

(1916) 08 MAD CK 0022
In the Madras High Court

A.S.S. Subbaiya Pandaram

APPELLANT

Vs

Mahamad Musthapa Maracayar and Others

RESPONDENT

Date of Decision : 31-08-1916

Acts Referred:

Transfer of Property Act, 1882 — Section 69

Citation : (1917) 5 LW 690 : (1917) 32 MLJ 85

Judgement

1. his an appeal by the plaintiff from the Decree of the Subordinate Judge of Tanjore dismissing the suit on the preliminary ground that it was

barred by Limitation.

2. The case has not been fully tried and except where the facts are admitted we have to take the statements in the plaint as true "for the present

purpose. The facts which raise the question in dispute may be shortly stated.

3. One Subbaiya Pandaram acquired large properties in a salt trade and settled certain of his properties in trust for charity by two instruments,

dated 21st February 1890 and 13th December 1894 and marked as Exhibits B and B 1 in the case. He had an only son. Arunachela, the 3rd

defendant and the plaintiff is his son. Subbaiya Pandaram constituted himself the 1st trustee and after his death his descendants according to

seniority were to be trustees hereditarily. The trustee for the time being had the power, if he was so inclined, to take Rs. 144 a year for his own use

out of the income of the charity properties and this power he had to exercise within three months after the close of the year. These are the only

material terms of the trust deeds for the present purpose. Subbaiya Pandaram died in 1895 and after his death a decree was obtained against

Arunachela for a large sum said to be due from his father Subbaiya and in

execution of that decree the charity properties covered by both Exhibits B and B 1 were attached as the private property of Subbaiya. The plaintiff objected to the attachment in the execution proceedings and on his objection being rejected instituted a regular suit to establish the right of the charity. While that suit was pending, the properties were sold in execution sale and purchased by the 1st defendant who obtained possession in March 1898 and he is in possession down to this date. Arunachela was removed from the trusteeship in July 1913 and the plaintiff is now the trustee under the deeds of endowment. The plaintiff now sues as trustee of the charity to recover possession of the charity properties on the ground that their sale for the payment of the personal debts of Subbaiya was void and that the 1st defendant acquired no title by his purchase. He also charges the 1st defendant with knowledge that the properties which he purchased were charity properties. He says he was a minor within three years before the action was brought. In these circumstances the 1st defendant having admittedly been in possession for over twelve years at the time when the action was brought and the charity represented by the then lawful trustee, the 3rd defendant who was under no disability, having been out of possession for over twelve years the question is whether the suit of the plaintiff is not barred by the Statute of Limitations. The plaintiff says no, and his case is put by his learned pleader in four different ways.

4. First he contends that the trustee for the time being is entitled to a beneficial interest to the extent of Rs. 144 a year, out of the charity properties which can legally pass to an alienee and that the execution sale did therefore pass an interest to the 1st defendant which came to an end only on the removal of the 3rd defendant from the trusteeship and that therefore on the principle of the decision of the Privy Council in *Abhiram Goswami's* case (1909) 36 I.A. p. 148, as explained in *Narsaya Upada Vs. Venkataramana Bhatta*, and followed in *Muthusami Aiyar v. Sree Sreemathinithi Swamiyar* avergal (1918) 25 M.L.J. p. 393 he was entitled to bring his action within twelve years after he became trustee and that the possession of the 1st defendant did not become adverse to him or to the charity till the beneficial interest of the 3rd defendant, of which the 1st defendant was transferee, ceased. This contention is, we think, untenable. The Rs. 144 which the trustee at his option is entitled to take is not an interest in the

charity properties which can pass to an alienee and by virtue of which the alienee has a right to hold possession of the charity properties during the period when the alienor remains a trustee. It is really in the nature of a power which the trustee has to exercise from time to time and the trustee for the time being has no proprietary interest in the trust properties. This is the view which the plaintiff himself took for in paragraph 4 of his plaint he says ""neither Subbaiya Pandaram nor his heirs have any proprietary right therein"", that is, in the charity properties.

