

(1935) 09 MAD CK 0034
In the Madras High Court

(Maramittathi Theruvil Motha Chettiam) Veettil Kelu	APPELLANT
Vs	
Kuttiyil Machikandy Chakkara Chappan and Others	RESPONDENT

Date of Decision : 12-09-1935

Acts Referred:

Citation : AIR 1936 Mad 308

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—The main question for decision in the second appeal, which arises out of a suit for redemption of a Malabar usufructuary mortgage (otti) is one of limitation. It is common ground that the suit mortgage was created by one Kelu who was the karnavan of the Mootha Chettiam Veettil tarwad which for the sake of brevity I will hereafter refer to as the M. tarwad. The original mortgagee was one Kuttiasson. He in 1869 assigned the mortgage to another Kelu reciting therein that he has got the consent of Chappan, the heir of the mortgagor Kelu and Karnavan of the M. Tarwad. This Chappan is said to be the predecessor-in-title of defendant 1. In 1871 the assignee of the mortgagee executed Ex. 3 which purports to be a deed of surrender of the mortgage right in favour of defendant 1, and one who is alleged to be his predecessor in the karnavan office. It is to be noted that under Ex. 3, the alleged karnavan of the M. tarwad purports to redeem the mortgage which the plaintiff now seeks to redeem, he also purporting to act on behalf of the M. tarwad.

2. It is found by the lower Courts that the plaintiff and his branch were apprised as long ago as 1878 of the claims which were being put forward by defendant 1, and his relatives representing the M. tarwad and they were aware of this surrender deed, Ex. 3, very shortly after it was executed. The lower Courts have both found that in fact it is the plaintiff who represents the M. tarwad and that defendant 1 is not a member of that tarwad at all. This finding is binding on me in second appeal. The question therefore is whether defendant 1 in redeeming this mortgage was setting up a title hostile to the real karnavan of the M. tarwad

and whether he can be said to have acquired a right by adverse possession, as against the heir of the original mortgagor in the equity of redemption. The lower Courts both found that the plaintiff's suit was barred by limitation. The main contentions of the plaintiff who is the appellant before me are : (1) that by the surrender deed Ex. 3, defendant 1 acquired the rights of the mortgagee and that his possession must be related to his lawful title as mortgagee even though he has set up an unlawful title as successor of the mortgagor; (2) even if defendant 1 was holding the property as mortgagor, he always purported to hold it as the rightful heir of the original mortgagor, Kelu, who was the representative of the M. tarwad so that his possession will not be adverse to the claim of the M. tarwad or to the estate of the original mortgagor.

3. As regards the first argument, there can be no doubt that where a person is setting up a hostile title and is in possession, his possession will not be deemed to be adverse to the true owner if it can be referred to a lawful title. This proposition is established by *Thomas v. Thomas* (1856) 2 K&J 79. If in fact defendant 1's possession can be referred to a lawful title as mortgagee, the mere fact that he was openly setting up his right to succeed to the mortgagor will not prevent the possession from being referred to the lawful title and being treated as not adverse to the true owner of the equity of redemption. The difficulty about this argument is in establishing a basis of fact for it. It is no doubt arguable that a surrender by a mortgagee may operate to keep alive the mortgage right in the surrenderee provided that that was the intention of the parties to the surrender. But in the present case there is nothing whatever to indicate that there was any intention to keep the mortgage alive. The surrender deed appears to have been intended to operate, as it actually recites, as evidence of the redemption and extinction of the mortgage by the person who was in possession and who claimed to be the karnavan of the tarwad entitled to the equity of redemption.

4. It was held by a single Judge of the Allahabad High Court in *Bijai Bahadur v. Parameswari Ram* 1924 All 834, that a person who is not entitled to redeem the mortgaged property, but who pays the mortgage money and gets possession of the property, does not thereby acquire the rights and liabilities, of the mortgagee. And it seems to me. that the basis of this decision is sound. If a person who has no right in the. equity of redemption redeems the mortgage, he is a mere volunteer with no equities in his favour. Presumably he can be ejected by the real owner and he cannot take shelter under the mortgage which he has discharged, for he has no. interest in the property which entitles him to redeem. It was held by a Full Bench of this Court in *Periya Aiya Ambalam v. Shunmugasundaram* 1914 38 Mad 908 . that where a trespasser dispossesses a mortgagee in possession and continues in, possession asserting a title adverse to the mortgagor also such dispossession will be adverse to the mortgagor from the time the mortgagor has knowledge of the assertion even though he may not then be entitled according to the terms of the mortgage to recover possession from the mortgagee. The reasoning in this decision seems to me to be applicable also

to a case in which the dispossession of the mortgagee was peaceful and was by way of redemption of a mortgage on the erroneous assumption of the powers of a mortgagor. It being established that defendant 1 was holding possession in the capacity of a mortgagor who has redeemed the mortgage, he cannot in my opinion be considered to have been holding possession as an assignee of the mortgage right which capacity he never acquired nor asserted.

