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Reserved on:02.08.2016
Delivered on:12.08.2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.08.2016

Coram:

THE HONOURABLE MS.JUSTICE R.MALA

S.A.(MD)No.582 of 2015

and

M.P.(MD)No.1 of 2015

Metttilbai

.. Appellant/Appellant/Plaintiff

vs.

1.Balammal (died)

2.Bright

3.Thomas

4.Lillybai

5.Vimalabai

6.Suganthabai

7.Devasundaram

8.Sam Sundar

9.Jaya

10.Hemalatha

11.Rakel (died)

12.Charlet

13.Rejitham

14.Jebamoni

15.Kanagammal Nadachi

... Respondents/Respondents/Defendants

(R.2 to R.10 recorded as L.Rs of
the deceased first respondent and
R.12 to R.14 recorded as L.Rs of
the deceased 11th respondent as
per order of this Court dated
15.09.2015 made in M.P.(MD)
No.1 of 2007 in S.A.(MD)SRNo.
10938 of 2006.)

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the decree and judgment dated 24.10.2005 passed in A.S.No.30 of 2005, on the file of the learned District Judge, Kanyakumari at Nagercoil, confirming the Judgment and decree dated 13.12.2004 passed in O.S.No.178 of 2003, on the file of the learned Subordinate Judge, Padmanabhapuram.



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For Appellant : Mr.P.Subramaniam
For Respondents : Mr.K.Sreekumaran Nair
for R.2 to R.10
: Mr.T.Arul
for R.12 and R.13

: Mr.S.O.Paramasivam
for R.14 and R.15

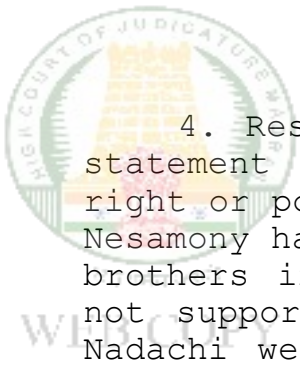
: R.1 and R.11 died

JUDGMENT

The plaintiff, who last the legal battle before both the Courts below, has come forward with this Second Appeal challenging the Judgement and Decree dated 24.10.2005, passed in A.S.No.30 of 2005, on the file of the learned District Judge, Kanyakumari at Nagercoil, by confirming the Judgment and Decree dated 13.12.2004, passed in O.S.No.178 of 2003, on the file of the learned Subordinate Judge, Padmanabhapuram.

2. Heard the learned counsel for the appellant and the learned Counsel for the respondents and perused the materials available on record.

3. The appellant, as a plaintiff filed a suit in O.S.No.178 of 2003 for declaration of title and injunction restraining the defendants from interfering with her possession and enjoyment of the suit properties by stating that the suit properties are originally belonged to Thankayyan, Nesayyan and Nesamony, who are brothers. Nesamony, who was the eldest brother executed a mortgage deed for him and for his brothers as guardian, on 13th Karkatakam 1107 M.E. (28.07.1932) in favour of one Chellammal Nadachy, daughter of Rahel Nadachy. The mortgage is not redeemed so far and by efflux of time, the mortgagee Chellammal became the owner of the properties. On 05.07.2000, Chellammal executed a registered will deed 47 of 2000 (05.07.2000) in favour of the plaintiff to an extent of 1 Acre 36 cents and 593 square links in Resurvey No.141/8 of Ponmanai Village. On 30.03.1993, Chellammal Nadachy sold 35 cents and 218 square links in R.S.No.141/8 to the plaintiff. On 30.03.1993, Kanakammal Nadachy, daughter of Rahel Nadachy executed a sale deed in favour of the plaintiff to an extent of 10 cents in R.S. No.141/8. Thus the plaintiff is the absolute owner of the suit properties. The defendants have no right, title and possession over the suit properties and they are trying to enter into the properties by claiming that they are the owners of the suit properties. Hence, she is constrained to file the suit for for declaration of title and injunction restraining the defendants from interfering with her possession and enjoyment of the suit properties.



