

(1963) 10 KL CK 0040
In the High Court Of Kerala
Case No : A.S. No's. 480 and 549 of 1962

Kunju Mohammed

APPELLANT

Vs

Muhammed Kochunim and others

RESPONDENT

Date of Decision : 03-10-1963

Acts Referred:

Penal Code, 1860 (IPC) — Section 145

Citation : (1967) KLJ 729

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

Bench : Single Bench

Advocate : S. Easwara Iyer and L. Gopalakrishnan Potti, for the Appellant; M.K. Narayana Menon and C.S. Narayanan for 1st Respondent in S.A. 480/62 and 2nd Respondent in S.A. 549/62 and P. Krishnamoorthy for Mis. T.S. Krishnamoorthy Iyer and G. Rajasekhara Menon for 3rd Respondent in S.A. 480/62 and 1st Respondent in S.A. 549/62, for the Respondent

Final Decision : Dismissed

Judgement

P.T. Raman Nayar, J.—These second appeals by the same person, the 1st defendant in O.S. No. 685 of 1121 and the 11th defendant in O.S. No. 424 of 1121, both of the Vaikom Munsiff's Court, are against the preliminary decrees for partition which the courts below have concurred in passing against him in respect of, so far as we are now concerned, the same property, described as items 1 and 2 in the plaint in the latter suit and as items 1, 2 and 3 in the former. The plaintiff in O.S. No. 424 (who is the 2nd defendant in O.S. No. 685) has been given a 13/48th share, while the three plaintiffs in O.S. No. 685 (who are defendants 6, 7 and 8 in O.S. No. 424) have been given a half share for themselves and defendants 4 and 5. Although the two suits were tried together I prefer to deal with them one by one. I shall first consider O.S. No. 424 in which suit the evidence was recorded. The appeal therefrom is S.A. No. 549 of 1962.

2. In this suit, both sides claim under one Makkar whom, for the purposes of the suit, they are content to regard as the sole owner of the property, the fact that

he was, in truth, only a purchaser from a co-owner being, for those purposes, a matter of no consequence. Makkar died in 1098 M.E. (1922-23 A.D.) leaving as his heirs, his son, the plaintiff, then an infant if born at all, his widow, Asya Umma, and Jus mother, Sara Umma. (The 11th defendant, namely, the appellant, disputed the plaintiff's paternity and contended that he was Asya Umma's son not by Makkar but by a second husband. But this contention is no longer available, the concurrent findings of the courts below being that the plaintiff is the son of Makkar). Makkar's widow and mother got into possession on Makkar's death and by Ex. XVI dated 12-12-1101 (27-7-1926) they and Makkar's brother, Mytho, claiming to be in possession as heirs of Makkar, (Mytho's claim being apparently on the basis that the plaintiff was not Makkar's son, for, if Makkar had left a son, Mytho would not be an heir) sold the property to the 11th defendant and put him in possession. This possession of the 11th defendant was disturbed by one Ali, the 1st defendant herein, and by one Kunjachi and her son Kasim, (the latter two now represented by defendants 6 to 8, the plaintiff in O.S. No. 685, and by defendants 23 and 24, defendants 4 and 5 in O.S. No. 685), descendants of one Kochu Vava to whom the property at one time belonged. This dispute led to proceedings u/s 128 of the Travancore Criminal Procedure Code (section 145 of the Indian Code) and, in those proceeding, the property was attached and put in the hands of a receiver on 5-3-1103 (21-10-1927). Those proceedings terminated on 5-6-1104 (17-1-1929) in favor of Ali, Kunjachi and Kasim - see the order Ex. III - Ali being found to be in possession of a portion of items 1, and Kunjachi and Kasim of the remaining portion of that item and of the whole of item 2. These persons got possession of their respective portion from the receiver on 29-3-1105 (14-U-1929), and, soon thereafter, the 11th defendant brought a suit, O.S. No. 678 of 1105, for a declaration of his title, and of his possession prior to the attachment by the criminal court, and for recovery of possession from the hands of Ali and the heirs of Kunjachi (Kunjachi having died meanwhile) inclusive of the present defendants 6, 7 and 8 (Both the suit and the proceedings u/s 128 of the Travancore Criminal Procedure Code included properties other than the property now in suit, but with that we are not concerned). The suit was dismissed by the first court but was decreed in appeal by the High Court of Travancore - the decision is reported in Kunju Mohamed v. Kunju Ali (1945 T.L. R. 908). In execution of this decree, the 11th defendant obtained possession of item 1 of the suit property on 28-5-1121 (11-1-1946) and of item 2 on 8-6-1121 (21-1-1946). Three weeks later, on 1-7-1121 (12-1-1946), the plaintiff brought the present suit for partition and separate possession of his share as one of Makkar's heirs. He was met with the plea of limitation among other pleas. This plea was negated by both the courts below, the first court on the obviously mistaken ground that the suit was brought within 12 years of the plaintiff attaining majority, and the second on the ground that the 11th defendant was not entitled to tack on the possession of the receiver in the criminal proceedings and that he had not completed 12 years of adverse possession.

