

(1936) 05 MAD CK 0015
In the Madras High Court

Annamalai Pathar

APPELLANT

Vs

Sri-la-sri Vythilinga Pandara Sannadhi Avergal and Another

RESPONDENT

Date of Decision : 04-05-1936

Acts Referred:

Citation : AIR 1937 Mad 295 : (1937) 45 LW 347

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This is a suit for recovery of possession of the suit site and the value of trees alleged to have been cut and removed by the servants of defendant 1. The suit property is Town Survey No. 726 in Mayavaram town and forms part of the village Abisheka Kattalai which belongs to the temple of Sri Mayuranathaswami whereof defendant 1 is the trustee, defendant 2, being alleged to be a lessee under him. The pymash numbers of the said site are 1234 and 1235. The entry relating to No. 1235 in the pymash account shows that a portion thereof was in the occupation of one Samu Mudali who was described as Kasavargam Samu Mudali. The learned District Munsif inferred from this that in 1829 Samu Mudali was occupying a portion of Pymash No. 1235, as a Kasavargam tenant of the temple and the learned District Judge also concurs with the District Munsif. But in or about 1837 Samu Mudali purported to sell half of both Pymash Nos. 1234 and 1235 as absolute owner by a deed of sale dated 25th December 1837 to one Somu Mudali. The sale deed recites that Somu Mudali was already in possession of a half of the said survey numbers by virtue of a gift and the remaining half was being sold to him. Thus by 1837 Somu became the absolute owner of both survey numbers and was in possession and enjoyment thereof. In the sale deed there is no reference to the said lands or any portion thereof being held on Kasavargam tenure. From the date of sale the said property appears to have continued in the family of Somu Mudali till about 1884 when there was a sale of the said property in favour of the plaintiff's father by one Parvathi Anni widow of one Rangaswami Mudali, brother of Somu Mudali. It appears that during the lifetime of Somu Mudali he effected two mortgages once

in 1880 and again in 1882. It was to discharge the mortgage of 1882 that Parvathi Anni sold the said property. After the death of the plaintiff's father at a family partition in 1900 the suit property fell to the share of the plaintiff. The case of the plaintiff is that up to 1927 it was in his enjoyment when defendant 1's servant unlawfully trespassed upon the land and dispossessed him. He traces his title and ownership to the suit property from Somu Mudali. Defendant 1, trustee pleaded that the suit property belonged to the temple and continued to belong to it, that Samu Mudali was in occupation of a portion thereof

in consideration of his doing service to the temple on festival occasions and also in consideration of his giving coconuts to the temple from the trees standing thereon on festival and other occasions, i.e., as a Kasavargam tenant,

that Somu Mudali was similarly in occupation doing the same service but after his death the properties came into the possession of the temple and continued to be in its possession. He denied that the plaintiff or his father was in possession and also the trespass alleged. It will thus be seen that on the pleadings the title asserted on either side was one of absolute ownership. The written statement clearly indicates that after Samu Mudali's death the Kasavargam tenancy came to an end and the property was not in the possession of anybody on Kasavargam tenure. The issues do not raise any question of tenure. Issues 1, 2 and 5 raise the question of the plaintiff's title as alleged in the plaint and his possession within 12 years before suit and also acquisition of title by prescription by the plaintiff. If at all the question of Kasavargam tenancy may be said to be involved in the issue relating to prescription. The learned District Munsif on a review of the entire evidence, in a carefully considered judgment found that after the site had passed into Somu's possession none had been doing any service to the temple, that he, his brother and his brother's widow were enjoying it as their absolute property, that after its sale to the plaintiff's father in 1884, he was enjoying it as his private property and that after his death, the plaintiff's family was enjoying it as such, that the temple was never in possession of the property within 12 years before suit and he acquired title thereto by adverse possession.

2. The learned District Munsif in discussing the question of adverse possession observes though from Ex. IV-b Samu Mudali appeared to be a Kasavargam tenant in regard to a portion of pymash No. 1235, still from the fact of his dealing with both the pymash numbers it could fairly be presumed that he occupied, the entire suit property as a tenant, but the tenancy became forfeited on alienation, that Somu was not in possession as a tenant and even assuming that Somu and his brother Rangaswami were Kasavargam tenants and after Rangaswami's death the property was inherited by his widow as such a tenant, the tenancy must have been determined on the alienation of the suit land by Rangaswami's widow, Parvathi Anni, to the plaintiff's father and that to the knowledge of the temple authorities the site was enjoyed by persons who were not Kasavargam tenants. He accordingly held that if the tenancy is deemed to be determined by the alienation the temple's right was lost Under Article 139, Lim.