4. Resisting the same, the defendants 1 to 10 filed a written statement stating that the plaintiff has no manner of ownership, right or possession and enjoyment in respect of the suit properties. Nesamony had no power to execute a mortgage for and on behalf of his brothers in favour of Chellammal Nadachi and the said mortgage is not supported by consideration. Chellammal Nadachi and Kanagammal Nadachi were incompetent to execute the will dated 05.07.2000 and the sale deed dated 30.03.1993. Since the executants had no right, the plaintiff did not get any right over the suit properties. The defendants are the absolute owners of the suit properties and they never attempted to trespass into the suit properties. Patta and tax receipts will not confer any right on the plaintiff and hence, they prayed for dismissal of the suit.

5. The defendants 11 to 13 filed a detailed written statement by stating that there is no usufructuary mortgage in 1107 M.R. and it is a false and nominal document and no such document is followed by possession. The sale deed dated 30.03.1993 in favour the plaintiff executed by Chellammal Nadachy and the sale deed dated 30.03.1993 in favour of the plaintiff executed by Kanagammal Nadachy are invalid and fraudulent documents. The mortgage in favour of Chellammal Nadachy and Kanagammal Nadachy are not followed by possession. Hence, they prayed for dismissal of the suit.

6. The 14th defendant filed a written statement stating that the plaintiff is enjoying the property comprised in S.No.141/8 as the wife of this defendant and the mortgage was redeemed already by his father. Chellammal Nadachy has no right to execute the Will deed regarding the plaint schedule properties, since she had already surrendered her right. The suit is bad for mis-joinder of parties and non-joinder of parties. The plaintiff has no right or title over the suit properties. Hence, he prayed for dismissal of the suit.

7. The trial Court, after considering the averments both in the plaint and written statement and the arguments of both sides, has framed the necessary issues and also considering the oral and documentary evidences of both sides, dismissed the suit stating that the plaintiff has not proved that she is in possession and enjoyment of the suit properties and hence, she is not entitled to get any relief of declaration of tile and injunction. Against which, the plaintiff preferred an appeal in A.S.No.30 of 2005. The first Appellate Court also dismissed the appeal by confirming the decree and judgment of the trial Court. Against which, the second appeal has been preferred by the plaintiff.

8. At the time of admission of the Second Appeal, the following Substantial Questions of Law have been framed:



dismissed the suit? and

(b) Whether the Courts below are right in deciding the issue contra to Section 92 of the Indian Evidence Act accepting the oral evidence and rejecting the recitals in the registered document?"

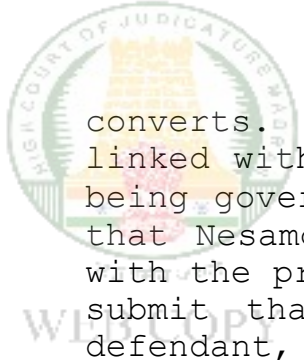
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9. The admitted facts are the property is belonging to one Vedamanikkam and he has three sons and two daughters viz., Nesamony, Thankayyan, Nesayyan, Chellammal and Kanakammal.

10. The learned Counsel for the appellant/plaintiff would submit that Ex.A.1 has been executed by Nesamony on his behalf and on behalf of his minor brothers in favour of Chellammal Nadachy on the eve of her marriage. Since it is a usufructuary mortgage which was not redeemed within 30 years, she became the owner of the property and she executed a Will under Ex.A.3, on 05.07.2000 to the appellant/plaintiff. Hence, the plaintiff is the owner of the property. The learned Counsel would further submit that as per Ex.A.7, on the eve of marriage of Kanakammal Nadachy, another sister of Nesamony, he executed Othi deed on 30.08.1951 in respect of Item No.3 of the suit schedule property measuring 10 cents out of 35 cents and 1/3rd of his share has not been redeemed by him. So, she became the owner of the property and she sold the same to the plaintiff under Ex.A.6 on 30.03.1993 in respect of item No.3 of suit schedule property. Hence, the plaintiff is the owner of Item No.3 of suit schedule property. Chellammal Nadachy sold Item No.1 of the suit schedule property under Ex.A.5, dated 30.03.1993 measuring 35 cents. Hence, the plaintiff is the owner of three items and she is in possession. Now the respondents are attempted to interfere with her possession and hence, she filed the suit.

