

(1897) 12 MAD CK 0013
In the Madras High Court

Kuthiravatttath Nair

APPELLANT

Vs

Manavikkrama
Manavikkrama Vs Kuthiravatttath Nair,
Puliakot Mutha Nair and Another, Nallapata Nair and Another
and Ullattil Thodiga Amma Neithiar

RESPONDENT

Date of Decision : 17-12-1897

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 43

Citation : (1898) 8 MLJ 92

Hon'ble Judges : Subrahmania Aiyar, J;Shephard, J

Bench : Full Bench

Judgement

Shephard, J.—The first point taken in the argument of this appeal is that raised by the 3rd issue. It appears from the evidence, and indeed is

in a measure admitted in the plaint itself, that before this suit was launched several suits were brought by the plaintiff or his predecessor against the

defendant or his predecessor, in some of which suits decrees were obtained by the Zamorin for the partition of the particular parcels comprised in

such suits. In each of these suits the tenant, who, as the plaint states and is admitted, held half under the Zamorin and half under the Nair, was

joined as a party. So far as regards the tenant, the plaint made such allegations and asked for such relief as would be made and asked for against

any tenant holding under a jenmi, while as regards the Nair, the plaint asked for partition, so that in the result the tenant might be left in undisturbed

possession of the moiety allotted to the Nair. Independently of these suits there was another suit brought against the Nair alone in which a division

of the devasvom property was sought for. That suit was dismissed on the ground that such property was not partible.

2. In these circumstances we are asked to hold that Section 43 of the CPC applies and that the plaintiff, having in his former suits omitted to sue in respect of the property now in question, is precluded from maintaining the present suit for partition of that property. Stated in the abstract, the question may be said to be whether one of two tenants in common, having sued for partition of part of the property so held by them, is at liberty to bring a separate suit for the remainder of the property. Now, it is quite clear that, in applying Section 43 of the Code, it has first to be seen whether the cause of action alleged in the plaint is identical with the cause of action alleged in the former suit (*Pittapur Raja v. Suriya Rau* ILR 8 M. 524; *Mussummat Chand Koiur v. Partab Singh*, L. R., 15 I. A., 157 ; *Munshee Buzloor Ruheem v. Shumsoonnissa Begum*, 11 M. I. A., 605) and that by the term cause of action must be understood all the circumstances alleged by the plaintiff to exist which, if proved or admitted, will entitle him to the relief prayed for L. R., 15 I. A. 158 ; *Bead v. Brown*, 22 Q. B. D., p. 131 . The class of cases to which Section 43 is intended to apply is indicated by the illustration. Where there has been an infringement of one right and one cause of action has arisen, the plaintiff must make his whole claim once for all in one suit. For instance, a plaintiff, who complains of wrongful detention or misappropriation of his securities, cannot, after recovering the securities or some of them in one action, afterwards sue to recover the remainder or damages for the detention of them 11 M. I. A., p. 605; *Serrao v. Noel*, 15 Q. B. D. 554. There being one single cause of action and the plaintiff having had "an opportunity in the former suit of recovering what he seeks to recover in the second, the former recovery is a bar to the latter action." The rule of law embodied in Section 43 operates not to give the defendant a ground of exception to the first suit, but, by prohibiting a second suit, indirectly to compel the plaintiff to include his whole demand in the first suit. There are, however, cases in which the nature of the right is such that independently of Section 43 the plaintiff is prohibited from severing his claim. For example, a mortgagor cannot redeem part of the mortgaged property on payment of a proportionate part of the mortgage debt. It is the right of the mortgagee to retain the whole security for any part of the debt. If the mortgagor chose to relinquish a part of the mortgaged property and sought to recover the remainder on payment of the whole debt, the mortgagee would have no

reason to complain and he would, u/s 43, have a complete answer to a second suit brought to recover the omitted part (see *Ukha v. Daga*, I. L.

E., 7 B., 182. But it is another question whether when a prayer for partial redemption has been granted or refused, the mortgagor can institute

another suit. If the prayer were refused, that is, if the mortgagee insisted on his right to have, the whole mortgage redeemed once for all, I conceive

that the dismissal of the first suit would clearly be no bar to the institution of a second and properly framed suit. The decision cited from 8 B., H. C.

