

**Kolandiyl Ammad Vs. Changaran and ors.**

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**Court :** Kerala

**Decided On :** Jun-04-1963

**Reported in :** AIR1963Ker344

**Judge :** T.C. Raghavan, J.

**Acts :** Limitation Act, 1908 - Sections 6 and 22 - Schedule - Article 44; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 1, Rule 10; [Transfer of Property Act, 1882](#) - Sections 122 and 123

**Appeal No. :** Second Appeal No. 1250 of 1959

**Appellant :** Kolandiyl Ammad

**Respondent :** Changaran and ors.

**Advocate for Def. :** A. Achuthan Nambiar, Adv. for Respondent (Nos. 1 and 2) and T.L. Vishwanatha Iyer, Adv. for Respondent (No. 5)

**Advocate for Pet/Ap. :** M.G. Sreedharan, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**T.C. Raghavan, J.**

1. The appellant filed the suit for partition and recovery of possession of his 28 out of 48 shares in the suit property, which is a tenancy right. The property belonged to the 1st defendant and a person named; Andarman; and the plaintiff's father, Avulla held the same on lease. Avulla died leaving the plaintiff and the 13th defendant, who were his minor children, and his widow, the 12th defendant. Thus on the death of Avulla, the plaintiff became entitled to 28 out of 48 shares, under the Mohamadan Law, being Avulla's son, the 13th defendant became entitled to 14 shares being the daughter and the 12th defendant, the widow of Avulla, took the remaining 6 shares. The 12th defendant, acting for herself and as guardian of her minor children, surrendered the leasehold right to the 1st defendant and Andarman on 5th May 1934. Defendants 14 to 17 obtained leases from the owners of the property after the surrender by the 12th defendant. The 18th defendant claimed to be a donee from the 1st defendant of his half share. Originally, defendants 14 to 18 were not impleaded in the suit and they were impleaded only on 19th November 1953 as per order in K. I. A. No, 3929 of 1953. The suit itself was instituted on 13th June 1950, the plaintiff having attained majority on 13th June 1950. The plaintiff's elder sister, the 13th defendant, who attained majority earlier, did not institute any suit. Defendants 14 to 18 alone are impleaded in the second appeal and they are respondents 1 to 5.

2. So far as the second appeal is concerned, the following findings alone need be noted. The trial court found that the surrender of the tenancy right by the mother acting as the guardian of the Mohamadan minors was void and invalid and therefore it did not affect the share of the children. It also held that since the 13th defendant did not file a suit within three years of her attaining majority, her rights were barred by limitation. Regarding the plaintiff, the trial court held that he was entitled to his 28 out of 48 shares in the tenancy right and was thus entitled to recovery of possession of the same. It held further that the tenancy created in favour of defendants 14 to 17 after the surrender by the 12th defendant also fell to the ground, since the surrender itself was void. On the question of limitation pleaded by these defendants under Sec. 22 of the Limitation Act, the trial court held that since their title was only derivative from the 1st defendant and Andarman, on the wiping out of the surrender the tenancy created by them also disappeared and these defendants could not therefore avail of the plea of

limitation. Similarly, on the plea of the 18th defendant that she was entitled to a half share in the property under the gift in her favour by the 1st defendant, the trial court held that since there was no evidence of acceptance of the gift by her, the gift was not established.

3. Two appeals were filed by the defendants 14 to 17 and the 18th defendant respectively before the lower appellate court. The learned Subordinate Judge accepted the case of the plaintiff that the surrender of the lease by the mother was void and invalid, mainly because there was no objection against that finding. But on the question of limitation the learned Subordinate Judge disagreed with the learned Munsif. The Subordinate Judge held that since defendants 14 to 18 were impleaded more than three years after the attainment of majority by the plaintiff, the suit against them was barred by limitation under Section 22 of the Limitation Act. He also held that the view expressed by the Munsif, that there was no evidence regarding the acceptance of the gift by the defendant, was wrong. In the result, he allowed the appeal in part holding that the plaintiff would be entitled to 28 out of 48 shares of an undivided half share over the property, that is, he would be entitled to 28 out of 96 shares of the property, and that share would be subject to the tenancy right of defendants 14 to 17. Thus under the decree the plaintiff was entitled to recover only symbolical possession of this share, the tenancy right, having been found with defendants 14 to 17, it is this decision of the learned Subordinate-Judge that is being questioned in second-appeal.