11. The learned Counsel for the plaintiff would further submit that once the title and the execution of mortgage have been admitted, since it was not redeemed within 30 years, the mortgagees viz., Chellammal Nadachy and Kanakammal Nadachy became the owner of the properties and they have right to deal with the properties. He would further submit that as per Section 3 of the Travancore Christian Guardianship Act, Nesamony is the full brother of Thankayyan, Nesayyan and he has executed othi deed in favour of Chellammal Nadachy and that has not been questioned after they attained majority. So, Ex.A.1 binds the shares of Thankayyan and Nesayyan.

12. He would rely upon a decision in **P.Pathrakali Nadachi Vs. V. Subbiah Nadar and Others** reported in **1981(3) MLJ 463**. In that it was held that the application of the usage to one section of people alone will make the law of inheritance a lopsided one in favour of

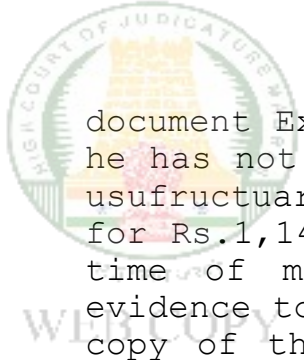


converts. Therefore, the continuance of the usage is irretrievably linked with both parties viz., Hindus as well as Christian converts being governed by the Hindu Law of inheritance and he would submit that Nesamony has every right to execute Othi mortgage deed dealt with the property on behalf of his minor brother. He would further submit that Thankayyan executed a Will in favour of the first defendant, W/o Nesayyan under Ex.B.3 and in that no description of the property has been given, even though the Will has been probated. Against which A.S.No.1050 of 1988 has been filed which is pending before this Court and it was not binding. He would further submit that as per Exs.A.3, A.5 and A.6, the appellant is entitled to a decree. That factum was not considered by both the Courts below. Hence, he prayed for allowing of this Second Appeal.

13. Per contra, the learned Counsel for the respondents would submit that the documents Exs.A.1 and A.7 have been executed with a malafide intention and they have not come into effect. Nesamony himself filed a suit in O.S.No.34 of 1980 for partition, which is pending before the District Munsif Court, Padmanabhapuram. In that the suit properties are the subject matter. So, Exs.A.1 and A.7 have not been come into effect. He would further submit that Article 61 of the Limitation Act is not applicable. As per Section 62 of the Transfer of Property Act, the possession has not been given to the mortgagees. So it was not acted upon. That factum was rightly considered by both the Courts below. Hence, he prayed for dismissal of the Second Appeal.

14. In support of his contention, the learned Counsel for the respondents would rely upon a decision in **Singh Ram (D) th. L.Rs Vs. Sheo Ram and Others** reported in **2015(3) CTC 197**. In that it was held that Article 61 of the Limitation Act would only commence when the mortgage money is paid out of rents and profits or partly out of rents and partly by payment of deposit by Mortgagor. The suit for declaration filed by Usufructuary Mortgagee on mere expiry of 30 years from the date of mortgage, is not maintainable and is not entitled for declaration. He would further submit that the documents Exs.A.1, A.3, A.5 to A.7 are created by her father-in-law of Nesamony and his only aim is to grab the property. Hence, he prayed for dismissal of the second appeal.