3. All that is urged before me in this appeal is this plea of limitation. The argument is that, on the 11th defendant's admitted entry into sole possession on his purchase under Ex. XVI dated 12-12-1101 (27-7-1926), there was an ouster of the plaintiff and a consequent dispossession bringing Art. 142 of the Limitation Act into play. The possession of the 11th defendant, it is said was in assertion of title to the entire property. It was open possession in assertion of a title hostile to the plaintiff. It was therefore adverse to the plaintiff; and hence by a conversion of the well accepted rule that the possession of one co-owner can become adverse to another only with the actual ouster of the latter, this adverse possession of the 11th defendant as against the plaintiff is tantamount to the ouster, in other words, the dispossession, of the latter.

4. So runs the argument. And so it has to run. For, it will be noticed that the 11th defendant can succeed only if Art. 142 and not Art. 144 is the proper provision of limitation to apply. His adverse possession, "tantamount to an ouster" could at the best have commenced only on 12-12-1101 (27-7-1926) when he bought the property under Ex. XVI and got into possession. On 5-3-1103 (2-10-1927), hardly two years later, he was dispossessed by the receiver appointed by the criminal court, and, even if we count the receiver's possession till 1105 (1929-30) as his possession in view of his eventual success in O.S. No. 678 of 1105 (which we cannot, having regard to the fact that the criminal proceedings in which the receiver was appointed ended against him, and that the decision in the civil suit can in no sense be regarded as a reversal of the order of the criminal court). Ali and the heir of Kunjachi obtained actual possession in 1105 (1929-30) by which time the 11th defendant had at best completed hardly four years of adverse possession. That apart, Ali and the heirs of Kunjachi were admittedly in possession from 1105 to 1121 (1929 to 1946), and, even though the 11th defendant succeeded in getting a decree for possession against them, in O.S. No. 678 of 1105, dispossessing them in execution thereof in 1121 (1946), their possession can in no sense be regarded as possession on his behalf. Therefore, in no view of the matter can it be said that by 1946, when the present suit was brought the 11th defendant had completed 12 years of adverse possession so as to make the suit barred under Art. 144 if that be the proper article to apply.

5. The plaintiff, it is the admitted case, is a co-owner with the 11th defendant and I do not think that in a suit for partition and separate possession by a co-owner out of possession against another who is in possession, Art. 142 can apply though it might apply where a co-owner in joint possession with another is thrown out by the latter. The proper article to apply, I have no doubt, is Art. 144. Art. 142 applies to a suit, "for possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession." No doubt it is unquestionable that the possession of one co-owner is presumably on behalf of the other co-owners and that, even if one co-owner is in exclusive possession, the others are constructively in possession through him. But, this is only as against third parties. As between,

