

(1961) 05 KL CK 0006
In the High Court Of Kerala
Case No : S.A. No. 857 of 1956 (M)

Parukutty Mannadissiar

APPELLANT

Vs

Easwara Chettiar and Another

RESPONDENT

Date of Decision : 05-05-1961

Acts Referred:

Transfer of Property Act, 1882 — Section 111(d), 2(c)

Citation : (1961) KLJ 956

Hon'ble Judges : T.C. Raghavan, J

Bench : Single Bench

Advocate : C.K. Viswanatha Iyer, for the Appellant; N. Sundara Iyer and V.R. Venkitakrishnan, for the Respondent

Final Decision : Dismissed

Judgement

Raghavan, J.—The plaintiff in O. S. No. 64 of 1953 on the file of the court of the District Munsiff of Palghat is the appellant before me, her suit having been dismissed by the trial court and the lower appellate court having concurred in the said dismissal. The plaintiff and her brother Ittichathara Mannadiar are the sole members of the Vatassery tarwad, of which the latter is the karnavan. The suit property belonging to the Vatassery tarwad was outstanding on Saswatham tenure (permanent lease) with tenants from early days. This Saswatham right was obtained in assignment in the name of the mother of the plaintiff on 30th June, 1899. The plaintiff and her brother, after they became the only members of the family, executed a simple mortgage in favor of the 2nd defendant in 1931 for Rs. 30,000/-, hypothecating three items of properties, of which the second item was the one on which the aforesaid Saswatham right was created. In 1934 the plaintiff and her brother executed a usufructuary mortgage over the same three items of properties for Rs. 45,000/- in favor of the 2nd defendant. By this document the three items of properties were handed over in possession to the mortgagee. Some other properties in the erstwhile Cochin State were also usufructuarily mortgaged to the 2nd defendant, since the income from the three

items of properties mentioned already was not sufficient to meet the interest on the mortgage money. Thereafter, the equity of redemption over the three items of properties was sold at the instance of another creditor and the 2nd defendant himself purchased the same at court auction, reserving on the said properties an amount of Rs. 30,000/- from the mortgage money. In pursuance of the court sale the 2nd defendant took symbolical delivery of the properties in 1935. Subsequently, the properties in Cochin State were also brought to sale by another creditor and the 2nd defendant purchased the same in court auction, reserving the balance mortgage debt of Rs. 15,000/- on those properties. The 2nd defendant obtained symbolical delivery through court on 3rd February, 1941. On 3rd February, 1953, that is, on the last day of the 12th year after the aforesaid symbolical delivery in 1941, the plaintiff filed the suit, out of which the present second appeal arises for recovery of possession of the plaint property, which is item No. 2 in the aforesaid mortgage documents, on the basis of her title as Saswatham tenure holder with mesne profits etc., alleging that by the two court sales the mortgage amount of Rs. 45,000/- was satisfied and what was sold through court was only the jenm right of the Vatassery tarwad and not the Saswatham right of the plaintiff. The lower courts held that the Saswatham tenure was subsisting on the properties until the same automatically got merged with the jenm right of the tarwad, when the plaintiff and her brother became the sole members of the Vatassery tarwad in 1920-21 on the death of Komu Mannadissiar, the sister of the grand-mother of the plaintiff. The lower courts also held that all the rights of the tarwad were sold through court and purchased by the 2nd defendant, so that there was no Saswatham right subsisting separately in favor of the plaintiff at the time of the suit. According to the lower courts, though symbolical delivery was taken on 3rd February, 1941, the sale itself having been earlier, the suit brought on 3rd February 1953 was barred by limitation. The second appeal, as already mentioned, is against the aforesaid decision of the lower courts. It may be mentioned that the 3rd defendant is the legal representative of the 2nd defendant, who died pending suit and the 1st defendant is the purchaser of the properties from the 2nd defendant.