E is an authority, if any is needed, on this point. Would it make any difference if the prayer for partial redemption were granted, with the result that

the mortgagee was allowed to remain in possession of part of the property as security for the unpaid portion of the debt? The difference is one not

recognized in Section 43 and, therefore, if there is any distinction to be drawn the reason for it must be sought elsewhere. In the case above cited

the plaintiff, a member of an undivided family, had first demanded a share of a particular portion of the family property. That suit had been

dismissed on the ground that it was not properly framed. The plaintiff then sued to have the whole property brought together and divided. It was

observed by Melvill, J., with reference to the argument that this suit was barred by Section 7 of the Code of 1859, that ""so far from these two

being the same cause of action, they present all the difference which is expressed by saying that the one is a cause of action and the other is no

cause of action."" This observation, it appears to me, would have been none the less true if the first suit instead of being dismissed had been decreed

in the plaintiff's favour. The cause of action as alleged in the plaint cannot be altered by the result of the suit. Nor can it possibly be held that a

decree for partial redemption or partial partition estops the plaintiff from claiming redemption or partition of the rest of the property or from alleging

that it is held by the defendant as mortgagee or tenant in common. If there is any estoppel in the matter, it is rather against the defendant than

against the plaintiff. In the present case it appears to me that the right put forward in the former suits is different from that put forward in the present

suit and that, therefore, there is no identity of causes of action. The right on the part of a tenant in common to have each field separately divided

between himself and his co-tenant is one thing: the right to claim a partition of all the fields held by them as tenants in common is another thing.

There has no doubt been an adjudication as to certain parcels of land on the footing of an alleged right of the former sort. To hold that that circumstance prohibits a general suit for partition would lead to the remarkable conclusion that the tenancy in common in respect of the yet undivided lands must continue indissoluble except by consent of the parties or perhaps by suit instituted by the Nair. As far as the Zamorin is concerned, he must for ever be in the position of a tenant in common who has no right to partition. Similarly in the analogous case of mortgagor and mortgagee, the latter, it is supposed, may continue to hold part of the land under the mortgage, while the former is debarred from bringing any further action. In both cases, the explanation is the same. It cannot be said that the causes of action are identical when the one plaintiff omits matters which the defendant is entitled to have included and the other is not open to that exception.

3. These reasons are sufficient, without any discussion of the circumstances of the different suits that have been brought by the Zamorin, for holding that the present suit is not barred by the provisions of Section 43. I would only add that I do not think the cases relied on by the Advocate-General in which a member of an undivided family has been permitted to sue his co-partner and a purchaser from the latter for partition of the property purchased, can be called in aid in the present case. In that class of cases it may be said that the plaintiff, adopting the alienation and seeking to have the purchaser's right defined, consents to a separation of the particular property from the rest of the family estate. The circumstances in the present case are entirely different.

4. The other point urged with regard to several of the parcels of land comprised in the suit was that of limitation. It was contended that, in the circumstances of this case, the suit fell within article 142 of the schedule to the Limitation Act, and that, therefore, the burden lay on the plaintiff of proving that possession remained with him till some time within twelve years of the institution of the suit. The answer to this, in my opinion, is that it must not be assumed that the plaintiff has been dispossessed so as to render Article 142 applicable to his case. The defendant's possession must *prima facie* be referred to the title in virtue of which it may have been lawfully enjoyed. At the outset his possession was that of a tenant in

common, not inconsistent with the title of the plaintiff, and, therefore, it lies upon him to show that his possession has assumed another character

and has become inconsistent with the plaintiff's title. There being no article especially applicable to the case of tenants in common, Article 144,

which is appropriate to the case of a possession which was in the beginning lawful but has become adverse, must be applied. Now, as between

tenants in common, mere non-participation of the profits by the one tenant and exclusive occupation by the other is not sufficient to entitle the

former to a decree for joint possession or consequently to make a case of adverse possession (*Watson and Co. v. Ramchund Dutt* ILR 18 C., 20).

The party claiming to hold adversely must at least go on to prove that it was in"" denial of the other's title that he excluded him from enjoyment of

the property. According to the English cases, there must be something amounting to ouster of the person against whom adverse possession is

claimed (*Culley v. Doe dem. Taylerson*, 11 A. & E., 1008). An ouster can be presumed to have taken place only when non-participation of the

profits has lasted for a considerable time and other circumstances concur. In the present case, the actual enjoyment of all the holdings has been in

the hands of tenants and not in those of the Nair, and in all the instances in which any question of limitation arises it has been proved that the

Zamorin took part in admitting the original tenant There are two classes of cases which need consideration. There are the cases in which it appears

that the present tenant represents the family a member of which at one time was admitted by the Zamorin and attorned to him. And there are the

cases in which the present tenant is shown to have been admitted by the Nair on paying off the former tenant who had been admitted by the