Act, and in any event it must be held to be barred by Article 143 and the tenant must be deemed to have acquired indefeasible right to the property. The learned District Judge concurred in every one of the conclusions of the learned District Munsif" save on the question of adverse possession. He said:

As the learned District Munsif says the presumption is that he (Samu) came into possessions of it as a tenant; and I think it may also be fairly presumed that his tenancy of the whole of the two numbers was the same as the tenancy which he undoubtedly had of a portion of 1235, i.e., a Kasavargam tenancy. The argument which was addressed to me for the temple on the question of adverse possession went on the assumption that Samu Mudali was a Kasavargam tenant of the whole of the land now in suit.

3. But he held that the tenancy was not forfeited on alienation and that the temple-could have in 1927 called upon the representatives of the original tenant to render the Kasavargam service for 1927 and on their refusal could have sued to eject them. He was also of opinion that though the agents of defendant 1 might have knowledge that the land was being in the possession of the plaintiff's father there were no grounds for presuming that the trustees must have realized that the plaintiff and his father were claiming to hold adversely to the temple. He finally came to the conclusion that the plaintiff has not acquired title by prescription and dismissed the suit. Mr. Rajah Ayyar on behalf of the plaintiff contends that on the concurrent findings of both the lower Courts the alienation of the suit property having taken place in 1836, the tenancy, such as it was, must be deemed to have come to an end and the right to possession of the temple became barred by Article 143 and the plaintiff and his predecessor-in-title have acquired title by prescription.

4. It seems to me that the inference of both the lower Courts that Samu Mudali was in occupation of both the pymash numbers as a Kasavargam tenant is not correct. In the first place from the mere description of Samu Mudali as a Kasavargam Samu Mudali in Ex. IV-b, it is not safe to infer that Samu Mudali was occupying the particular plot as a Kasavargam tenant under the temple. From she treatment of the entire property as the absolute property by Samu Mudali so early as 1837, the presumption would seem to be that the entire property was not held on a Kasavargam tenure. Assuming that Samu Mudali held the entire plot as a Kasavargam tenant on the date of alienation in favour of Somu, did Somu after alienation hold the same as a tenant? That the property came into the possession of Somu is admitted in the written statement. To say the least, the plea of Pandarasannadhi in this behalf is disingenuous. There is in my opinion a distinct admission of the alienation in favour of Somu, but to get over the effect of alienation, service to the temple was alleged but both the Courts have found that the said allegation was false, and that neither he nor his members of the family did any such service. Thus if to the knowledge of the temple possession came into the hands of the alienee of Samu and he and his successors were not doing any service to the temple, but on the other hand they

were dealing with the property as their own, would it not be legitimate to presume that even assuming in its inception Samu came to be in possession as a Kasavargam tenant of a portion of pymash No. 1235, by the date of the alienation by Samu to Somu, the entire property was not the subject of any tenure and Samu came to own the property as absolute owner and there was a grant in favour of Samu by the temple. There is nothing to prevent such a presumption being made because the property belonged to the temple: vide *Magniram Sitaram v. Kasturbhai Manibhai* AIR 1922 PC 163.

5. Assuming the entire property down to the date of alienation in the hands of Somu was held by him as a Kasavargam tenant, the question is, what is the effect of an alienation by him as a Kasavargam tenant or even assuming Somu was such a tenant, what is the effect of an alienation by his successors? The incidents of a Kasavargam tenancy in districts in which it prevails and especially in the Tanjore District with which this second appeal is concerned, so far as they have been ascertained by judicial decisions may be thus stated: (1) The Kasavargamdar has no proprietary interest in the land which he occupies; (2) he is the proprietor of the superstructure if any he built thereon and is entitled to compensation for the value of the superstructure on eviction; (3) he and his heirs are entitled to occupy the land so long as he or they perform the service and are willing to do so, *Nadarsa Rowthen Vs. Amirtham and Others*, ; (4) mere cessation of service does not put an end to tenancy. He forfeits his right to occupy the land only if he refuses to perform service: vide *Saminatha Iyer v. Marimuthu*, (1912) 14 IC 689. Therefore there must be refusal by the tenant before the landlord is entitled to evict him; (5) the Kasavargamdar is not entitled to alienate the land by sale or mortgage but the tenancy passes by inheritance to his heirs subject to the same conditions of tenure, *Nadarsa Rowthen Vs. Amirtham and Others*, , (6) on alienation the landlord is entitled to evict the alienee without any notice to quit: vide *Subbaraya v. Nataraja*, (1891) 14 Mad 98.

