kumries and included as such in the register of Government kumries. The onus of establishing these

allegations rests on him.

17. The last contention requires some explanation. It appears that the Government for the purposes of clearing the undergrowth in the forests, have

been in the habit of allowing the forest tribes who sparsely inhabited the forest to make clearances, and grow such cereals as they were capable of.

These primitive tribes cultivated certain spots, reaped the crop and then moved off to some other patches of land. These apparently were called

Government kumries. The Government also allowed some of the neighbouring wargdars to take the leaf manures from the forest and clear the

undergrowth for the desultory cultivation, called kumri. These apparently are designated warg kumries. In all these cases, dealings with forest lands

appear to have been by distinct permission of the Government. Has the plaintiff been able to show either old possession of the kumri lands, which

he says have become attached to his wargs by long enjoyment, or has he been able to show that he has acquired a right by adverse possession to

the exclusion of the Government? Both the Subordinate Judge as well as the District Judge, whose judgments on appeal on questions of fact,

properly and regularly arrived at, are conclusive, have held, upon a careful examination of the evidence, that the plaintiff has failed to establish a

continuous enjoyment beyond thirty-five or forty years from the date of the suit. The period of limitation against the Government is sixty years.

Assuming that a licensee can convert a permissive occupation into an absolute title by long possession, the period of possession proved by the

tarwad falls short of the period of prescription. Their Lordships think that a licensee cannot claim title only from possession, however long, unless it

is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence. The plaintiff produced no evidence

to show that the Government either acquiesced in his exclusive possession or did in fact evince that consciously they acquiesced in the tarwad's

adverse possession.

18. Apart from this, the Courts in India, who were Judges of fact, have held that the boundaries which the plaintiff has set up are unidentifiable. As

regards title by transfer, they have found that in no case has the knowledge been brought home to the officers of Government that any of these

lands were sold or mortgaged with their consent.

19. As regards a grant emanating from the Government, there is absolutely no evidence. No potta has been produced showing a grant by the

Government. The inference is inevitable that the plaintiff possessed no such potta.

20. The order of May 23, 1860, No. 830, made clear the position in which the people who were licensed to enter the forest for the purpose of

desultory cultivation, stood in relation to the Government. Paragraph 8 of this order runs as follows:--

The Board give their decided opinion against the validity of any claim to proprietary rights in forest, based on the entry of "kumri sist" in the patta

or the account of any estate. They regard it as simply a rent or farm of the privilege of cutting kumri in the tract in question; the continuance of which

must depend on the pleasure of the Government. The facts detailed in their proceedings seem fully to bear out this view.

21. In the proceedings of the Board of Revenue dated July 24, 1860, the Government's rights as regards the wargdar kumries are placed on the

same basis as the Sirkar or Government kumries:--

The Board understand the Government proposal to raise the rate of assessment on the kumri cultivation of the Hekal Taluk, to apply to "Wargdar

kumri" so called, as well as to Sirkar kumri as the Government do not admit that the rights of the former are in any way superior to those of the

latter, or that the entry of that item, among others in the warg, originally denoted anything more than that the wargdar was also the temporary renter

of certain jungle farms or privileges, which the Sirkar was competent to modify or discontinue at will; and it is solely as an act of grace that in the

Bekal Taluk the wargdar, whose warg includes the item, is in consequence of the more systematic nature of the cultivation still to be recognised as

the party with whom Government have to deal for the realisation of the assessment, which elsewhere will be made directly with the kumri ryots.

22. On behalf of the appellant an argument was put forward before the Board which does not appear to have been advanced in any of the Courts

in India. Their Lordships do not desire to rule out summarily on that ground the contention which has been so strongly urged before them. It is

contended that the incidents attached to these wargdar kumries stand on the same footing as ryotwari holdings. The chief ground on which this

analogy appears to be founded, as learned counsel admitted, were two facts, namely, that the wargdar possessed in these kumri lands a heritable

and transferable interest.

23. In order to prevent future confusion their Lordships desire to say that there is absolutely no relation or analogy between the nature of these

kumri lands and ryotwari holdings. The latter belong to a totally different category of tenures. Ryotwari holdings relate to arable lands for fixed

periods--ordinarily thirty years--and are subject to periodical surveys and assessments. No inference, therefore, can be derived from the fact that

kumari lands, cultivated on the kumri system, were held by wargdars whose property is transferable and heritable.

24. Coming now to the question of limitation it appears that in 1903 the Government officials marked off the lands in suit and issued to the plaintiff

as the karnavan of his tar and, what is called a rough potta, showing the lands to which Government admitted his right to obtain a grant subject to

the usual conditions. The plaintiff preferred objections to the exclusion from the rough potta of the lands in suit. His objections were definitely

rejected in 1905.

25. The present suit to set aside that order and to obtain a declaration of his right was not brought until 1913. Article 120 of the first Schedule of

the Indian Limitation Act (IX of 1908) applies to this case. It provides that the period of limitation for a suit ""for which no period of limitation is

provided elsewhere in this Schedule"" shall be six years. No period of limitation is specifically provided elsewhere for the assertion of a claim of this

kind. Their Lordships think that the lower Courts rightly applied Article 120 to this suit.

26. On the whole their Lordships are of opinion that the appeal fails and should be dismissed with costs and they will so humbly advise His

Majesty.