Zamorin. There is evidence in all these cases that the Nair intended the tenant who attorned to him to hold as his tenant to the exclusion of any

claim by the Zamorin, but it is not shown that the Zamorin had any notice of this attempted usurpation on the part of the Nair. In the first class of

cases where the present occupant of the land can be identified in point of law with the tenant who was at one time admitted by the Zamorin, it is

clear that the Zamorin has not lost his right of action against him, unless it appears that the tenancy has been determined. If the tenant were sued

and relied upon Article 142 of the Limitation Act, it would lie upon him to prove that the tenancy had been determined more than twelve years

before the date of the suit. This would be so even if the holding of the tenant had been reduced to that of a tenant by sufferance (*Adimulam v. Pir*

Ravuthan ILR 8 M. 424) and such a designation would certainly not be appropriate to tenants of the Zamorin who, whether or not there was a

Kanom were at any rate entitled to compensation for improvements before they could be ejected. The only possible way in which it could be

suggested that the tenancy had been determined, would be by forfeiture consequent on the tenant's implied denial of the landlord's right. But the

landlord is not bound to insist on a forfeiture when the occasion arises, and unless he elects to do so, the tenancy remains unaffected. A

disobedience by the tenant, known to the landlord and accompanied by payment of rent to a third party, does not, at any rate as long as the term

of his tenancy lasts, make the tenant's possession adverse; though in the case of a tenancy at will such conduct might afford evidence of the

determination of the tenancy. (See *Doe dem. Graves v. Wells*, 10 A. & E., 435 where it appears that the dicta of Lord Redesdale in *Hovenden v.*

Annesley, 2. Schedule and Left were not adopted). Here it is not even proved that the landlord was apprised of the tenant's conduct, Holding with

regard to the first class of cases that the tenancy is not proved to have been determined, I think, it follows that the Nair's possession was not

adverse, for it was only by ousting the tenant or putting an end to the tenancy that the Nair could acquire adverse possession. In the other class of

cases there is the circumstance that the present tenant is one who has been admitted by the Nair alone in supersession of the tenant who had

attorned to the Zamorin. In these cases the original tenancy was lawfully determined and the present tenant has never attorned to the Zamorin.

Nevertheless, I think it is impossible to hold that the Zamorin has suffered anything in the nature of an ouster. If there had been no tenancy in

common and the present tenant had simply taken over possession from the original tenant, there could be no question of adverse possession. The

fact that the Nair took part in the transaction and took an acknowledgment from the new tenant cannot by itself alter the nature of the Nair's

possession. The admission by the Nair of a new tenant was not per se inconsistent with the rights of his tenant in common. It is not necessary to

consider the question which would arise if knowledge of the action of the Nair in concert with the tenants had been brought home to the Zamorin.

No circumstances, have been proved from which such knowledge could be inferred.

5. For these reasons, I think that the plea of limitation fails in both the abovementioned classes of cases.

Subrahmania Aiyar, J.

6. Of the several suits, referred to in support of the contention that the present claim is barred u/s 43 of the Code of Civil Procedure, all, excepting

the one which related to certain devasvom lands, are more or less similar in their character and may be considered together. Those suits were

based on demises of some parcels of land out of the whole property held by the plaintiff, the Zamorin, and the defendant, the Nair, as co-owners.

In them not only the tenants, who held under the demises and against whom part of the relief was claimed, were made defendants, but also the co-

owner, and a division by metes and bounds of the parcels to which the demises related was sought. Though the frame of these suits is ambiguous,

yet the suits, in so far as the co-owner was concerned, cannot but be treated as suits for partition of the parcels then in dispute. Now the question

is whether the cause of action in any of those suits is identical with that in the present suit. It is impossible to doubt that the claim for partition in

each of those suits was on the footing that the plaintiff was entitled to a partition confined to the particular parcels comprised in the demises to the

tenants who were impleaded in each suit. This view of the Zamorin's right is of course wrong. But strangely enough, not only both the co-owners

and their advisers, but even the Courts, that had to deal with the suits, Continued up to at least 1877, to act as if a claim for such partial partition

was sustainable in law. Unquestionably, the cause of action, thus relied on in each of those suits is different from that in the present suit since the

latter is based upon a right, which unlike that alleged in the previous suits the Zamorin undoubtedly has, to a general and complete partition of the

entire property held by him and the defendant, *Kakaji Ranoji v. Bapuji Madhavarav* 3 B., H. C. R., App. C. J.. 205 is an authority in point, and

Ukkha v. Daga I.L.R., 7 B., 182 is distinguishable on the ground that there the two suits were on the same right which the plaintiff alleged gave him

a title to a share of what had been left undivided at a private partial partition.

