

(1970) 09 KL CK 0011
In the High Court Of Kerala
Case No : Appeal Suit No. 438 of 1964

Krishna Pillai Govinda Pillai	Vs	APPELLANT
Govinda Pillai Madhavan Pillai and Others		RESPONDENT

Date of Decision : 04-09-1970

Acts Referred:

Limitation Act, 1908 — Article 142, 144

Citation : AIR 1971 Ker 87

Hon'ble Judges : V.P. Gopalan Nambiyar, J; T.S. Krishnamoorthy Iyer, J; K. Sadasivan, J

Bench : Full Bench

Advocate : T.K. Narayana Pillai and N. Govindan Nair, for the Appellant; T.S. Venkiteswara Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Gopalan Nambiyar, J.—The 1st Defendant in a suit for redemption is the appellant in this appeal- It has been referred to a Full Bench as it was claimed that the Full Bench decisions in Mathew v. Ayyappankutty 1962 K LT 61 : (MR 1962 K 164 (FB)) and K. Gopalan Thanthri Vs. Ittira Kelan and Others, have covered the ground in the appellant's favour. The Division Bench which made the reference was not sure that these cases applied to the facts on hand, but felt it desirable that the matter should be heard by a Full Bench,

2. Ext. P. 1 mortgage, dated 10-4-1116 (1106?) (M. E.), sought to be redeemed, was usufructuary, and for a term of three years, in favour of the 1st Defendant, by one Narayana Pillai Govinda Pillai. Nothing was payable under the terms of the mortgage to the mortgagor (mortgagee--Ed.). There was a lease back in favour of the mortgagor. O. S. No. 2050 of 1110 was instituted by the appellant for arrears of rent under the lease-back, and for recovery of possession. The equity of redemption of the mortgagor was attached before judgment. The suit was decreed on 25th Kumbhom 1112 M. E. (vide Ext. D-I). In satisfaction of the decree the mortgagor sold the equity of redemption of the plaint property to the

appellant on 30-3-1115, under Ext. D-2. Meanwhile. O. S. No. 307/1113 had been instituted against the mortgagor, and, pending suit, the equity of redemption had been attached on 8-3-1113. In pursuance of the decree in the said suit, the equity of redemption was sold in auction on 20-4-1120, and purchased by the decree-holder under Ex. P. 2. He obtained the symbolical delivery on 13-12-1120 -- vide Ex, P3, and sold his rights to the plaintiff-respondent under Ext. P. 4 dated 15-2-1121. The appellant filed O. S. No. 46 of 1121, to set aside the Ext. P. 2 sale. The suit, his appeal, and Second Appeal therefrom, were all dismissed (vide Exts, P-5 to P-7). The present suit out of which this appeal arises was filed on 27-12-1133 M. E. corresponding to 11-8-1958, for redemption of Ext. P-1 mortgage on the strength of the court auction purchase evidenced by Ex. P-2. The appellant's plea was that in pursuance of Ext. D-2 sale by the original mortgagor, he had remained" in possession as full owner from and after that date, and even if the sale be invalid, he had perfected title against the mortgagor by adverse possession and limitation. This contention was repelled by both the courts below, and, in second appeal, also by a learned Judge of this Court. This further appeal has been preferred with the leave of the learned single Judge.

3. In K. Gopalan Thanthri Vs. Ittira Kelan and Others, a Full Bench of this Court held:

"Where by a sale or other transaction the mortgagor consents to the possessory mortgagee being in possession not merely of the mortgage interest but also of the equity of redemption, he, in effect, delivers possession of the equity of redemption to the mortgagee so that thereafter the possession of the tangible property by the mortgagee involves possession not merely of the mortgage interest, but of the equity of redemption as well. And, if the transaction does not effect a valid transfer of title to the equity of redemption, the mortgagee's possession thereof would be adverse to the mortgagor, and, by remaining in possession beyond the statutory period, he would prescribe title thereto. The same result would follow in the case of a landlord selling the reversion to the tenant in possession of the tangible property. What the Supreme Court emphasized in AIR 1963 SC 70 was that the consent necessary to put the possessory mortgagee in possession of the equity of redemption as well as to prescribe for title thereto, must be by a person competent to give consent, not by a person like a minor who has not the capacity to do so. The karnavan of a tarwad effectively and completely represents the tarwad in dealings with the outside world. Section 21 of the Travancore Ezhava Act and Section 25 of the Travancore Nayar Act only place curbs on the exercise of this power, but do not effect his inherent capacity. It follows that he has the capacity to consent to a possessory Mortgagee so changing the character of his possession as to comprise within its scope the equity of redemption as well, in other words, to put him in possession of the equity of redemption. And, if the transaction by which it is done is not effective to convey title to the mortgagee, then the possession of the equity of redemption by the mortgagee becomes adverse to the tarwad."

