

Gopi REDDI
 v.
 MAHANANDI
 REDDI.

JUDGMENT :—We are of opinion that where the award cannot be produced and therefore cannot be filed, the special procedure, by which a decree can issue upon the award filed, in Court becomes impossible, and the plaintiffs must, therefore, be referred to a regular suit to enforce the terms of the award.

We make no order as to the costs of this reference.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

IMAM (PLAINTIFF), APPELLANT,

v.

BALAMMA (DEFENDANT No. 3), RESPONDENT.*

Hindu law—Notice by possession of widow of her rights to maintenance—Sale of family property to discharge previous mortgage.

Immovable property of a joint Hindu family was sold by a member of the family and his two sons to the plaintiff, and the purchase money was expended in redeeming a mortgage. The character of the mortgage debt was not shown.

In a suit by the plaintiff for possession it appeared that the property in question had been in the exclusive possession of another member of the family, and after his death in that of his widow, for more than 26 years; and that neither of them had concurred in the sale to the plaintiff; it was also found that the widow was entitled to possession on account of maintenance:

Held, that the separate possession of the widow was notice to the plaintiff of her interest in the land, and that he was not entitled to defeat it.

SECOND APPEAL against the decree of J. W. Best, District Judge of South Canara, in appeal suit No. 378 of 1887, reversing the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 67 of 1887.

This was a suit instituted in 1887 for possession of certain land. The land was the property of a joint Hindu family to which the defendant belonged. Defendants Nos. 1 and 2 were the sons of one Ramappa (deceased), and defendant No. 3 was the widow of Ramappa's brother Bhadru. The dates when Ramappa and Bhadru died did not appear from the record of the second appeal.

* