

(1958) 07 KL CK 0029

High Court Of Kerala

Case No: Letters Patent Appeal No. 172 of 1952 (M)

Raman Bhattathiripad

APPELLANT

Vs

Devasena Antharjanam

RESPONDENT

Date of Decision: July 9, 1958

Acts Referred:

- Limitation Act, 1963 - Article 134
- Malabar Compensation for Tenants Improvements Act, 1899 - Section 5

Citation: (1958) KLJ 1061

Hon'ble Judges: K.T. Koshi, C.J; G. Kumara Pillai, J

Bench: Division Bench

Advocate: D.A. Krishna Warriar, for the Appellant; N. Sundara Iyer and D.H. Nambooripad, for the Respondent

Final Decision: Dismissed

Judgement

G. Kumara Pillai, J.

This letters patent appeal is filed against the judgment and decree dated 16-10-1951 passed by Mr. Justice Raghava Rao of the Madras High Court in Appeal Suit No. 549 of 1947 of that court. The suit which gave rise to that appeal was one for partition and redemption of a kanom right over one-half the properties sought to be partitioned. The properties belonged in common to the plaintiffs' illom and a Nair tarwad, known as Melappat tarwad, in uzthuthu right, i.e., "a joint jenmom right enjoyed by a rotatory system of cultivation designed to ensure equality of enjoyment, in quality as well as in quantity". By Ext. P. 1 the plaintiffs' illom granted in 1859 a kanom demise of its undivided half right in the properties to the other co-owner, the Melappat tarwad. In 1876 the Melappat tarwad sold the entire properties by Ext. P. 12 to Koodancheri tarwad alleging that the whole properties belonged to them and that they were the absolute owners thereof. Koodancheri tarwad in its turn sold the properties to the defendants by Ext. P. 13 dated 26-8-1915. The kanom demise, Ext. P. 1, was ignored in this sale deed also and the

sale was made on the footing that the Koodancheri tarwad was the absolute owner of the properties, having obtained the same under Ext. P. 12. In 1931 the plaintiffs brought a suit, O.S. No. 101 of 1931 of the Walluvanad Munsiff's court, for redemption of Ext. P. 1. This suit was dismissed by the trial court, and the appeal as well as the second appeal filed by the plaintiffs were also dismissed. Ext. P. 5 is the judgment of the High Court of Madras dismissing the second appeal arising out of O.S. No. 101 of 1931. The High Court held by Ext. P. 5 judgment that on account of the transfer (Ext. P. 12) by the Melappat tarwad in 1876 the plaintiffs' right to redeem Ext. P. 1 had become barred by limitation and extinguished after twelve years from the date of Ext. P. 12 under Article 134 of the Limitation Act. Subsequently, the plaintiffs brought, in the court of the Subordinate Judge of Ottapalam, the present suit for partition of the suit properties, basing their claim on the uzthuthu right, and for redemption of Ext. P. 1 so far as the half-share which belonged to them and which they had demised by that document was concerned. The defendants pleaded inter alia res judicata by virtue of the decisions in O.S. No. 101 of 1931 and the appeal and the second appeal against the decision in that suit and the bar of limitation under Article 134 of the Limitation Act. The trial court found that there was no res judicata but upheld the plea of limitation and consequently dismissed the suit. Against the trial court's decree the plaintiffs filed A.S. No. 549 of 1947 in the Madras High Court, and Mr. Justice Raghava Rao heard and disposed of that appeal. Before that learned Judge the defendants' counsel supported the trial court's decision both on the ground of res judicata (which had not been accepted by the trial court) and the bar of limitation. Mr. Justice Raghava Rao was inclined to accept the plaintiffs' case that there was no res judicata although he has not recorded a finding on that question. But he took the view that the plaintiffs' right to redeem Ext. P. 1 was clearly barred and extinguished by Article 134 of the Limitation Act, and therefore, he confirmed the trial court's decree and dismissed the appeal with costs. Plaintiffs have, therefore, filed this letters patent appeal. In O.S. No. 101 of 1931 as well as in this case, both in the trial court and in the appellate court and also here, the parties have proceeded on the basis that Ext. P. 1 was a mortgage.