15. Considering the rival submissions made by both sides and on a perusal of typed set of papers, it is an admitted fact that the properties are belonging to Vedamanikkam and Vedamanikkam had three sons and two daughters viz., Nesamony, Thankayyan, Nesayyan, Chellammal and Kanakammal and they are belonging to Christian religion. Now the Court has to decide as to whether Ex.A.1 dated 28.07.1932 is an usufructuary mortgage (Othi) in favour of Chellammal Nadachi executed by Nesamony and on his behalf and on behalf of his minor brothers Thankayyan and Nesayyan. In that it was specifically mentioned that on the eve of the marriage, the property has been given as usufructuary mortgage for enjoyment. The



document Ex.A.1 has been executed for Rs.3,000/- as Sridhana, since he has not paid Sridhana amount and that property has been given as usufructuary mortgage. Ex.A.7 usufructuary mortgage was executed for Rs.1,140/- towards balance costs of agreed gold ornament at the time of marriage of Kanakammal Nadachi. There is no iota of evidence to show that the documents were given effective. The tamil copy of the documents Exs.A.1 and A.2 is available. The learned Counsel for the respondents would submit that Nesamony has no *locus standi* to execute Othi deed.

16. At this juncture, it is appropriate to extract Section 3 of the Travancore Christian Guardianship Act, which is as follows:

"3. The following persons, in the order named, shall be the legal guardians of minors in respect of their person and properties, namely, the father, mother, paternal grand-father, full-brothers in the order of seniority, half-brothers by the same father in the order of seniority, maternal grand-father, paternal uncles in the order of seniority and maternal uncles in the order of seniority;

Provided that the husband shall be the legal guardian of his minor wife in respect of her person and property."

In that it was specifically mentioned Father, Mother, paternal grand-father, full brothers in order of seniority, shall be the legal guardians of minors. Here, admittedly, Nesamony is the full brother of Thankayyan and Nesayyan. Hence, he is a competent person to act as guardian for minor brothers and executed the sale deed and othi deed. So, I am of the view that Nesamony is entitled to execute Othi Mortgage deed - Ex.A.1 on behalf of himself and on behalf of his minor brother which is valid under law and he is a competent person to represent his minor brothers as per Section 3 of the Travancore Christian Guardianship Act. Exs.A.7 and A.8 are concerned, since his brothers attained majority and they did not agree and joined with him, Nesamony has executed usufructuoury mortgage only in respect of his 1/3rd share. Now this Court has to consider whether it has been acted upon. But there is no iota of evidence before the Court to show that in pursuant of Exs.A.1 and A.2 = Exs.A.7 and A.8, Chellammal Nadachy and Kanakammal Nadachi were enjoying the property.

17.The main claim of the appellant is that Exs.A.1 and A.2 = Exs.A.7 and A.8 have not been redeemed within a period of 30 years, as per Article 61 of the Limitation Act and hence, the Mortgagees have become the owners of the properties. At this juncture, it is appropriate to incorporate Article 61 of the Limitation Act, which is as follows:



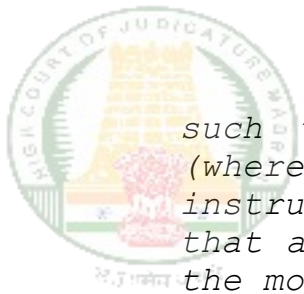
Description of suit	Period of limitation	Time from which period begins to run
61. By a mortgagor- (a) to redeem or recover possession of immovable property mortgaged;	Thirty years	When the right to redeem or to recover possession accrues
(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration;	Twelve years	When the transfer becomes known to the plaintiff
(c) to recover surplus collections received by the mortgagee after the mortgage has been satisfied.	Three years	When the mortgagor re-enters on the mortgaged property.

18. It is also appropriate to incorporate Sections 58(d) of the Transfer of Property Act, which is as follows:

"58(d) Usufructuary mortgage - Where the mortgagor delivers possession (or expressly or by implication binds himself to deliver possession) of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property (or any part of such rents and profits and to appropriate the same) in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest, or in payment of the mortgage -money, or partly in in lieu of interest (or) partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee as usufructuary mortgagee.

