

(1984) 04 KL CK 0026**High Court Of Kerala****Case No:** S.A. No. 405 of 1978

Govindan Chakrayudhan and
Others

APPELLANT

Vs

Thankamma Sarada and Others

RESPONDENT

Date of Decision: April 9, 1984**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 145

Citation: (1984) KLJ 388**Hon'ble Judges:** V. Bhaskaran Nambiar, J; G. Balagangadharan Nair, J**Bench:** Division Bench**Advocate:** P. Krishnamoorthy, for the Appellant; P. Sukwnaran Nayar, for the Respondent**Final Decision:** Dismissed

Judgement

Balagangadharan Nair, J.

This appeal by the 4 plaintiffs arises out of a suit for declaration of title, cancellation of a sale deed, recovery of possession and redemption. The relief of redemption has been concurrently granted in their favour, but the courts below have differed on the relief of recovery of possession. The material facts necessary for the disposal of the appeal are the following: The suit properties belonged to a family called Poovakuzhi tarwad. Ayyana Mallan, the then karnavan of the tarwad executed a mortgage Ext. A14 dated 13-12-1096 for 1/3rd share of the properties--the plaint B schedule property--in favour of one Piratti Madi. This was followed by a puisne mortgage Ext. A1 dated 18-1-1102 to one Mathevan Kochummini with a direction to redeem Ext. A14. The first defendant who is a member of the Poovakuzhi tarwad became entitled to the puisne mortgage by virtue of certain assignments. In 1118 the then karanavan Marthandan Narayanan executed a sale deed Ext. A1 for the C schedule property to the second defendant. The Poovakuzhi tarwad partitioned under Ext. A9 dated 20-1-1966 under which the equity of redemption over the mortgaged properties--the B schedule property and the C schedule property were allotted to

the plaintiffs. B and C schedule properties constitute the A schedule property. The first defendant instituted a suit O.S. 764 of 1124 for redeeming the mortgage Ext. A14 and for an injunction against the second defendant--he was the third defendant in that Suit--and another to restrain them from interfering with his possession over the C schedule property. In that suit a receiver was appointed the same year (1949). The suit O.S. 764 was dismissed in respect of the C schedule property. In the meanwhile, the Makkathayam heirs of the former karnavan filed a suit for partition, O.S. 27 of 1962. In that suit the 4th defendant was appointed receiver and he took over possession from the receiver in O.S. 764 of 1124. In the present suit the plaintiffs seek to set aside the sale deed Ext. A2, redeem the mortgage over the B schedule property and recover the C schedule from the receiver. For the purpose of the appeal which is mainly concerned with the question of limitation it is enough briefly to note the contentions of the second defendant which can be summarised thus: The properties belonged to the sakha of Ayyana Mallan. The other sakhas had no right to the properties. Marthadan Narayanan the senior anandiravan in his sakha sold the suit properties to the second defendant under Ext. A2, the sale deed of 1118 and a portion of the property was subsequently sold to the 3rd defendant. The puisne mortgagee Kochummini did not redeem the prior mortgage. In O.S. 764 of 1124 brought by the first defendant it was found that he could redeem the mortgage and recover possession of the mortgaged properties only and not any other properties. Later defendants 2 and 3 filed O.S. 814 of 1967 to redeem and recover the properties from the first defendant and obtained a decree. The second defendant is entitled to get possession from the receiver. The plaintiffs did not get any right over the suit properties and even if they had any right, it was lost by limitation and adverse possession. The Munsiff decreed the suit as prayed for except that of redemption with costs.

2. On appeal by the legal representatives of the second defendant and their transferees the learned District Judge formulated 3 questions for decision. (1) Whether the plaintiffs are members of the jenmi tarwad. (2) Whether the sale deed Ext. A2 in favour of the second defendant is void and (3) Whether the plaintiffs' title to the suit property, if any, was lost by limitation and adverse possession. On the first point the learned Judge held that the plaintiffs are members of the tarwad, On the validity of Ext. A2 he held that it was executed by the karnavan even though it describes that the properties belonged to him, that it was contrary to Section 21, Travancore Ezhava Act and was therefore void and that a suit was not necessary to set it aside. On the 3rd point it was held that at the date of the suit the plaintiffs title to the suit properties except the mortgaged properties had already become lost by adverse possession. On this last finding the learned Judge reversed the Munsiff and dismissed the suit except in respect of the mortgaged property (about which there was no question before the appellate court).

3. This appeal was admitted on the following questions of law:

1. Whether on the facts and circumstances of the case the period during which the receiver was in possession of the property can be said" to be adverse to the plaintiffs, and

2. The burden to prove adverse possession being on the defendant was the court below justified in finding adverse possession when no evidence was adduced by the second defendant to prove that.

4. The appeal initially came before a learned Judge who has referred it to a Bench for disposal.

5. The substantial points argued before us and underlying the two questions on which the appeal was admitted, relate to the impact of the appointment of a receiver on adverse possession. Under Ext. A2 dated 22-4-1118 Marthandan Narayanan sold the C schedule property to the second defendant, In the suit O.S. 764 of 1124 a receiver was appointed for the C schedule property. This happened in 1949. Since then the property was admittedly in the possession of the receiver, first in that suit--O.S. 764 of 1124--and subsequently with the receiver in O.S. 27 of 1962. These proceedings show that although he took the sale deed Ext. A2 in 1118 the second defendant did not continue in possession as he was dispossessed by the successive receivers. Whatever be the competency of Marthandan Narayanan to execute the sale deed Ext. A2 he was in possession of the C schedule property and obviously the second defendant got possession of the property. The question is whether the dispossession by the receiver has affected the second defendant's possession and title.