7. Next, as to the suit about the devasvom lands also, the conclusion must be

the same. In it the plaintiff sought as one of the two trustees of the devasvom a partition of the lands forming the endowments of the institution. That was the right alleged though in law he had no such right. How then can that claim bar a suit in respect of the absolutely different right on which the present claim rests and which undoubtedly the plaintiff has? Clearly, therefore, it must be held that none of the suits relied on bars the present claim u/s 43.

8. As to the next point taken, viz., limitation, the article applicable is clearly not 142 as was contended for the defendant, but 144. And the

question is whether the defendant has held adverse possession for the statutory period in all or any of the cases in which the plea was urged. The

facts material so far as that question is concerned are these. The plaintiff and the defendant are co-owners standing in the relation of tenants in

common. Some parcels of land have been held by tenants who originally came into possession under demises or kanom mortgages granted by the

predecessors of the plaintiff in respect of their undivided share or privies or $\frac{1}{2}$ those who so entered into possession or parties to whom the

property was, at the instance of the defendant or his predecessors, subsequently handed over by the Zamorin's tenants. These persons attorned to

the defendant's predecessors or the defendant himself and paid rent accordingly. From this the defendant contends that though he has not held

direct and actual possession, yet the possession held through these tenants is sufficient to render the possession adverse as against the plaintiff. In

dealing with a case such as this, some of the special rules governing the matter of adverse possession with reference to persons standing in the

relation of landlord and tenant, of mortgagor and mortgagee and of: tenants in common, have to be borne in mind. And what are these rules?

9. First, as to landlord and tenant.--Now a tenant's possession, unlike that of a stranger, is, in its inception, in subserviency to and consistent with

the landlord's title, and as, during the existence of the tenancy, the tenant is bound to protect the interest of the landlord, the latter has a right to act

upon the supposition that his interest has not been betrayed and that no change in the character of the possession has taken place unless and until it

is brought home to him that the contrary is the case. Therefore, though the law does not absolutely disable a tenant from disclaiming his land-lord's

title and claiming to hold in his own right, yet if he does so, "the statute does not begin to operate until the possession before consistent with the title

of the real owner becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued and notorious so as to preclude

all doubt as to the character of the holding or the want of knowledge on the part of the owner." (See 4 How. at p. 296 Zellar's Lessee v. Eckhart,

cited in Angell on Limitation). It should be added, however, that if the disavowal of the landlord's title and the assertion of the claim to hold on the

tenant's own account take place during the currency of a definite term, then the tenant's possession does not necessarily become adverse

immediately. For in such a case the term would become forfeited only if the landlord does some act showing his intention, on the ground of the

denial of his title, to determine the tenancy. In the absence of such act, the term subsists and the possession is, in law, possession under the lease.

But the moment the term comes to its natural termination by effluxion of time the disloyal tenant's possession becomes adverse. The Advocate-

General in his argument went further. He contended that even after the expiry of the term the character of the possession remains unaltered so long

as either the landlord or the tenant does not, by express notice to the other, put an end to the tenancy. Now, the expiry of the term by effluxion of

time coupled with the continuing denial by the tenant that his holding was under the landlord's title, renders impossible the arising between the

parties of even a tenancy by sufferance. What tenancy can there be then between the parties which requires to be put an end to by express notice

? None. And it follows, as already stated, that the possession in such a case becomes on the expiry of the term ipso facto absolutely wrongful--

wrongful with respect to both the parties concerned. For that would indeed be an anomalous possession which, as to the rights of one party, was

adverse, and as to the other fiduciary; and if as a consequence of a disclaimer with the knowledge of the landlord and the setting up of a title in

himself, the tenant forfeits his possession as tenant and the other benefits incident to the character of a tenant, he ought to be entitled to the

advantage which would result from his known adverse possession (see 3 Peters at page 43, Willison v. Watkins, cited in Angell on Limitation).

And the same observations apply to the case of a tenant from year to year who denies his landlord's title. For such denial is in itself, as all the

Judges pointed out in *Doe dem. Graves v. Wells*, evidence of the cessation of the tenancy (10 A. & E., at pages 435--7). And hence it is that in

such a case the tenant is liable to be ejected without notice to quit. The contention of the Advocate-General is, therefore, opposed to principal and

unsupported by authority. And the decisions in Indian cases on the point imply that the rule of law as to it is as stated above. If, instead of claiming

title in himself, the tenant attorns and pays rent to or hands the property over to a third party who claims against the landlord, it follows, from what

has been stated above, that the possession of the third party is adverse to the original owner provided the owner has knowledge of the facts;

subject of course, if the tenancy be for a definite term, to the observations made above in dealing with the case of a tenant setting up title in himself.