19. It is also appropriate to incorporate Sections 60 and 62 of the Transfer of Property Act which are as follows:

60. Right of mortgagor to redeem: At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver (to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee), (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost the mortgagor either to re-transfer the mortgaged property to him or to



such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished.

Provided that the right conferred by this section has not been extinguished by act of the parties or by (decree) of a Court.

The right conferred by this Section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property: - Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except (only) where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

62. Right of usufructuary mortgagor to recover possession:- In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property (together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee) -

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property, - when such money is paid;

(b) Where the mortgagee is authorised to pay himself from such rents and profits (or any part thereof a part only of the mortgage-money), - when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee (the mortgage-money or the balance thereof) or deposits it in Court hereinafter provided.

20. The learned Counsel for the respondents would submit that Exs. A.1 and A.2 = Exs.A.7 and A.8 are not valid documents and they were not given effective and they are invalid and hence, the plaintiff is not in possession of the suit properties. Nesamony himself has no intention to give the properties as usufructuary mortgage because he himself filed a suit for partition and separate possession of his share in the suit property and that suit is pending in O.S.No.34 of 1989, on the file of the Subordinate Court,

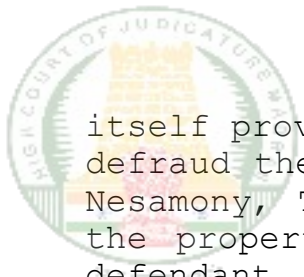
Padmanabhapuram for claiming his 95 ½ cents in A schedule items 1 and 2, partition of 1/3rd share in A schedule items 3 and ½ share in A schedule items 4 to 6 and ½ share in B schedule property. That items are subject matter of the present suit. In this plaint pleadings, he has not pleaded that the properties have been mortgaged in favour of his sisters. While considering the plaint pleadings, he himself stated that the total extent of A schedule item 1 and 2 is 4 acres 14 cents and out of which, his brother Nesayyan sold 1 acre 37 cents. Hence, 2 acres 77 cents is available and in that he is entitled to 1/3rd share. He would further submit that he sold 27 cents, out of his 1/3rd share. So he is entitled only 65 1/3 cents. So, the plaint will prove that usufructuary mortgage deeds Exs.A.1 and A.7 are not true and not acted upon. It is appropriate to consider when the cause of action for the redemption has been arisen.

21. At this juncture, it is appropriate to consider the decision relied upon by the learned Counsel for the respondents in ***Singh Ram (D) th. L.Rs Vs. Sheo Ram and Others*** reported in **2015(3) CTC 197** and in paragraph Nos.14 and 15, it was held as follows:

14. We need not multiply reference to other judgments. Reference to above judgments clearly spell out the reasons for conflicting views. In cases where distinction in usufructuary mortgagor's right under Section 62 of the T.P. Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of right of redemption after 30 years.

15. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly."

22. So merely because 30 years has been lapsed, the execution of usufructuary mortgage under Exs.A.1 and A.2 = A.7 and A.8 will not confer title to the Mortgagees viz., Chellammal Nadachi under Exs.A.1 and A.2 and Kanakammal Nadachi under Exs.A.7 and A.8. So, considering the above cited Full Bench Judgment of the Honourable Supreme Court, I am of the view that the arguments advanced by the learned Counsel for the appellant that since the usufructuary mortgage has not been redeemed within 30 years, as per Article 61 of the Limitation Act, they became the owners of the properties, does not merit acceptance. Furthermore as already discussed by this Court, that Exs.A.1 and A.2 = A.7 and A.8 have not been acted upon and they are not valid. The subsequent contact of this Nesamony



itself proved that those documents were executed only with a view to defraud the other co-sharers. One more adding circumstance is that Nesamony, Thankayyan, Nesayyan have each entitled to 1/3rd share in the property. Thangayyan executed a Will in favour of the first defendant, W/o Nesayyan. Se filed Probate O.P. No.57 of 1985 and in that Nesamony's one child and Nesayyan are the parties to the proceedings. That has been challenged by way of appeal in A.S.No.1050 of 1988 and that appeal has been dismissed by confirming the judgment and decree passed in O.P.No.57 of 1985.

