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**(1966) 12 KL CK 0019**  
**In the High Court Of Kerala**  
**Case No : S.A. No. 240 of 1963**

Kesava Pillai and Others

APPELLANT

Vs

Sreedharan Pillai and Another

RESPONDENT

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**Date of Decision :** 01-12-1966

**Acts Referred:**

Limitation Act, 1908 — Section 28  
Limitation Act, 1963 — Article 148

**Citation :** (1967) KLJ 479

**Hon'ble Judges :** P.T. Raman Nayar, J

**Bench :** Single Bench

**Advocate :** P. Kochukrishna Pillai and T.R. Achutha Warriar, for the Appellant; K. Velayudhan Nair, V.S. Muthathu, K.J. Joseph and M.C. Sen, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

P.T. Raman Nayar, J.—The property in suit originally belonged to the tarwad of Parameswara Pillai, the father of the plaintiffs. It was then subject to a possessory mortgage, Ex. P-1 dated 3.12.1087 M.E. (18.7.1912 A.D.) and a deed of further charge, Ex. P-2 dated 16.7.1093 (29.3.1918). The mortgagee was admittedly in possession, and, under the terms of the deed, nothing was payable, to the mortgagor by way of residual rent or profits. In a partition of the tarwad in 1103 (1927-28), the property was allotted to Parameswaran Pillai and his brother Gopala Pillai while their mother, Lekshmi Amma, who was then alive was given a separate share. The partition deed is not in evidence but the contention that Parameswaran Pillai and Gopala Pillai took the properties jointly as a thavazhi and not in equal shares as tenants-in-common was abandoned in the lower appellate court, and, although it has been repeated in the memorandum of Second Appeal, it has not been urged at the hearing. Gopala Pillai died in 1107 (1931-32) leaving his mother Lekshmi Amma as his heir. But Parameswaran Pillai seems to have been under the belief that Gopala Pillai's half share devolved on him by survivorship. At any rate, he sold the property on 24.2.1117 (10.10.1941) to the defendant as if it belonged solely to him. The

defendant, in due course, redeemed the possessory mortgage and got into possession -- but when exactly this happened does not appear either from the pleadings or the evidence, although, it is now said by counsel for the defendant that it was on 30.2.1117 (16.10.1941). In 1959, 17 years after the sale by Parameswaran Pillai to the defendant the plaintiffs who claimed Gopala Pillai's half share in the property under the gift Ex. P-5 dated 23.11.1958, in their favor by Lekshmi Amma, brought the present suit for partition and redemption and consequent possession of that half share from the hands of the defendant. They were met with pleas of estoppel, and of limitation and adverse possession. (There were other pleas but they are no longer pressed). Both pleas were rejected by the courts below which consequently decreed the plaintiffs' suit. Hence this Second Appeal by the defendant. The plea of estoppel was thus taken in paragraph 5 of the written statement:

Lekshmi Amma had conceded that, on Gopala Pillai's death, his property including his share in the suit property devolved solely on Parameswaran Pillai and had conducted herself accordingly. There has been no assertion of any title by her since 1107. Hence I believed that Parameswaran Pillai was the sole owner of the property and I bought it in 1117. The plaintiffs who claim under Lekshmi Amma are thus estopped from putting forward any title to the property.

The evidence adduced in support of this plea consists of Ex. D-1 dated 19.6.1111 (1.2.1936) and the testimony of the defendant as D.W. 1 and another witness as D.W. 3. Ex. D-1 is a possessory mortgage by Parameswaran Pillai and Lekshmi Amma of some properties, other than the suit property, in favor of a stranger. One of the properties covered by that mortgage was a property obtained by Parameswaran Pillai and his brother Gopala Pillai in their tarwad partition and with regard to this there was the statement in Ex.D-1 that Lekshmi Amma admitted that Parameswaran Pillai had got Gopala Pillai's share. The defendant in his evidence did not say that it was on the faith of the recitals in Ex. D-1 that he bought the suit property. Nor is there anything which in the least indicates that, by her declaration in Ex. D-1, Lekshmi Amma intentionally caused or permitted the defendant to believe it to be true that, on Gopala Pillai's death, Parameswaran Pillai got all his property, and to act on such belief. Ex. D-1 cannot therefore be the basis of an estoppel against the plaintiffs.