10. Passing now to the case of mortgagor and mortgagee, mere denial by a mortgagee in possession or by the representative of the mortgagee in

possession of the mortgagor's right to redeem is of itself not sufficient to convert such possession into adverse possession. *Mussad v. The*

Collector of Malabar ILR 10 M. 191. Now there can be no doubt that if the interest of the mortgagee alone is assailed by a third party, that of the

mortgagor is not thereby affected. But where the mortgagor has made over possession of the mortgaged property to the mortgagee and while he is

so out of actual possession, the former's interest is invaded, *Turner, G. J.*, and *Muttusami Aiyar, J.*, in *Ammu v. Ramakrishna Sastri*, treat such

invasion as an ouster ILR 2 M. 229. *Innes and Muttusami Aiyar, J. J.*, however, in *Chathu v. Aku* peak of the right to redeem as a mere right of

action; though there are observations in the course of the same judgment which show that if the party claiming in antagonism to the mortgagor had

taken and held possession of the mortgaged property itself for 12 years, such possession would bar the mortgagor as was held in *Ammu v.*

Ramakrishna Sastri ILR 7 M. 28 ; compare *Moidin v. Oothumanganni* ILR 11 M. 416). This last conclusion is in conflict with the opinion

expressed by *Telang, J.*, in *Chinto v. Janki*. The reason for that opinion is stated by the learned Judge thus: "The mortgagor, having once put the

mortgagee in possession, ordinarily has no right to the possession himself until the mortgage is paid off. The mere fact of the mortgagee's letting the

property go out of his possession cannot give the mortgagor such a right before payment. And the party in possession though, he may be a

trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up *jus tertii*" (ILR 13 B.58). And

notwithstanding *Puttappa v. Timmaji* ILR 14 B., p. 177), it would be seen from the later case of *Vinayak Janardan v. Mainai*, that the above

opinion of Telang, J., commended itself as sound to Sargent, (J. J., and Candy, J. ILR 19 B.. 138. In this state of the authorities, if I may express

my own inclination, I would with deference say that Justice Telang's view appears to be the better view. If, however, that adopted in *Ammu v.*

Ramakrishna Sastri, be the correct one, still the possession of the person taking it from the mortgagee would not be adverse unless and until the

mortgagor has notice of it, *Mussad v. The Collector of Malabar* I. L. R., 10 M. 191.

11. Lastly as to the case of tenants in common.--The special characteristic of their right is united possession. Each has a present right to enter upon

the whole land and upon every part of it and to occupy and enjoy the whole. And if one tenant in common occupied and took the whole profits,

the other has, apart from statute, no remedy against the former whilst the tenancy in common continues unless he was put out of possession when

he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety and the other accepted that appointment,

when an action of account would lie as against a bailiff of the owner of the entirety of an estate (*Henderson v. Eason*, 17 Q. B. 718 ; see also

Watson and Go. v. Ramchund Dutt, I. L. E., 18 C. 10; and *Lachmeswar Singh v. Manowar Hossein* ILR 19 O., 253). Consequently, sole

occupation by one tenant in common is *prima facie* not inconsistent with the right of any other tenant in common. And in such cases there is no

ouster or adverse possession until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be

inferred from notorious acts and circumstances.

12. Such being the rules applicable to a case like the present, how does the matter stand upon the facts here? it may be shortly observed that the

possession relied on by the defendant amounts at the highest to nothing more than sole occupation by one of two tenants in common. In none of

the instances, in which limitation is pleaded, express disclaimer of the co-owner's right and notice thereof to him are either alleged or established

and the facts relied on as proof of adverse possession seem only to show what

has been termed "silent possession." And when regard is had to the position of the parties, to the fact that the parcels of land as to which adverse possession is set up are so few compared with the large number of isolated parcels admitted to have been held jointly and to the nature of the demises under which the disputed parcels were or are held by the actual occupants thereof, it is impossible to come to the conclusion that what are relied on as supporting the contention in question constitute such open and notorious acts of exclusive ownership as, in law, are necessary to warrant the inference that one tenant in common has been ousted by the other. The plea of limitation must, therefore, be held to fail in all the instances in which it was urged.

13. I concur in the conclusion arrived at by my learned colleague.