23. So the judgment in respect of the Will is concerned, the judgment in rem and it binds others and the judgment is binding the plaintiff also. Further as already stated, after execution of Exs.A.1 and A.2 = A.7 and A.8, Nesamony himself sold a portion of the properties to the third parties. In such circumstances I am of the view that the first Appellate Court has rightly held that the plaintiff is not entitled to any relief, since Exs.A.1 and A.7 were not true and acted upon

24. The learned Counsel for the appellant/plaintiff would rely upon a decision in **P.Pathrakali Nadachi Vs. V.Subbiah Nadar and Others** reported in **1981(3) MLJ 463** and in paragraph No.12 of the above said judgment it is held as follows:

"12. In view of this position, we can dispose -of the appeal by holding that the first appellate Judge has applied the correct principles of law and decreed the suit and as such the appeal must fail. However_ Mr. Selvaraj contended before us that we should independently examine the correctness of the ratio laid down in Ananchaperumal Nadar v. Muthiah Nadar, 34 Trav Li 503: 1944 Trav LR 595 (FB) and render judgment in the case. Learned counsel stated that the Christian Succession Act had been enacted only to consolidate and amend the rules of law applicable to intestate succession among the Indian Christians in. Travancore and the legislation had not interfered with or abrogated the customary law followed by the Hindu Nadars of Travancore State, which permitted members of Nadar families belonging to the Christian faith also being admitted to inheritance and succession. Learned counsel argued or impliedly impinge upon the, usage adopted by the Hindu Nadars in refraining from treating the converts to Christianity as apostates and instead, treating them as members of the family and admitted them to succession in accordance with the principles of Hindu Law. As such, - any change brought about by the Christian Succession Act to regulate the law of succession relating to Christian converts cannot have the effect of 'extinguishing the customary law followed by the Nadars of the Hindu faith and consequently, the customary law will continue to govern the Hindu and Christian Nadars so far as the rights of



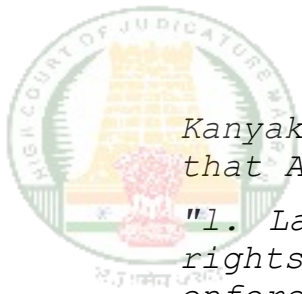
succession to properties left behind by Hindu Nadars are concerned. To put it differently, the submission of learned counsel was that though the converts would, subsequent to the passing of the Act, be governed by the Christian Law of succession. the non converts i.e., Hindus would continue to be governed by the old and subsisting law governing them. In this context, learned counsel. placed very great reliance on the dissenting judgment of Abraham J. in Ananchaperumal Nadar V. Muthiah Nadar, 34 Trav LJ 503; 1944 Trav LR 595 (FB). The relevant portions in the judgment read as follows:-

"Indeed, the gist of the argument was that with the passing of the Christian Succession Act which applied to the Nadar converts, the usage primarily existing stood abrogated, for want of mutuality. It seems to me impossible to accept this argument for the simple reason that in spite of the Christian Succession Act ' the law of the Hindu Nadar remained the same and should govern the devolution of his property. Part of that law was an established usage whereby apostasy did not work any forfeiture of rights to property or succession There was absolutely no disqualification from the religious, social or proprietary point of view. The disqualification was removed not by Hindu Law, but in spite of it and by custom. If, in those circumstances, before the Christian Succession Act came into force, family properties had be actually divided between the convert and his Hindu relations, such division would not still have re-introduced any peculiar disqualification or abrogated the custom in use. The Christian Succession Act practically brought about this division by transforming the joint tenancy into a tenancy in common. Parcenership and its concomitant survivorship ceased to exist. That was all. The convert would, therefore, thereafter, be governed by the Christian Law of succession and ' the Hindu, by the old and subsisting law governing him."