2. In Ext. P. 12 there is absolutely no reference to Ext. P. 1 and it has been executed on the footing that the executants thereof were the full and complete owners of the entire properties and that they were selling their jenmam right in them to the members of the Koodancheri tarwad. The relevant portion of Ext. P. 12 (translation) reads:

We have hereby assigned to you our jenmam right herein in teer also delivering into your possession all the back deeds of title relating thereto.

The document is dated 14th August 1876. In Ext. P. 13 executed by the members of the Koodancheri Tarwad in favour of the defendants' illom on 26-7-1915 also there is no reference to Ext. P. 1. After describing the title which they had derived under Ext. P. 12 the executants of Ext. P. 13 said in it:

We have hereby assigned the said nine items of properties in jenmam teer to your mana for the jenmom value of Rs. 10,870... As the properties in the schedule have been assigned in jenmom teer, we agree and it is also settled that save for your mana above having the jenmom right in the properties and holding possession of them in jenmom right from this date onwards and cultivating them and also causing them to be cultivated and enjoying them for ever and doing all such acts as you please in the full and free exercise of all liberties thereunder enuring to the mana and that we have henceforth no manner further right, title or interest either in the properties or in the kuzhikkoors and chamayams therein.

(Translation)

3. Article 134 of the Limitation Act as it stood before the amendment of 1929 read as follows:

"To recover possession of immovable property conveyed or bequeathed in trust or mortgage and afterwards transferred by the trustee or mortgagee for valuable consideration.	Twelve years.	The date of the transfer.
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The third column, after the amendment, reads: "When the transfer becomes known to the plaintiff". The plaintiffs' knowledge of the sale by the mortgagee was, therefore, immaterial before the amendment, and if the mortgagee had sold the property for valuable consideration and the transferee had obtained possession, under the law as it stood before the amendment of 1929, the mortgagor's right to recover possession would have become barred and extinguished after twelve years from the date of the sale by the mortgagee.

4. In the present case, all the requirements of Article 134 of the Limitation Act have been satisfied both in respect of Exts. P. 12 and P. 13. Ext. P. 12 was executed on 14.8.1876 for a consideration of Rs. 1428-9-2. The previous mortgage, Ext. P. 1, was not acknowledged in Ext. P. 12, and it was expressly stated therein that the executants had got the full jenmom right over the properties and were conveying the same to the vendees. Likewise, in Ext. P. 13 also, executed on 26.8.1915, there was no acknowledgment of Ext. P. 1 and the executants traced their right to Ext. P. 12 and purported to convey to the vendees the full jenmom right they had in the properties. Twelve years had elapsed long before the amendment of 1929 in the case of both these documents.

5. In section 5 of the Malabar Compensation for Tenants Improvements Act, Madras Act I of 1900, it is provided:

5. (1) Every tenant shall on ejectment be entitled to compensation for improvements which have been made by him, his predecessor-in-interest, or by any person not in occupation at the time of the ejectment who derived title from either of them, and for which compensation has not already been paid; and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy or the payment or tender of the mortgage-money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court.

(2) A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be.

On the strength of this provision it was contended by the appellants counsel that until the mortgagor paid to the mortgagee the entire value of improvements due to the latter the relationship of mortgagor and mortgagee would continue and that, therefore, there could be no question of that relationship becoming barred or extinguished before the payment of the value of the improvements due to the mortgagee. As no value of improvements has been paid by the plaintiffs' illom the appellant's counsel contended that the mortgage, Ext. P. 1, still subsists and the plaintiffs are entitled to recover possession of the properties by redeeming it. We are unable to accept this contention. Section 5 of the Malabar Compensation for Tenants Improvements Act can have no application for ascertaining whether Article 134 of the Limitation Act would apply to a case or not. In all cases of limitation the right which is found to have become barred and extinguished would admittedly be alive and in force till the date it became barred by limitation and would have also been alive and continued to be in force even after its date but for the fact that by the operation of the law of limitation it became barred on that date. Similarly, in the case of mortgages governed by the Malabar Compensation for Tenants Improvements Act also the rights of the mortgagor arising out of the relationship between the mortgagor and the mortgagee would be alive and be in force till such right became barred by limitation under Art. 134 of the Limitation Act, and would be barred and extinguished after that date. Limitation arises by the super-imposition of the conditions prescribed by the relevant Article upon the relationship existing between the parties which gives rise to the right sought to be enforced. u/s 5 of the Malabar Compensation for Tenants Improvements Act the relationship of the mortgagor and the mortgagee would have continued up to the time the mortgagor's right became barred under Article 134 of the Limitation Act. There is nothing in section 5 of the Malabar Compensation for Tenants Improvements Act to support the appellant's contention that it saves the mortgagor's right from the operation of Article 134 of the Limitation Act. This was the only aspect of the question raised and discussed in the subordinate Judge's Court and in the Madras High Court; and, in the view we have taken above, the appellant's contention on this