2. Both the lower courts have concurrently held that the Saswatham right existed on the property from early days and that right was purchased by the plaintiff's mother. In the two mortgage documents in favor of the 2nd defendant, namely Exts. A4 and A5, also there are recitals to the effect that the second item therein was being held by the plaintiff in Saswatham right. Therefore, it is beyond dispute that the Saswatham right existed, the only possible dispute being whether it subsisted after the death of Komu Mannadissiar or whether it merged with the jenm right of the tarwad on the death of Komu Mannadissiar. On this question the learned Subordinate Judge in paragraph 9 of his judgment relies on Sec. 111(d) of the Transfer of Property Act, which lays down that a lease of immovable property determines in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right. I am afraid that the learned Subordinate Judge is in error in this

view. The Saswatham right involved in this case is one, which was undisputedly created prior to the Transfer of Property Act. Section 2(c) of the said Act lays down that nothing contained in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act comes into force, or any relief in respect of any such right or liability. This provision clearly shows that where tenures were created before the passing of the transfer of Property Act, the acquisition of such tenures by the holder of a superior right cannot merge them in the superior right under the common law of this country before the Transfer of Property Act was passed. In such, cases Section 111(d) cannot have any application. If any further authority is required in support of this proposition Kumar Chandra Singh Dudharia and Another Vs. Sarat Chandra Goswami and Others, may be referred to. In Dulhin Lacchanbati Kumari v. Bodh Nath Tiwari (A. I. R. P. C. 94) Lord Shaw observes:

Merger is not a thing which occurs ipso jure upon the acquisition of what, for the sake of a just, generalization, may be called the superior with the inferior right. There may be many reasons-conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others-in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain? This is in accord with settled law, of which two recent instances may be given; namely, Capital and Counties Bank v. Rhodes and especially the judgment of Farewell J. in Ingle v. Jenkins.

It is thus abundantly clear that it was not the common law in India before the Transfer of, Property Act, that merger was a thing which resulted ipso jure upon the acquisition of the superior with the inferior rights. It was really the intention that decided the question if the intention was to keep the two rights separate, the inferior and superior rights remained separately. In the present case there is positive indication that the party wanted to keep these rights separate and therefore the finding of the lower courts that the Saswatham right merged with the jenm right of the tarwad cannot be sustained.

3. There is the further question as to who is entitled to the Saswatham right whether the plaintiff individually or the Vataserry tarwad. On this question also, in view of the categorical admission by Ittichathara Mannadiar in the mortgage documents already referred to and also in Ext. A3 which is the certified copy of the written statement filed by him in O. S. No. 39 of 1929 on the file of the Sub-Court, Palghat, there does not appear any ground for holding that the Saswatham right belongs to the tarwad. Therefore, I hold that the plaintiff is entitled to the Saswatham right in her individually capacity.

4. Mr. Sundara Iyer, the learned counsel of the respondent, urges that all the right title and interest of the mortgagors, namely the plaintiff and Ittichathara Mannadiar in the plaint property were sold in court auction and purchased by the

2nd defendant and therefore, according to him the Saswatham right, even if it subsisted without merger, was also included in the sale and was purchased by the 2nd defendant. But this contention appears to be difficult of acceptance, because the sale certificate, Ext. B8, recites that the right conveyed under the document was the jenm right of the defendants. There is no reference in this document to the Saswatham, right or at least to the right, title and interest of the defendants the only recital being "the defendants" jenm right". In view of this, I am constrained to hold that what passed under the sale certificate was only the jenm right of the defendants, which means the jenm right of the Vatasery tarwad. The result is the Saswatham right, which subsided on the property in favor of the plaintiff and which was included in the mortgage documents, remains still unredeemed. Mr. Sundra Iyer at this, stage contends that the present suit as framed, based on title, paying a small court fee, filed in the District Munsiff's Court, is misconceived and has therefore to be dismissed. I am inclined to think that, in view of the findings I have already come to, this contention of Mr. Sundara Iyer has considerable force. But Mr. C. K. Viswanatha Iyer, the appellant's learned advocate, prays that this Court might send the case down to the trial court with a direction that the appellant's plaint be returned to her for presentation to the proper court. The present plaint based on title as a Saswatham tenure holder and for recovery of possession ignoring the mortgages cannot in that form be presented to another court, unless the plaint is considerably amended so as even to change the nature of the suit. In such circumstances I do not think that the prayer of Mr. Viswanatha Iyer can be allowed. Therefore, I dismiss the second appeal, holding that the suit as framed is not maintainable. In the circumstances of the case the parties are directed to bear their respective costs in second appeal.