4. Mr. M. C. Sreedharan, the learned advocate of the appellant, brings to my notice some observations in some decisions to the effect that a lessee is bound by a judgment against his lessor in the absence of any fraud or collusion on his part and that a lawful judgment which deprives the landlord of the estate deprives the tenant, of necessity, of his subordinate right. One of the decisions is *Krishnan Nair v. Kambi*, AIR 1937 Mad 544. Mr. Sreedharan refers to two more decisions and they are *Sheikh Yusuf v. Jyotish Chandra*, AIR 1932 Cal 241 and *Sailendra Nath v. Bijan Lal*, AIR 1945 Cal 283. The observations in these two cases are to the effect that a sub-lessee would be bound by a decree for possession obtained by the lessor against a lessee, no matter whether the suit lease was created before or after the suit. The learned counsel also points out that this dictum of the Calcutta

cases has been approved by the Supreme Court in *Gurushiddaswarni Guru Ganga-dharswami v. Dakshina Maharashtra Digarn-bar Jain Sabha*, AIR 1953 SC 514. But, as pointed, out in the Supreme Court decision itself, the case before me is not one by a landlord against his tenant for evicting him basing the claim on the ground of determination of tenancy. Therefore, these decisions cannot be pressed into service for getting round the plea of limitation by a person in possession.

5. Even if the right of the 1st defendant and Andarman under the surrender is found to be void and invalid, even then that decision by itself cannot grant recovery of possession of the property from the persons in actual possession. There is a distinction between a suit for possession and a suit for a mere declaration, as pointed out in *Kasim Ali v. Ratna Manikka Mudaliar*, AIR 1938 Mad 677. The Madras High Court held therein that the suit contemplated by Article 44 of the Limitation Act was a suit for possession and not a mere suit for declaration and such a suit should be instituted against the parties in possession as well.

6. In the present case, the suit is undoubtedly one for recovery of possession of the property and not for a mere declaration that the surrender is void and invalid. In such a suit for possession the persons in actual possession of the property are necessary parties and they should be impleaded. If the impleading of such persons in possession, who are necessary parties, takes place more than three years after the attainment of majority by the plaintiff, it is evident that the suit is barred under Section 22 of the Limitation Act against such persons. That proposition is clear; and if any authority is required for the same, *Rangacharlu Chettyar v. Muthukarnapan* 16 Ind Cas 420 (Mad) may be referred to. That was a suit in ejectment against A, and B was added as a party on the statement of A that the property was usufructually mortgaged by A to 'B, who was thus in possession. It was held that because B was impleaded more than 12 years after the dispossession of the plaintiff by A, the plaintiff's suit was barred against B, whether Article 142 or Article 144 of the Limitation Act applied. According to me, that Division Bench decision of the Madras High Court applies to the present case. The plaintiff lost possession of the Property more than 12 years before his attainment of majority, so that he got a period of three years after his attaining majority to get recovery of possession from the persons, in actual possession. Having failed to

imp lead such persons within the said three years, the suit is barred by limitation against those individuals. Thus the decision of the learned Subordinate Judge that the suit is barred against defendants 14 to 18 has to be upheld.

7. The finding of the learned Munsif, that it is not established that the gift was accepted by the donee, is also wrong. It is clear from the recitals in the gift deed that the donor conveyed such possession as he then had to the donee and the donee accepted the same. The property was then outstanding with tenants and what remained with the donor was only the right to collect rent from them; and that right to collect rent was transferred to and accepted by the donee under the terms of the gift. Therefore, on this point. also the finding of the learned Subordinate Judge is correct.

8. The consequence is the second appeal is dismissed, but, in the circumstances, without costs.

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