what I might call the non-possessing co-owner and the possessing co-owner, the latter alone is in possession even if, so far as the outside world is concerned, the former is constructively in possession through him. Adverse possession by the possessing co-owner can, doubtless, commence only with actual ouster, but even if this ouster can be regarded as dispossession of the non-possessing co-owner of his constructive possession, the first requirement, namely, that the plaintiff must have been in possession of the property is not satisfied since, as between a non-possessing co-owner plaintiff and a possessing co-owner defendant, the latter is in sole possession and the former is not in possession at all. The argument that, because the decisions have said that the possession of the possessing co-owner becomes adverse to the non-possessing co-owner on the ouster of the latter, the courts, and more often the editors of law reports, have been led to assume that Art. 144, which makes the commencement of adverse possession the starting point, is the proper article to apply in such a case, forgetful of the fact that if there is ouster there is dispossession, and that therefore Art. 142 comes into play to the exclusion of the residuary article. Art. 144, though attractive seems to me clearly unsound.

6. No decided case has been brought to my notice where Art. 142 has been applied in such a case. On the other hand, it has been expressly decided in a number of cases of which I need mention only *Ittappan v. Manavikrama* (I.L.R. 21 Mad 163), *Palania Pillai v. Amjath Ibrahim* (A.I.R. 1942 Mad 622) (F.B.) and *Sanku v. Parvathi Amnta* (1962 KLT 881) that Art. 144 is the proper article to apply, although I must say that, except in the case first named, the applicability of Art. 142 was not expressly considered. The headnotes to the decisions in *Wuntakal Yalpi Chenabasavana Gowd Vs. Rao Bahadur Y. Mahabaleswarappa and Another*, and in *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*, show that Art. 144 was applied in those cases, and, although the article is not specifically referred to in the course of the judgments, it seems to me clear that the headnotes are correct. For, in the former case, it was on the finding that the defendant had completed 12 years of adverse possession that their Lordships upheld the plea of limitation in the latter it was on the finding that the defendant had not completed 12 years of adverse possession that their Lordships rejected the plea. In the former case the trial court had applied Art. 142, for, it dismissed the suit on the ground that the plaintiff (as defined by section 2(8) of the Limitation Act) was not in possession of the property at any time within the 12 years preceding the suit. Yet, when their Lordships of the Supreme Court came to consider the question of limitation, what they said was, "To defeat the claims of the plaintiff therefore it is incumbent upon defendant No. 1 to prove that he held the property adversely to his co-owner for the statutory period". It seems to me obvious that their Lordships considered that Art. 142 would not apply and that Art. 144 was the proper article to apply. In the latter case, the plaintiff had not been in possession "within the 12 years preceding the suit, and yet their Lordships found that the suit was not barred by limitation since the defendant had not completed 12 years of adverse possession. Both the Supreme Court

decisions therefore seem to me clear authority for the position that, in a case like the present, it is Art. 144 and not Art. 142 that applies.

7. Art. 144 being the proper article to apply, the possession of Ali and of the heirs of Kunjachi can, as I have already remarked, avail the 11th defendant in his plea of limitation only if he is holding from them or they were holding on his behalf so that he can add their possession to his own in order to complete 12 years of adverse possession. That is not the case. Ali and the heirs of Kunjachi were in no sense holding the property for or on behalf of the 11th defendant, and the fact that the 11th defendant took possession in execution of a decree against these persons does not make him one holding under them or deriving title from them so as to entitle him to add their possession to his. In fact the 11th defendant holds against and not from or under Ali and the heirs of Kunjachi.

8. I hold that the plea of limitation taken by the appellant 11th defendant has been rightly rejected by the courts below.