6. The effect of the alienation therefore by the Kasavargamdar is to cause a forfeiture of the tenancy and the alienee does not acquire the status of a tenant unless and until he is recognized as such by the landlord. Thus the landlord has got a right to recover possession the moment the forfeiture is incurred. There is authority for the position that in such circumstances Article 143, Lim. Act, may be applied. In *K.V. Ayyaswami Pattar and Another Vs. M.R.Ry. Manavikrama Zamorin Rajah Avl. of Calicut (dead) and Others*, , the learned Chief Justice and Cornish, J. dealt with case of a customary tenure in Malabar. His Lordship the Chief Justice in the course of the judgment observed thus;

The Subordinate Judge found that, as the tenure was determined by forfeiture, the plaintiff, the respondent here was entitled to resume the properties; but with regard to the question of limitation he held that as the alienation took place in 1900 the forfeiture was incurred then and as the suit was instituted more than 12 years after that, it was clearly barred by Article 143, Lim. Act.... His plaint is quite clear and the claim is based upon a forfeiture by reason of alienation and

nothing else. In this Court we intend to confine ourselves to that claim. The article applicable is clearly Article 143 and limitation commenced to run from the date of alienation. In ray view, the respondent's claim in the Court below was clearly barred.

7. This is also the view taken in two earlier cases, *Madavan v. Athi Nangiyar*, (1892) 15 Mad 123 and *Zamorin Rajah of Calicut v. Unikat Karnavan Samu Nair* AIR 1922 Mad 290. But it is contended by Mr. K.S. Krishnaswami Iyengar that the said decisions are wrong, that Article 143 would not apply to the case of a landlord and tenant but Article 139 would; that for the application of Article 143 mere forfeiture will not do but it should have been perfected by an overt act and that as there was no determination of the tenancy by an overt act following the alleged forfeiture the plaintiff or his predecessor in title has not acquired any title to the property by lapse of time. In my opinion this contention is untenable. The effect of a forfeiture by reason of the breach of the conditions in a lease is thus stated by Redman on Landlord and Tenant at pp. 579 and 580:

An act or default whether in terms defeating the estate or giving a right of re-entry does not absolutely determine the lease but makes it voidable at the election of the landlord alone and not of the tenant who may not take advantage of his own wrong. And the landlord must by some unequivocal act evince his intention to avoid it, such as commencing proceedings in ejectment.

8. Thus it will be seen that no overt act i.e., no act or intimation of election on the part of the plaintiff to avoid the lease as necessary before bringing an action of ejectment, the action itself being treated as manifestation of an election to avoid the lease. But u/s 111, T.P. Act, there must be an overt act signifying the landlord's intention to determine the lease and the suit is liable to be dismissed in the absence of proof of such an act. But Courts in India have applied the English rule to cases of tenancies before the Transfer of Property Act or to cases which are not governed by it. The effect of forfeiture in Indian law is accurately summed up by Sadasiva Aiyar, J. in *Korapalu v. Narayana* AIR 1915 Mad 813:

The provision in Section 111, T.P. Act (about a further act being necessary besides the breach of the covenant in the forfeiture clause before a suit could be brought) was probably a relic brought over into that Indian statute from the antiquated technicality of the old English Common Law which required the formality of re-entry by the lessor of the leased lands before the lease could be determined for breach of covenant; but this formality is unnecessary in the case of leases not governed by the Transfer of Property Act. As said in *Padmanabhayya v. Ranga* (1910) 34 Mad 161, the forfeiture is complete when the breach of the condition or the denial of the title occurs. But as it is left to the lessor's option to take advantage of it or not the election was not a condition precedent to the right of action, but the institution of the action was simply a mode of manifesting the election.

9. I would put it even more strongly by saying that, as the breach of the

condition gives rise to a cause of action at once, there is strictly no question of election between two different rights, but there is only an election whether the lessor is to retain the right created or to give up the right. Thus the legal position is this. In a case which is not governed by Section 111, T.P. Act, a forfeiture though it does not determine the lease ipso facto, gives an immediate right to sue for possession. No doubt it is open to the landlord until the institution of the suit to waive the forfeiture if he does not in the meantime express any intention to claim it. The reason of the rule is, the happening of the cause of forfeiture only renders the lease void as to the lessee. It may be affirmed by the lessor; then the rights and obligations of both parties will continue without regard to the forfeiture, but until there is a positive act affirming the tenancy and thereby waiving the forfeiture, the right to sue for possession by reason of the incurring of the forfeiture will continue to subsist in the landlord and if he does not avail himself of it his right will be barred. But if he does any act indicating his election to waive the forfeiture, his right of action is barred and he must wait until forfeiture is again incurred or the lease is determined otherwise.