5. Next he contends that there was no limit of time for the institution of this suit and that Section 10 of the Act applied. The argument, if we

understood right, was that the 1st defendant was not an assign for valuable consideration, because though he is an assign and though he gave

valuable consideration, he was not an " assign for valuable consideration "within the meaning of the section as he had knowledge at the time of his

purchase of the true nature of the property and that it could not be sold for the payment of the private debt of the trustee; in fact, unless he acted

with good faith an assign for consideration is not an assign for consideration within the meaning of the section. There is no warrant for the

introduction of additional words to qualify the plain meaning of the section and when we remember that the very words "in good faith" which were

found in the Limitation Acts of 1871 and 1859 were deliberately omitted in the Act of 1877, this introduction becomes still less permissible. The

only authority cited is a case reported in Rama Churn Tewary v. Protap Chundra Dutt Jha (1886) 2 C.L.J. 448. That decision was adversely

criticised in Rama Kanai Ghosh v. Rajah Sri Sri Hari Narayan Singh Deo Bahadur (1905) 2C.L.J. 546 a case reported at p. 546 of the same

volume where Mookerjee, J. examines the provisions of Section 10 and the cognate Article 134. We entirely agree, if we may say so with respect,

with that exposition. It is true that in a case reported in Singaram Chettiar v. Kaliasundaram Pillai (1914) M.W.N. 735 the learned Chief Justice

and Mr. Justice Hannay said they were unable to follow this ruling of Mookerjee, J. as they thought that it appeared to be at variance with the

decision of the Privy Council in Radhanath Doss v. Gisborne (1871) 14 M.I.A. 1 at p. decided under the Act of 1859 and other decisions which

followed it even after the words "in good faith" were omitted in the Acts of 1877 and 1908. This observation is merely obiter and¹ a careful

perusal of the judgment of Mookerjee, J. shows that it is in no way inconsistent with the decision of the Privy Council or the other decisions which

followed it as we shall shew presently. Mr. Ramachandra Aiyar relied on this and certain other decisions of this Court as to the meaning of the

word "purchaser" occurring in Article 134 of the Act as throwing light on the meaning of the word assign for value, in Section 10; see Singaram

Chettiar v. Kalianasundaram Pillai (1914) M.W.N. 735 and Tholasinga Mudali v. Nagalinga Chetty (1871) 14 M.I.A. 1. In these cases the

meaning of the word "purchaser" as applied to a purchaser from a mortgagee was discussed. It is clear that an assignee merely of the mortgagee's

interest is not a purchaser within the meaning of the article. It obviously means a person who purported to obtain an absolute title which the

mortgagee purported to convey. Except in an English mortgage or a mortgage by conditional sale, the absolute title or the legal estate is not vested

in the mortgagee; and except in a very limited class of mortgages the mortgagee has no power to sell the mortgaged property. (See Section 69 of

the Transfer of Property Act). If therefore the assignee from a mortgagee knows that his assignor is only a mortgagee and that he could under no

conceivable, circumstances dispose of the absolute title, as for instance, in the case of an ordinary usufructuary mortgage of properties outside the

Towns specified in Section 69 of the Transfer of Property Act, that assignee may not be a purchaser within the meaning of the article. That is the

utmost extent to which the cases take us. Lord Cairns delivering the judgment of the Privy Council in Radanath Doss v. Gisborne (1871) 14

M.I.A. 1at p., said that a purchaser must mean "some person who purchases that which de facto is a mortgage upon a representation and in the

full belief that it is not a mortgage but an absolute title." It is to be observed that "good faith" is not said to be an element in the definition of

"purchaser". That was another requisite required by the Act of 1859 to entitle a purchaser to take advantage of the shorter period of limitation

prescribed by Section 5 of the Act; the "full belief" need not be a bona fide belief. This is made quite clear at pages 17 and 19 of the report. At

page 17 His Lordship says ""In pleading a purchase for valuable consideration in this country, the very first averment in the plea is, that the person

selling either was seised, or alleged that he was seised, for an absolute title and then the plea goes on to say, that being so seised, or alleging that he

was so seised, he contracted to sell, and did sell and convey that absolute title, asserting it to be such, to the purchaser, who paid his money for

that which was thus sold,"" and at page 19 after considering the terms of the deed of transfer by the mortgagee to the purchaser in that case, he says