13. Eventually, Abraham J. held as follows:-

"If any change is deemed necessary, it should be, brought about by legislation, and not by judicial interference. It is not for the court to make up for any mutuality previously enjoyed, , by .changing the law for the Hindu Nadars -what it now obtains?"

14. Mr. Selvaraj submitted -that, the view taken by the dissenting judge, Abraham J. had eventually found favour with Government and this is reflected by the extension of the Caste Disabilities Removal Act (21 of 1850) to



Kanyakumari District in 1951 (1126 M. E.). Section 1 of that Act reads as follows:-

"1. Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced:-

So much of any law or usage now in force within India as inflicts on any person forfeiture of rights of property, or may be held in any way to impair or afflict any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in any court." Since this Act has been extended to Kanyakumari district to which the parties belong, long after the death of Ponnammal, its provisions cannot have application to the facts of the case, and hence it, is not necessary for us to dwell at length on the change brought about by the legislation on the personal law or usage which affected the rights of inheritance of any person by reason of exclusion from the communion of any religion or deprivation of caste. It will however be apposite to point out that we are not now dealing with any usage which affected the rights of inheritance of persons on the ground of religious or caste considerations, but on the other hand, we are concerned with the continuance of a custom which accorded with the underlying object of the Caste Disabilities Removal Act. While pure Hindu Law as such treated converts to Christianity as apostates and forfeited the rights to property or succession of the converts, the customary law practised by the Nadars, in so far as the Christian converts should not be treated as outcastes and they would not be deprived of their right to property or succession. In our opinion, the modification of the, personal law by custom by long and continuous usage which resulted in the customary law being recognised as a valid and enforceable by courts, cannot be viewed from one angle alone, but on the other hand, must be viewed in its entire perspective. Seen from the side of the converts alone. It is no doubt 'true that the Christian Act did not affect the, rights of Hindu Nadars to overlook, the conversion to Christianity of, their family members and recognise their rights also to claim the properties of the family under the rule of survivorship, reversion etc. But, what is of significance is whether, on this ground alone, the appellant's contention that the Act in question did not interfere with the practice of the customary law can be accepted. For a proper appreciation of the matter, we must bear in mind the underlying reason for the members of the Nadar community deviating from the principles of Hindu Law and admitting to succession and inheritance the members of the family who had gone over to the Christian faith. Obviously, the members of the



community. must have felt that notwithstanding the conversion to Christianity of some of the family members, the ties of relationship as well as social communion, marital rites, funeral rites, etc. need not stand affected and, likewise, so long as the converts were prepared to be governed by the system of inheritance under the Hindu law, there need not be any exclusion of the Christian converts from property rights. Stated differently, it means that the members of the Hindu faith agreed to give shares in the properties to the Christian converts, provided, in return, their right to succeed to the properties of the Christian converts also remained unaffected and was recognised by the converts by agreeing to have a common system of inheritance under the Hindu Law. It is this mutuality which should 'have impelled the -Nadar community to deviate from the ancient texts and evolve a customary law that created rights and liabilities in favour of the converts as well as the non-converts. To forget this feature and contend that the usage was a completely one-sided affair and the Hindu Nadars were bound by it for ever and anon irrespective of the curtailment of their mutual rights by enactments like the Christian Succession Act, is too sweeping an argument to merit acceptance. As pointed out by V Krishnaswami Iyer C. J. where a usage at variance with the personal law had been established to prevail amongst persons, the advantages and disadvantages resulting from that usage must be preserved in their full integrity in every individual case to which the usage is sought to be applied. Otherwise, the blind application of the ,usage to one section of the people alone will make the law of, inheritance a lopsided one in favour of the converts. By way of illustration, it may be stated that a convert can lay claim to the properties of a Hindu as a survivor or as a reversioner, but correspondingly, a Hindu will not be entitled to claim such rights against the properties left by a convert, since the latter's properties will be governed by the Christian Succession Act in the matter of succession. Therefore, the continuance of the usage is irretrievably linked with both parties, viz. Hindu as well as Christian converts being governed by the Hindu Law of inheritance. Once legislation intervened and placed the Christian converts outside the fold of Hindu Law, in the matter of inheritance in respect of their properties, the usage must be held to have been disrupted in its form. content and applicability resulting in its discontinuance. We are unable to share the opinion of Abraham J. that notwithstanding the converts being governed by the Christian law of succession, the Hindu Nadars will continue to be governed by the customary law practised by them hitherto and that a change in the state of affairs can be brought about only by legislation and not judicial interference. The learned Judge has had to note that no legislation was called