5. If therefore the possession of defendant 1 cannot be deemed to be the possession of a mortgagee, the further question is whether it is prevented from becoming adverse to the rights of the plaintiff by reason of the fact that defendant 1 himself claimed not in his personal capacity but as the karnavan of the M. tarwad and successor in office of the original mortgagor, Kelu. I must confess that at first sight the argument for the appellant on this head seemed to me to be attractive. Provided that the M. tarwad is a clearly defined corporation, the fact that defendant 1 was holding the suit property as manager of that corporation, an office to which he was not really entitled, would not normally constitute adverse possession against the corporation when under its true manager. In *Mulji Bhulabhai v. Manohar Ganesh* (1888) 12 Bom 322 it was held that when certain defendants got possession of land belonging to a deity on the ground that they represented the deity, they could not be considered to have prescribed against the rightful manager for the deity. Unfortunately however in the present case there is no such clear entity as is provided by the deity in the case just referred to. The M. tarwad seems to be a body of decidedly doubtful membership and very vague limits. The plaintiff avers that he and his relatives belong to this tarwad and that the defendants are not members of this tarwad at all. Similarly the defendants alleged that they represent this M. tarwad and that the plaintiff and his relatives are not members of this tarwad at all. In the evidence they have gone further and each party has given a name to the tarwad which they allege to be the true tarwad of their opponent. Now no doubt there must be a body of men and women who in fact compose the M. tarwad. And it seems to me probable that the constitution of that body must be fairly well known to the people of the locality.

6. The fact however remains that the lower Courts have found that the defendants do not belong to this body of men at all; and it is not for me in second appeal to endeavour to go behind that finding or to suggest that the truth may lie somewhere between the case of the plaintiff and the case of the defendants. Now if defendant 1 purported to hold this land in the capacity of the head of the M. tarwad, he certainly was not holding the land on behalf of a mere name, but on behalf of a certain body of men whose identity was present in his mind; and, I do not think it can be questioned that on the pleadings and the evidence, he must be deemed to have held possession on behalf of a body of his own near relatives whose right he was asserting as constituting the M. tarwad and that he was not holding possession on behalf of the body of men comprising the plaintiff's near relatives, whose membership of the M. tarwad he has been actively denying for many years past. In such a state of affairs it is difficult to

see how merely because defendant 1 described himself as the karnavan of the M. tarwad in order to give a colour of right to his action in redeeming the mortgage, he can be said to have been in fact holding the property for the plaintiff and his associates, when he has in fact been arrogating to himself the office of head of another body of individuals going by the same name, to which. name they have been found to be not entitled.

7. As the learned District Munsif points out, this is not as the case has come into Court, whatever it be in fact, a struggle between two individuals, both members of one tarwad, for the headship of that tarwad. As the case has been put before the Court, it is a struggle between two bodies of men each claiming to be the M. tarwad to the exclusion of the other. In such circumstances the possession of one of these bodies in my opinion would be adverse to the other when it is known that this possession is asserted in a capacity hostile to the title claimed by the other group. In this view I agree with the findings of the lower Courts that the possession of defendant 1 was adverse to the plaintiff and to the tarwad of which the plaintiff has been found to be the head, and that the plaintiff's suit is therefore barred by limitation. In this view it is unnecessary to go in detail into the further argument advanced for defendant 1, that the plaintiff is not entitled to redeem the kanom or first mortgage without also redeeming the puramkadam or the second mortgage alleged to have been created on the same property by the same mortgagor in favour of the same mortgagee. All I would say on this point is that the evidence regarding this second mortgage, its terms, and its validity as against the M. tarwad seems too indefinite to form the basis of a legal conclusion that the redemption of the first mortgage cannot be made without the redemption of the second mortgage.

8. In the result, therefore, the appeal is dismissed with costs.