aspect of the question has to fail.

6. But, the appellant's counsel has raised another aspect of the question also before us. According to him, for the application of Article 134 of the Limitation Act it is necessary that possession should have been given by the mortgagee-transferor to the transferee at the time of the sale which is sought to be relied upon as the starting point of limitation, and since no such transfer of possession had been made on the date of Ext. P. 12 the date of that transfer cannot be taken as the starting point of limitation. On the question whether a transfer of possession on the date of the sale is necessary or not for the application of Article 134 of the Limitation Act, the members of a Full Bench of the Madras High Court have given differing opinions in *Seeti Kutti v. Kunhi Pathumma* (I.L.R. 40 Mad. 1041). Wallis, C.J., and Coutts Trotter, J., held in that case that "Article 134 of the Limitation Act applies to a transfer from a trustee or a mortgagee under which possession is not taken by the transferee"; and they were also of the view that "where possession is taken under the transfer not on the date of the transfer but some time later" time would begin to run under Article 134 from the date of taking possession. Abdur Rahim and Seshagiri Ayyar, JJ., were of the view that Article 134 would apply even though possession was not transferred on the date of the sale and that in such a case time would begin to run not from the date of transfer but from the date of taking possession. Srinivasa Iyengar, J., was of the opinion that Article 134 would not apply at all to such a case. Another case referred to by the appellant's counsel was *Ramchandra v. Sheikh Mohidin* (I.L.R. 23 Bom. 614). All that has been said in that case also was only that Article 134 would not apply to a case where the transferee had not obtained possession at all. There is nothing in that case to show that Article 134 would not apply to a transferee who had actually obtained possession although not on the date of the sale. As pointed out in [Musammat Ram Piari and Others Vs. Budhsain and Others](#),

Article 134 is designed to protect the interest of the person in possession who might have obtained, by transfer from the mortgagee, larger rights than those which the mortgagee was competent to transfer for valuable consideration, and has remained in unqualified enjoyment of the same for more than twelve years from the date of the transfer.

What appears to have taken place in this case is that even before Ext. P. 12 Melappat tarwad had granted a kanom to Koodancheri tarwad and by Ext. P. 12 they transferred the Koodancheri tarwad their jenmom right also. There is absolutely no evidence in this case, nor was there any suggestion till the letters patent appeal was filed, that the kanom granted by the Melappat tarwad to the Koodancheri tarwad was one in which Ext. P. 1 was acknowledged. Nor does it purport to have been granted under the right obtained by virtue of Ext. P. 1. Even in O.S. 101 of 1931 there was no such suggestion. The circumstances would amply support the respondents' contention that even the kanom granted by the Melappat tarwad before Ext. P. 12

was one ignoring Ext. P. 1. and asserting their jenmom right to the entire properties. Whatever that be, as after Ext. P. 12 the vendee thereunder was, under the right derived therefrom, actually in possession for more than twelve years before 1929, such possession under Ext. P. 12 would be sufficient to attract the provisions of Article 134 of the Limitation Act. Even if the appellant's contention can be allowed to prevail so far as Ext. P. 12 is concerned, there can be no such objection to Ext. P. 13 at all. The executants of Ext. P. 13 transferred actual possession also to the vendees thereunder on the date of that sale, and admittedly more than twelve years had elapsed after that sale before the amendment of 1929. Hence from whatever aspect the question is viewed we have absolutely no doubt that the plaintiffs' right has become barred and extinguished under Article 134 of the Limitation Act. The appeal, therefore, fails and is dismissed with costs.