Their Lordships can find in this deed no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the

property of the Maheewan estate was a property which the vendor claimed to hold by what we should call in this country a fee-simple title,"" It

will be seen that their Lordships nowhere say that if a transferee from a trustee or mortgagee knew that his vendor was a trustee or mortgagee he

cannot be a "purchaser" within the meaning of Section 5 of the Act of 1859 corresponding to art, 134. They merely use that fact as an element to

be taken into consideration in determining the question whether in fact the transferee purported to purchase anything more than the mortgagee's

interest. It must be remembered that a mortgagee as such has a transferable beneficial interest in the mortgaged property while a trustee as such

has no such interest, though a trustee may also be a beneficiary under the trustee. Both in the case of a trustee and mortgagee the purchaser may

have knowledge that his vendor is only a trustee or mortgagee; but they may purport to transfer the absolute title in the exercise of a power of sale

and the vendee may purchase it knowing or having reason to believe that the trustee or the mortgagee was exercising that power mischievously or

even fraudulently; at the same time he may bargain for and get a transfer of the absolute title. There can be no doubt that the purchaser in such a

case obtains the sale in the full belief that what he is getting is a transfer of the absolute title, though at the same time he may know that if

proceedings are taken against him he may not be able to retain his purchase; Article 134, in fact, assumes that the purchaser in possession could

not resist a suit for recovery and that his title by purchase is not good. If good faith were required, the purchaser except in a very small number of

cases (as for example, where the transfer is made in the exercise of a power bona fide assumed to exist by both parties though in fact there is no

such power) would get a good title without the assistance of any law of limitation. So long as the legal title is transferred to the purchaser and

possession given to him whether such title is transferred by virtue of the legal estate vesting in the trustee or mortgagee or by virtue of a special

power, the transferee can take advantage of Article 134, So far at any rate as alienation of trust property is concerned there is no distinction

between a private trust and a charity. In this matter the decision of the Privy Council in Dhamodar Doss v. Lakhan Doss ILR (1910) C. 885

appears to be conclusive. There the two disciples of a deceased Mahant divided the properties of the Mutt which were trust properties to their

knowledge, the junior chela obtaining a portion. It was held that the possession of the junior chela was adverse to the senior chela and the trust

which he represented, and the title of the charity was barred after twelve years of such possession. We must therefore disallow this contention.

6. The next contention is that the possession of the 1st defendant was not continuous for 12 years. It was said that in a previous suit between the

parties (to which we shall have to refer hereafter on another point) the 1st defendant was appointed Receiver by the Court and that during the

period when the 1st defendant was in possession as Receiver, his possession could not be said to have been adverse to the trust. In the first place

there is no allegation in the plaint that the 1st defendant ever lost his possession after he got it in March 1898. Whether this so called interruption

was before the 1st defendant perfected his title by 12 years possession or after, we do not know. As to the terms and conditions on which the 1st

defendant was appointed, there is no statement. Mr. Ramachandrier says that his client will supply all these omissions at the trial, but the question is

not one of proof, but of pleading. Assuming however that the 1st defendant was in possession as Receiver for some time during the pendency of

the former suit, that suit having been admittedly dismissed, the 1st defendant now who was also the defendant in that suit could not be said to have

lost his possession during his receivership. It is not contended that the 1st defendant quitted possession or lost possession and that nobody was in

possession during that period, so as to revive the possession of the trust as in the case of Agency Co. v. Short (1888) L.R. 3 A.C. 798. The

possession of the Court through the Receiver can only be on behalf of the party entitled as finally settled in that suit and as the suit was dismissed,

the possession must be deemed to have been on behalf of the 1st defendant himself, he being the successful party.

7. These are the points taken in respect of the claim of the plaintiff as the lawful trustee of the charity in succession to Arunachela his father who

had been removed from the trusteeship in 1913. Article 134 of the Limitation Act, has been held by this Court to be inapplicable to a purchaser in

court auction Ahmed Kutti v. Raman Nambudri ILR (1901) Mad. 99. We have held that Section 10 does not apply. The only other articles

applicable are Article 142 or 144. Whichever article applies, the 1st defendant having been in possession without any title whatsoever (for the case

of the plaintiff is that the execution sale was absolutely void and conveyed no title whatever to the 1st defendant) the title of the trustee Arunachela

and of the charity which he represented was extinguished. Damodar Das v. Lakhan Das ILR (1910) C. p. 885. The plaintiff as a successor has no

fresh cause of action. The plaintiff's suit then as the successor of Arunachela in the trusteeship fails and must be dismissed.