9. If, however, I am mistaken in the view that the commencement of adverse possession by a possessing co-owner by the ouster of a non-possessing co-owner does not amount to a dispossession of the latter while in possession so as to attract Art. 142 of the Limitation Act and it is really that article that applies, I should think that the suit is barred by limitation. The decisions in *Palania Pillai v. Amjath Ibrahim* (A.I. R. 1942 Mad 622) (F.B.), and in *Joseph v. John* (1959 K.L. T. 630) (resting largely on the former case and affirmed on appeal by a division bench of this court in A.S. No. 468 of 1960) seem to me sufficient authority for holding that the possession of the 11th defendant after his purchase under Ex. XVI dated 12-12-1101 (27-7-1926) from Asya Umma and Sara Umma, two of the three co-heirs of the undisputed owner, Makkar, was adverse to the third co-heir, the plaintiff. It is true that decisions that equate the position of a person who get into possession pursuant to a purchase from one of two or more co-owners with that of a rank trespasser, cannot be regarded as correct. A purchaser from a co-owner obtains valid title to his vendor's share of the property and that gives him the right to be in possession, so that, until the contrary is shown, his possession is referable to this lawful title and is therefore not adverse. (I must here observe that this applies only to a case where the co-owners are tenants-in-common, as in the present case, and not to a case where the co-owners are co-parceners. In the former, a purchaser gets the title which his vendor has to a definite share in the property and therefore the right to be in possession as a co-owner. In the latter case, he gets no interest whatsoever in the property as such and no right to possession. All that he gets is the right to enforce a partition in which he might or might not get the property; and so his possession cannot be referred to any lawful title and is therefore adverse). Authority is hardly necessary for the proposition that a purchaser from a tenant-in-common becomes a co-owner of the property with the remaining tenants-in-common. But if it were, it is to be found in *Wuntakal Yalpi Chenabasavana Gowd Vs. Rao Bahadur Y. Mahabaleswarappa and Another*, to which reference has

already been made. The plaintiff therein was a purchaser from Nagana who was a co-owner of the property in dispute along with the 1st defendant, and, in dealing with the position occupied by the plaintiff in relation to the 1st defendant, this is what their Lordships observed. (See paragraph (6) of the judgment):

As the plaintiff purports to derive his title from Magana, he can be said to have established his title as a co-owner with defendant No. 1 and this being the position the presumption of law would be that the possession of one co-owner was on behalf of the other also unless actual ouster was proved.

It is true that the purchase by the plaintiff therein was from a non-possessing co-owner and that the 1st defendant was a possessing co-owner while the converse is the position here. But that can in no way affect the jural relationship between a purchaser from a co-owner and the remaining co-owners. The purchaser becomes a co-owner with the remaining co-owners, and the presumption of law is that the possession, whether of the purchaser or of any of the other co-owners, is on behalf of the rest unless the contrary is shown by proof of ouster. The true test, it seems to me, in the case of a purchaser from a co-owner getting into sole possession, is whether his animus is to hold the property as a full owner or merely as a co-owner; and that will depend on whether his purchase, whatever it was in truth, purports to be of the entire property or only of the share of the alienating co-owner. It is true that the purchase, whatever it purports to be, can, in effect, be only of the share of the alienating co-owner. But, if it purports to be of the entire property and not merely of a share, the alienating co-owner professing to be the sole owner, the animus of the purchaser would be to hold the property as sole owner and not as a co-owner. If, however, the purchase is only of a share, his animus can only be to hold the property as a co-owner and not as sole owner. The possession obtained by the purchaser is open, actual possession just as in the case of possession taken by a rank trespasser, and the same enquiry which would serve to disclose to the remaining co-owners whether the possessor is a rank trespasser or a purchaser from their co-owner - and the remaining co-owners can neglect to make such inquiry only on peril of losing the property by operation of limitation - would also serve to disclose to them whether he is holding the property merely as a co-owner, in other words in admission of their title, or as sole owner in assertion of title hostile to themselves. It is not the law that limitation cannot run in the case of co-ownership property on a third party getting into possession; and, whether it be that the third party gets into possession is a rank trespasser or a person who, purporting to have bought the entire property (from one who, though in truth only a co-owner, claims to be the sole owner) and not merely a share therein, holds it with the animus of a full owner, I should think that his possession is adverse to the non-alienating co-owners. His very entry on the property, albeit on the strength of a purchase from one of the co-owners, is in assertion of full title hostile to the remaining co-owners and to my mind operates as an ouster of those co-owners.

10. A perusal of Ex. XVI can leave no room for doubt that what Makkar's widow, mother and brother purported to sell was the property in entirety and not merely a share therein, the title they asserted being that they got the property as the of Makkar. The clause in the sale deed that they were transferring their entire right, title and interest in the property cannot mean that they were professing to sell only the share which, in truth, was all that they owned.