In the above case, the Full Bench affirmed the decision of this Court in = Chacko Mathew Vs. Ayyappan Kutty, that a sale of tarwad property by the karnavan of the tarwad to the mortgagee in possession alters the character of the latter's possession so as to include within its scope the interest of the mortgagor tarwad, with the result that, notwithstanding that the sale was an invalid sale not binding on the tarwad, a suit for redemption would be barred after 12 years of such altered possession.

4. The position here disclosed is fundamentally different. Here too, no doubt, Ext. D-2 sale in favour of the appellant, was, by reason of Section 64 of the Civil P. C., void as against the plaintiff-respondent. If nothing more had happened, and the appellant had continued in possession, he might conceivably have prescribed title by adverse possession. In A. S. Nos. 562, 629 and 630 of 1963, D/- 30-10-1969 (reported in 1970 KLT 610 and 1970 KLJ 809 Kochappi Kunji and Others Vs. Velayudhan Damodaran and Others, a Full Bench of this Court recently surveyed the position regarding adverse possession by the mortgagee of a bare equity of redemption, such as in the present case, against the mortgagor. After discussing the authorities this Court observed:

"For, the principle we would deduce from the above observations is this. Property subject to a possessory mortgage comprises two distinct subjects capable of independent possession, the intangible or incorporeal equity of redemption capable only of what, following Salmond, we shall call incorporeal possession, and the tangible or corporeal property itself, capable, of corporeal possession. Possession of the corporeal property is with the mortgagee, while possession of the incorporeal equity of redemption remains with the mortgagor. If the mortgagor releases the equity of redemption in favour of the mortgagee he thereby makes over his incorporeal possession of the equity of redemption to the mortgagee by what might be called a symbolic or notional delivery, that being the only kind of delivery which the incorporeal equity of redemption is susceptible of. Thereafter the mortgagee is in actual possession of both the corporeal property and the incorporeal equity of redemption, and, where the release is invalid in law, he is in adverse possession of the equity of redemption. But short of such a release, possession of the corporeal property, whether by the mortgagee or by a trespasser thereon, is not possession of the equity of redemption even if it is accompanied by assertion of full title to the property to the knowledge of the mortgagor. It is possession only of the corporeal property and no more. It is no more possession of the incorporeal equity of redemption than assertion of title, to and possession of, a property by a person not in possession, albeit to the knowledge of the person in actual possession, amounts to possession of the property by the former. The incorporeal possession of the mortgagor of the one subject, namely, the equity of redemption, is in no wise affected by the possession of the other subject, namely the corporeal property, whether by the mortgagee or by a trespasser thereon even if such possession be accompanied by assertion of title to the subject of which the mortgagee or the trespasser is not in possession, namely, the equity of redemption. But where the

incorporeal possession of the equity of redemption is accompanied by tangible incidents such as the receipt of rents and profits, perception of such rents and profits by a third party asserting possession of the equity of redemption would be cogent evidence of such possession. There is, however, no such incident in this case and therefore no question of either the mortgagee, or of the trespassers on the corporeal property, having trespassed on the equity of redemption, possession whereof was and has continued to be with the mortgagor.

We are here concerned with adverse possession of a bare equity of redemption of the mortgagor. The denial of his title in Ext. H which is claimed to be the foundation for adverse possession occurred during the currency of the mortgage Ext. C. We have been shown nothing either to refer the possession of the trespassers as against the mortgagor to something other than its lawful source, viz. that of the mortgagee whom they dispossessed, or to amount in any way to an infringement of the bare equity of redemption of the mortgagor. We accordingly hold that the rights of plaintiff in O. S. No. 256 of 1962 to redeem Ext. C had not been barred by adverse possession."

As pointed out above, if nothing else had happened subsequent to the release or sale by the mortgagor of his equity of redemption to the mortgagee, the appellant might well have been on safe ground. But we do have the important fact in this case that while the appellant remained in possession as full owner in pursuance of Ext. D-2, there was a symbolical delivery in favour of the predecessor of the plaintiff in pursuance of Ext. P-2 sale. This was sufficient assertion of his bare right to the equity of redemption. Indeed, there was nothing more he could do in exercise of the said right And; after the symbolical delivery by Ext. P-3, our attention was not called to any act or assertion on the part of the appellant which in any way invalid or erroded, the bare equity of redemption of the plaintiff. Far from that, it is seen that the litigation commenced by the appellant shortly after the symbolical delivery, and evidenced by Exts. P-5 to P-7 referred to supra, was in purported acknowledgement of the said right of the plaintiff, and for avoidance of the same. This appears to us to make a crucial difference; and for this reason, the principle of the decisions in K. Gopalan Thanthri Vs. Ittira Kelan and Others, and in Chacko Mathew Vs. Ayyappan Kutty, can have no application.

5. The decision of the learned Judge was correct. We dismiss this appeal with costs.