8. But the plaintiff contends - that is the fourth point argued by Mr. Ramachandrier - that he has put forward an alternative claim to the possession

of the lands on the ground of his prior possession, even when Arunachela was the trustee, and that the 1st defendant in fact dispossessed him when

he (the 1st defendant) obtained delivery in March 1898 and in as much as he, the plaintiff, was a minor at the time of the dispossession and within

three years of the institution of the suit, his claim to recover possession treating his prior possession as the root of his title is not barred. This raises

an interesting question as to the rights of successive independent trespassers who have been continuously in possession if and when the title of the

real owner is extinguished. The weight of authority is in favour of the view that in such a case the first trespasser gets the title and not the last who

was in possession at the time when the title of the real owner became extinguished. It is now well settled that a person in possession without a title

has the right to maintain his possession against all the world except the rightful owner; that he can sue in ejectment and recover possession - not

merely in trespass --from any person who subsequently dispossesses him unless the latter is the real owner or claims under him or justifies under

his authority; proof by the defendant that the real title was outstanding in a third party would be no defence. In fact the prior possession is itself a

root of title and the prior possessor has all the rights of a true owner except of course against the owner himself, see Asher v. Whitelock (1865)

L.R. 1 Q.B. p. 1 where Doe v. Barnard (1849) 13 Q.B. p. 945 is explained; Perry v. Clissord (1907) A.C. 73, Sundar v. Parbati ILR (1889) All.

P. 51, Narayana Rao v. Dharmachar ILR (1902) Mad. P. 514. It is equally well settled that the effect of the extinction of the title of the real owner is not to transfer that title to the person in possession at the time of such extinction, though it is sometimes said that the adverse possessor for the requisite period obtains a title by statutory transfer. Section 28 of the Limitation Act like Section 34 of 3 and 4 Will. IV Ch. 27 merely extinguishes the title of the real owner, and the person in possession who had a right to retain that possession against all but the real owner in consequence of the extinction of the title of the real owner cannot be ousted thereafter even by the real owner and in that sense acquires a title by statute; but it is not an involuntary transfer by statute of the estate of the rightful owner though the title acquired by the trespasser may have the same legal character as that lost by the rightful owner (See Dart's Vendors and Purchasers, Vol. I p. 473). Cf. Tichborne v. Weir 67 Law Times p.735 with In re Nisbett and Potts Contract (1906) I. Ch. P. 368. From this it follows that if a prior possessor had a right to eject a subsequent trespasser so long as the title of the rightful owner was outstanding, that right could not cease to exist because that title becomes extinct by lapse of time. If then the prior possessor can eject the subsequent trespasser the title must be in the first trespasser unless of course the subsequent trespasser had obtained a title by adverse possession against the previous trespasser This is the view taken by Sir F. Pollock, (see page 95 of his essay on possession) by Dart (Vendors and Purchasers p. 474) by Mr. Y.H. Carson (Real Property Statutes, p. 80) and by Mr. Lightwood, (Possession of land, p. 275. The case of Asher v. Whitlock (1865) L.R. 1 Q.B. p.1 appears to decide this very point as will be seen from the various dates given in the report. The title of the real owner appears to have become extinguished by the lapse of 20 years when the widow of the original disseisor and her second husband were in possession; at that time she had no title to remain or retain possession as her interest ceased by her second marriage and her daughter was the person entitled. The daughter's heirs succeeded in ejecting the second husband of the widow, which they could not have done if the title vested in the widow or her second husband who were the subsequent trespassers in possession at the time when the title of the real owner was extinguished. The passage from Pollock on Possession was cited with approval by Lindley, L. J. (as he

then was) in *Dalton v. Fitzgerald* (1897) 2 Ch. P. 86. The only authority against this view are some observations of Lord Romilly in *Dixon v.*

Gayfere (1853) 17 Beav. P. 421 from which it appears His Lordship was of opinion that in law the person last in possession would acquire the

legal title. The actual decision in the case does not touch the present question. These observations were dissented from in *Asher v. Whitlock*