10. If these principles of substantive law are borne in mind, it will be seen that both Arts. 139 and 143 apply to the case of landlord and tenant though their operation is different. If it is necessary that forfeiture should be followed by an overt act determining the lease before the landlord can sue for possession, the forfeiture land the overt act determine the lease and Article 139, Lim. Act, would apply and the landlord will have 12 years to recover possession from the time when the lease is determined by the overt act. But where forfeiture itself gives rise to an action for possession at once, Article 143 would apply. If a period of 12 years is allowed to elapse from the time the right to sue for possession has accrued, the tenant acquires title to hold the land absolutely by the operation of Section 28, Lim. Act. But if the landlord waives the forfeiture, he can wait until the termination of the lease in cases where the lease is terminable otherwise and take advantage of Article 139. It is wrong to view the question as one of adverse possession. Article 143, Lim. Act, is based on Sections 2 and 3 (1833, 3 and 4 Will. IV, Ch. 27) and the relevant provisions run thus:

2. No person shall make any entry or distress or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within 20 years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

3. . . . And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

11. On a construction of this statute it has been held that where an estate is

liable to be determined by forfeiture time prima facie runs from the date of forfeiture but u/s 4 of the said statute (a provision corresponding to which is not found in the Limitation Act) if advantage is not taken of the forfeiture it does not run till the estate falls into possession. In *Governors of Magdalen Hospital v. Knotts* (1878) 8 Ch D 709, a question arose as to when the right to sue for possession accrued to a landlord under the said statute to recover possession of property let under a voidable lease. Theisiger, L.J. discussed the effect of the said provisions 2 and 3 and observed thus:

Where a lease is made in breach of trust, the avoidance of such lease takes effect ab initio, and may render the lessee liable to account for back profits, while the lessee under a voidable lease has a lawful possession until the lease is actually avoided and is not liable in an action for mesne profits for anything prior to the avoidance. It may be said therefore that in the former case the possession is adverse throughout, while in the latter it only becomes adverse when the determination to put an end to it is communicated either by service of writ or otherwise. But the distinction referred to, although existing in point of fact, does not necessarily carry with it different legal consequences so far as the Statute of Limitation is concerned. That statute has got rid of the doctrine of adverse possession and renders immaterial the inquiry into the nature of the possession of the person against whom the claim to land or rent is made. The question under it, and upon which the case in *Magdalen College v. Attorney-General* (1857) 6 HLC 189 and the cases following it proceeded, is, whether 20 years have elapsed since the claimant's right of entry or action accrued.... A right to issue a writ of ejectment to recover land held under a voidable lease, without proof of any prior act evidencing an election to avoid it is a right to bring an action within the meaning of the second section of the statute in question.

12. See also *Whitton v. Peacock* (1834) 3 M & K 325, a case to which Section 4 of the Statute is not applicable. And the effect of the statute has been held

to be to make a parliamentary conveyance of the land to the person in possession after that period of 20 years has elapsed: vide *Doe D. Jukes v. Sumner* (1845) 14 M & W 39.

13. No doubt in *Governors of Magdalen Hospital v. Knotts* (1879) 4 AC 324, the case in *Governors of Magdalen Hospital v. Knotts* (1878) 8 Ch D 709 was affirmed on the ground that the lease was void differing from the Court of appeal, but the observations of Theisiger, L.J. remain unaffected and they would directly apply to cases coming Under Article 143, Lim. Act. Therefore the question under that Article is whether 12 years have elapsed from the date of forfeiture and not whether the tenant was holding adversely. There can be no doubt in this case that under the incidents appertaining to the Kasavargam tenure, the tenancy would determine on forfeiture; even assuming it is not ipso facto determined by forfeiture still the landlord had a right to sue for immediate possession. Therefore on the date of alienation by Samu to Somu, forfeiture had been incurred and the temple had an immediate right to sue for possession and

it cannot for a moment be doubted that the temple must have known that the property was being dealt with by Somu and his successors in title as absolute owners and the possession of Somu was admitted by the trustee himself as already stated by me; Article 143 would therefore apply and the plaintiff's predecessors-in-title and therefore the plaintiff must be deemed to have acquired an indefeasible right to hold the land absolutely, and the defendants have no right to resist his claim. I would therefore reverse the decree of the learned District Judge and restore that of the learned District Munsif with costs throughout. Leave refused.