2. The evidence of the defendant and of Dw. 3 was to the effect that Lekshmi Amma actively participated in the negotiations that led to the purchase of the suit property by the defendant from Parameswaran Pillai and that she told the defendant that she had no right whatsoever to the property and that it belonged solely to Parameswarn Pillai. But this, as we have seen, is not what was pleaded as constituting an estoppel. The facts there pleaded were entirely different and made out only an admission by Lekshmi Amma (probably in Ex. D-1 but no particulars of this alleged admission were given) and her subsequent conduct in not setting up title in herself as constituting estoppel. I have little hesitation in rejecting this evidence as false and as something that cannot be looked into

having regard to the pleading.

3. It follows that the plea of estoppel was rightly rejected by the courts below.

4. With regard to the plea of limitation and adverse possession what is now stated is that the defendant was in adverse possession of the equity of redemption ever since his purchase on 24.2.1117 (10.10.1941) from Parameswarn Pillai who claimed full ownership, and that the defendant's possession of the property itself after redemption was adverse possession so far as the equity of redemption was concerned. Hence the plaintiffs' title to the equity of redemption was extinguished by the combined operation of article 144 and section 28 of the Limitation Act of 1908 long before they brought this suit. But the plea taken was only that the suit was barred by adverse possession for over 12 years after the defendant's purchase of 1117, not that the plaintiff's title had been extinguished by adverse possession, and, at any rate, in the lower appellate court, the argument seems to have been only that the article of limitation governing a suit for redemption brought against a redeeming co-mortgagor like the defendant by a non-redeeming co-mortgagor like the plaintiffs was article 144 and not article 148. Now, whatever might have been Parameswaran Pillai's assertion when he sold the property to the defendant in 1117 he was in truth only a co-owner of the property with Lekshmi Amma. And, despite his purchase of the entire property as if it belonged solely to Parameswaran Pillai that was the position occupied by the defendant as well. The plaintiffs' suit is therefore, as rightly contended by the defendant in the court below, a suit for redemption brought against a redeeming co-mortgagor by a non-redeeming co-mortgagor and the article of limitation to apply is article 148--see the recent division bench ruling of this court in Lekshmi Pillai v Chellappan Pillai (1966 K.L. T. 833). The suit, it is not disputed, was brought within 60 years of the possessory mortgage, Ex. P-1 dated 3.12.1087, and, as a suit for redemption and possession, it is clearly within time.

5. The plea of extinguishment of title by the operation of section 28 of the Limitation Act is often loosely taken in pleadings in the shape of a statement to the effect that the suit is barred by limitation and adverse possession, and I shall therefore proceed to consider the contention now urged on behalf of the defendant although there is no specific plea in support of it. As I have remarked, there was nothing payable to the mortgagor under Ex. P-I, and there was no act of possession which the mortgagor could have performed in respect of the equity of redemption. Therefore, in my view, the mere purchase of the equity of redemption by the defendant as if it belonged solely to Parameswaran Pillai could not have been followed, and was, in fact, not followed, by any act of possession with regard to the equity of redemption. So it follows that the defendant could not have been in adverse possession of the equity of redemption. His first act of possession in respect of the property was when he gained possession on redeeming the mortgage, Ex. D-I. But the possession he so gained could not have been adverse to the equity of redemption since it could be traced to his

lawful title as a redeeming comortgagor. The defendant, as I have already remarked, was only a co-owner of the equity of redemption along with Lekshmi Amma (after the gift by Lekshmi Amma to the plaintiffs, along with the plaintiffs) and the mere fact that he redeemed the property and got into possession cannot amount to ouster of the other co-owners of the equity of redemption. That would be so even if it be that, as asserted in the written statement, the purchase by the defendant from Parameswaran Pillai in 1117 was with the knowledge of Lekshmi Amma, the evidence tendered in respect of which assertion I have already disbelieved. The defendant had undoubtedly a half share, namely Parameswam Pillai's half share, in the equity of redemption, and his possession after redeeming the mortgage could not have been adverse to the other co-owners of the equity of redemption even if he believed that he was the sole owner of the equity of redemption. In truth, so far as the interest of the remaining co-owners was concerned, his possession was only that of a mortgagee by subrogation. No act amounting to an ouster in respect of the equity of redemption has been pleaded or proved.

6. All this apart, there is, as I have already said, nothing to show when the redemption was effected by the defendant so that, even if his possession after such redemption were adverse to the title of the other co-owners of the equity of redemption, there is nothing to show that he had completed 12 years of such possession when the suit was brought. In the result I dismiss this appeal with costs.