for since the customary law died a natural death by reason of the Christian Succession Act robbing the customary law of its content of mutuality, and as such, all that the court had done in *Ananchaperumal Nadar v. Muthiah Nadar*, 34 Trav LJ 503: 194-4 Trav LR 595 (FB) was only to have noticed this feature and determined the rights of parties accordingly."

25. The above citation is not applicable to the facts of the present case. Already this Court held that as per Section 3 of the Travancore Christian Guardianship Act, the full brother has acted as guardian of minors in the absence of father, mother and paternal grandfather.

26. The learned Counsel appearing for the appellant/plaintiff would submit that as per Section 27 of the Limitation Act, the right of the plaintiff as owner of the properties has been extinguished. But the above argument does not hold good, because there is no evidence to show that in pursuance of execution of Exs.A.1 and A.2 = A.7 and A.8, Chellammal Nadachi and Kanakammal Nadachi took possession and enjoyed the same and there is no evidence to show that they handed over the possession to the plaintiff. In such circumstances, since the appellant/plaintiff is not in possession of the properties, the question of application of Section 27 of the Limitation Act does not arise. So, the Substantial Question of Law (a) is answered accordingly.

27. The learned Counsel for the appellant would submit that once the documents Exs.A.1 and A.2 = A.7 and A.8 are there, both the Courts below ought to have accepted the terms and oral evidences shall not be looked into and they are barred under Section 92 of the Indian Evidence Act. There is no quarrel over the propositions. But the plaintiff ought to have proved that the predecessors in title have right over the property and they were in possession and they handed over the possession to them. But admittedly the oral and documentary evidences would show that even Exs.A.1 and A.2 = A.7 and A.8 are registered documents, there is no iota of evidence before the Court to show that mortgagees have taken possession of the properties and handed over the properties to the appellant/plaintiff in pursuance of settlement deed and sale deed. Per contra, there is documentary evidence to show that the Mortgagor himself has dealt with the property by way of selling some of the properties and filed a suit for partition and executed the Will. The finding in the Will is judgment in rem. Hence, I am of the view that the appellant/plaintiff is not entitled to any relief. The Substantial Question of Law (b) is answered accordingly.

28. In view of the answer given to the Substantial Questions of Laws (a) and (b), the trial Court and the first Appellate Court have rightly held that the appellant/plaintiff is not entitled to any relief and dismissed the suit. Hence, this Second Appeal deserves to be dismissed with costs.

29. Accordingly, this Second Appeal is dismissed, by



confirming the judgment and decree passed by both the Courts below, with costs. Consequently, the connected Civil Miscellaneous Petition is also dismissed.

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Assistant Registrar (CSII)

/True Copy/

Sub Assistant Registrar

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To

1. The learned District Judge,
Kanyakumari at Nagercoil.
2. The Subordinate Judge,
Padmanabhapuram.

+1 cc to Mr.T.ARUL, Advocate, Sr.No: 45130
+1 cc to Mr.S.RAMESH , Advocate, Sr.No: 44273
+1 cc to Mr.K.SREE KUMARAN NAIR , Advocate, Sr.No: 43943

JAM/DB/SARIII/29.09.16/15 P-6C

S.A.No.582 of 2015
and
M.P. (MD) No.1 of 2015
12.08.2016