11. It is argued on behalf of the 11th defendant that Ali and the heirs of Kunjachi having been in possession from 1105 to 1121 (1929-1946), a period of over 16 years, and that that possession being in no sense possession on behalf of or under the plaintiff, the plaintiff's title to the property was extinguished on the expiry of 12 years by reason of section 28 of the Limitation Act, whether it be Art. 142 or Art. 144 that would have applied had the plaintiff instituted a suit for possession against Ali and the heirs of Kunjachi. This is really not a plea of limitation but a plea of want of title in the plaintiff, a plea not taken in this form at any previous stage of the case. It cannot be countenanced here, in this second appeal, for the first time; and it is also to be noted that no such plea of extinguishment of the plaintiff's title by reason of their own possession for over the statutory period was put forward by Ali or the heirs of Kunjachi although they are parties to the suit.

12. Turning now to O.S. No. 685 (the appeal wherefrom is S.A. 480 of 1962) it is the common case that the property belonged solely to one Pathumma, the sister of Kunjachi (to whom reference has already been made and whose heirs are the three plaintiffs and defendants 4 and 5 in this suit) and that this Pathumma was the sole owner in sole possession. Pathumma died in 1092 (1916-17) leaving as her heirs, her husband, Uthuman, and her sister, Kunjachi, on whom the property devolved in equal shares. It is the case of the appellant 1st defendant that Uthuman was in sole possession after Pathumma's death, but this is disputed by the plaintiffs whose case is that Uthuman was in possession only of item I and that Kunjachi got into possession of items 2 and 3. It is, however, not necessary to decide which of these two cases is true since that is not in any way material to the decision. Uthuman sold the entire property to Makkar by means of Ex. XIV dated 4.6.1097 (17.1.1922), and, as we have seen, four years later, two of Makkar's three heirs, namely, his widow and mother (joined by Makkar's brother who was a mere pretender) sold it to the 1st defendant under Ex. XVI dated 12.12.1110 (27.7.1926). Reference has already been made to the scramble for possession following this sale between the 1st defendant on the one hand and Ali and Kunjachi and her son on the other, to the proceedings u/s 128 of the Travancore Criminal Procedure Code resulting in possession being found and made over through the receiver to Ali and the heirs of Kunjachi in 1105 (1929-30), and to the suit, O.S. No. 678 of 1105, in which, 15 years later, the 1st defendant succeeded in obtaining a decree for possession against these persons in execution of which he obtained delivery in 1121 (1945-46) It is only necessary to add that the present plaintiffs who, as we have seen, are heirs of Kunjachi were, in that capacity, parties to that suit, being defendants 8 to 10

therein, the remaining heirs being defendants 6 and 7.

13 In the appeal in this suit, S.A. No. 480 of 1962, two points are taken. The first is that the suit is barred by limitation, and the second that it is barred by res judicata. The first is obviously unsustainable, for accepting the 1st defendant's case that Uthuman was in sole possession and that Makkar got into sole possession in pursuance of his purchase under Ex. XIV dated 4.6.1097 (17.1.1922), the possession of Uthuman could not have been adverse to his co-heir Kunjachi, there being no case of any ouster by Uthuman of Kunjachi. The adverse possession and ouster set up is that pursuant to the purchase by Makkar in 1097 (1921-22). But this possession, even accepting the 1st defendant's case that Makkar was in sole possession, lasted only for six years, until, in 1103 (1927-28), the property was attached in the criminal proceedings and put in charge of a receiver. From 1105 (1929-30) till 1121 (1945-46) Ali and the heirs of Kunjachi, among them the Plaintiffs, were in possession, so that, whether it be Art. 142 or Art. 144 that applies, there can be no question of the suit brought in 1121 (1945-46) being barred by limitation. Nor can there be any question of the 1st defendant, who and his predecessors were at best in adverse possession from 1097 (1921-22) to 1103 (1927-28), or, even tacking on the possession of the receiver, till 1105 (1929-30) having acquired any title by prescription.