(1865) L.R. 1 Q.B. p. 1 where Cockburn, C. J. said ""The Master of the Rolls may be right in equity, but I doubt his being right in law."" It appears

that when the Limitation Bill of 1877 was drafted it was proposed to add a section dealing with this matter but it was dropped (see *Mitra*, Vol. I,

p. 445). On principle and on the authorities we think the plaintiff had a right to recover possession on his title based on his prior possession, and

that right is not barred if the facts are as alleged by him. Mr. Rangachariar however contended that though this may be so in a case where the

plaintiff claims the property beneficially, in this case as he sues to recover the property for the charity and inasmuch as the charity is barred by

reason of the 12 years adverse possession suffered by the lawful trustee, the plaintiff's suit is barred. We think this is not correct. For the purpose

of limitation the plaintiff must be taken to be suing for a personal right, though no doubt if he recovers possession of the properties he may have to

hold them for the charity. The charity is barred and can be barred only when its trustee or the manager is barred, as the charity can sue only

through a natural person see *Jagadindranath Roy v. Hemanta Kumari Debi* ILR (1904) Cal. P. 129. Mr. Rangachariar did not contend that as the

1st defendant obtained possession claiming under a sale in execution of a decree against the then trustee, (which sale must on the allegations in the

plaint be taken to be a nullity) that the 1st defendant could have resisted any suit for possession by the plaintiff by virtue of his prior possession.

9. This conclusion of ours would necessitate a remand of the suit for a trial of this claim. But Mr. Rangachariar contends that as this very claim

based on prior possession was put forward as a ground of claim in a previous suit, O.S. 16 of 1907 between the same parties, where also the

present plaintiff asked for the same reliefs as he asks now and as that suit was dismissed the present claim is barred by the former adjudication.

Although this question was not dealt with by the lower Court, in Order to avoid delay we decided to hear parties on this point in appeal and

dispose of it here as the question is one of pure law. It depends entirely on the effect of the former Judgment, Exhibit G. The plaintiff in the suit has also been read to us by the appellant and we find the material portions, correctly set out in the Judgment G. In paragraph 12 of the plaintiff in that suit the present plaintiff in setting out his various titles for the reliefs claimed there, set up this very title of prior possession. The only relief asked for was possession of the properties sued for from the present defendants 1 and 2 who were also defendants 1 and 2 in that suit. The father Arunachala was made a party but no relief was asked against him and no relief by way of recovery of possession could possibly be asked, as admittedly he was not in possession. The Subordinate Judge of Negapatam in whose Court that suit was filed, the same Court in which the present suit also was instituted, held that the prior possession of the plaintiff even if true gave him no cause of action to recover possession of the properties till that prior possession was perfected under the statute of limitation against the real owner and disallowed the claim. Whether he was right or wrong in so holding, the decree dismissing the plaintiff's suit based inter alia on that claim is res judicata, and obviously prevents the plaintiff from again putting forward the same claim. The appellant agrees that this may be so, but as in this case, Arunachala who was the lawful trustee was a party to that suit, that decision cannot be res judicata; the right argument is that as the plaintiff cannot recover against the lawful owner by virtue of prior possession and having been a party to that suit, that decision was perfectly right and that decision really held, that the prior possession was not good as a root of title against a trespasser in the presence of the lawful owner. We are unable to accept this contention. It will be seen from the pleadings and the judgment in the previous suit, that though Arunachala was a party to that suit, he was only a nominal party; not even a declaration of title against him was asked - not that this would make any difference for the application of the principle of res judicata. The cause of action on the claim of prior possession ""was against the parties in possession and against them alone and it is against them that the suit was dismissed. We therefore think that this claim was not available to the plaintiff in the present suit.

10. Mr. Ramachandrier also contended that the respondent is not entitled to take this point now as he did not raise it in his written statement and if

he had raised it then, the appellant have avoided the plea by pleading fraud, negligence or other ground of avoidance of the previous judgment.

There is no basis for this contention. For the defendants have pleaded this very judgment as res judicata in paragraph 17 of their written statement

and an issue (issue 10) has been raised on this plea. The plaintiff never pleaded that the previous judgment was not binding on him. We must

therefore dismiss the appeal with costs.