6. In Lekshmanan v. Govindan, 1963 KLT 1152, Mathew, J. (as he then was) followed article 362 from Halsbury's Laws of England, 3rd Edition, Vol. 24, page 202:

the appointment of a Receiver does not save the rights of any persons, but the parties to the action in which the Receiver was appointed.

and also Article 489:

Where the Court during the pendency of an action is in possession of property by a Receiver, the possession enures for the benefit of the party to the action, ultimately declared to be entitled, so that during such possession, time will run against, but not in favour of, a person who is a stranger to the suit.

The learned Judge also relied on Article 683 in Vol. XXXII, page 419 of the same book:

The possession by the receiver, though it necessarily displaces the possession of the owner or occupier to some extent for the purpose of the appointment, does not interfere with the rights and liabilities of the parties to the action in relation to strangers. It is not such an interruption of possession as prevents time running in favour of the defendant as against strangers to the action, though it does prevent it running in favour of strangers as against the party obtaining the appointment.

What happened in that case was that pursuant to a dispute between the third defendant on the one hand and defendants 1, 2 and 4 on the other over possession, the Magistrate attached the property and put it in the possession of a receiver u/s 145, Cr. Procedure Code. The Magistrate did not decide the possession but referred the parties to a civil suit for adjudication of the rights. For this purpose the third defendant filed O.S. 89 of 1123 which was compromised by the parties. The plaintiffs then brought a suit out of which the appeal arose, for declaration of title and recovery of possession alleging that the suit property belonged to their family and the third defendant was in possession as a lessee. They challenged the compromise as not binding on them and claimed recovery of possession of the property from the receiver. The suit was resisted by the 1st defendant, denying the lease set up by the plaintiffs and claiming that she was in possession in her own right from 1101 and that she had perfected her title to the property by adverse possession and that she was therefore entitled to get the property from the receiver with the profits. While the Munsiff granted the plaintiffs a decree, the District Judge, Trivandrum came to a contrary conclusion and dismissed the suit holding that the plaintiffs had no subsisting title. The principal point argued in the High Court for the plaintiffs was that the possession of the receiver being the possession of the true owner the plaintiffs had a subsisting title even though they were not parties to the proceeding u/s 145 or to O.S. 89 of 1123. On the strength of the above articles from Halsbury the learned Judge held that it was not possible to say that the possession by the Receiver was the possession by the plaintiffs although they may be true owners of the property. It was further held that the person who was entitled to the property under the compromise in O.S. 89 of 1123 must be deemed to have been in possession through the receiver. The appeal was accordingly dismissed. The case strongly supports the defence and is against the plaintiffs' claim that the possession of the receiver would enure to their favour.

7. We might note the following paragraphs from Kerr on the Law and Practice as to Receivers, 16th Edition:

The appointment of a receiver does not in any way affect the right to the property over which he is appointed. The court takes possession by its receiver and his possession is that of all the parties to the action according to their titles." (p. 122).

The appointment of a receiver in an action does not prevent the operation of the Limitation Act, 1980 against a rightful owner who is out of possession and is not a party to the action. Nor will it interrupt the possession of a stranger so as to prevent the statute from conferring a title on him." (p. 148)

8. Those passages lend further support to the view taken in 1963 KLT 1152. Counsel for the appellants placed strong reliance upon P. Lakshmi Reddy Vs. L. Lakshmi Reddy. In that case the question principally considered by their Lordships was whether the doctrine that the possession of the court through the receiver enabled a person who was not previously in possession to claim that the Receiver must be

deemed to have taken possession adversely to the true owner on his behalf, merely because he ultimately succeeds in getting a decree for possession against the defendant therein who was previously in possession without title. It was held "The doctrine of Receiver's possession being that of the successful party cannot, in our opinion, be pushed to the extent of enabling a person who was initially out of possession to claim the tacking on of Receivers possession to his subsequent adverse possession." The question here is totally different. Further down their Lordships continued:

The position may conceivably be different where the defendant in the suit was previously in adverse possession against the real owner and the Receiver has taken possession from him and restores it back to him on the successful termination of the suit in his favour.

This is the point involved in the appeal and although their Lordships did not express any opinion upon it, they significantly remarked that the point may be different from the point which they were considering. It is more significant that this point was not decided by them. And what they decided does not arise in this appeal. There is nothing in the decision which will help the appellants make out that their title is unaffected by the initial possession of the second defendant and the subsequent possession of the receiver. They were not parties to the suits in which the receivers were appointed and as the passage from Halsbury shows during the receiver's possession, time continued to run against but not in favour; of the plaintiffs who were not parties to the suits. The plaintiffs were throughout out of possession and they had no subsisting title at the date of this suit. In our view, the learned District Judge was right in his conclusion.

We dismiss the appeal but without costs.