14 On the second point, it seems to me necessary to consider the pleadings and the decree in O.S. No. 678 of 1105 to find out what exactly was heard and finally decided in that suit. But only the plaint, Ex. 1, and the judgment of the High Court in appeal, Ex. II, have been put in evidence. We do not know what exactly were the defenses taken or what were the issues settled. Nor has the decree been produced to show what was the formal expression that the adjudication took. But, it would appear from the judgment of the High Court, that the present plaintiffs and the other heirs of Kunjachi (defendants 6 to 10 in that suit) suffered the suit to proceed ex parte although they entered appearance in the High Court to contest the appeal filed by the present 1st defendant (the plaintiff therein) who had failed in the first court. In paragraph 8 of his plaint in that suit, the present 1st defendant asserted that he was the sole owner of the property and that defendants 6 to 10, the heirs of Kunjachi, had no title whatsoever. And he asked for a declaration of his title and of his possession prior to the criminal proceedings, and for recovery of the property from the hands of the defendants inclusive of the present plaintiffs. We find from paragraph 7 of the judgment of the High Court that, so far as the property now in suit is concerned, the decree of the first court was reversed and the suit allowed; and it is on this that the plea of res judicata is based.

15 This plea would have been very well if that was all the judgment of the High Court said. But, if we go through the entire judgment, we find that the decision therein is based on the finding given at the close of paragraph 4, that Uthuman, who was a co-owner along with his wife's sister (namely, Kunjachi), "had also both title and legal possession as against Ali, the 1st defendant therein, who

could claim no such right." It is also stated that defendants 6 to 10 therein (among whom were the present plaintiffs), the children of Kunjachi, the other co-sharer, had not claimed to be in possession - the fact was that they suffered the suit to proceed, ex parte and did not come forward to make any such claim. And, if we turn to paragraph 6, we find the following statement:

It was then contended on behalf of the 1st respondent (Ali) that the plaintiff (the present 1st defendant) could not succeed on the strength of his title as on his own showing he was only a part-owner of these properties, the other owner being Kunjachi whose interests are represented by defendants 6 to 10. There is no substance in this contention. Kunjachi's heirs, though parties to this suit, have not put forward any claim to these properties. The 1st defendant (Ali) who is the only contesting defendant in this case is found to have no title. His possession is that of a trespasser which we have held has not been perfected by adverse possession. In these circumstances we have only to repel this contention of the 1st defendant. If one of the co-owners is in exclusive possession of some part of co-ownership property, he is entitled to maintain such possession until he is evicted in due course of law in a suit for partition filed by the other co-sharer. This right of the co-owner in possession will vest in such co-owner's transferee as also his heirs.

16 From what is set out above, it is abundantly clear that the decision which is pleaded as res judicata is based on the following findings:

(1) Uthuman and Kunjachi, and their successors, namely, the present 1st defendant (the plaintiff therein) and the present plaintiffs were co-owners of the property;

(2) Uthuman was in sole possession as co-owner, this finding being based on the fact that Kunjachi's heirs, namely, the present plaintiffs, had not come forward to claim possession in themselves; and

(3) This right of Uthuman to be in possession and maintain such possession even as against the other co-owners until evicted in due course of law in a suit for partition, vested in the present 1st defendant as Uthuman's transferee.

It is on these findings, and not on the finding that the present 1st defendant, the plaintiff therein, had exclusive title and that the present plaintiffs, and the other heirs of Kunjachi (defendants 6 to 10 therein) had none, that the present 1st defendant's suit for possession, even as against the present plaintiffs, who were found to be co-owners along with him was allowed. The possession decreed to the present 1st defendant in O.S. No. 678 of 1105, and obtained by him in execution of the decree, was possession as a co-owner along with the heirs of Kunjachi, and the decision, far from being res judicata in favor of the 1st defendant, is res judicata in favor of the plaintiffs.

17. I find both the points in S.A. No. 480 of 1962, the second appeal from this suit, against the appellant 1st defendant.

18. In the result I dismiss both appeals, both with costs leave granted in both.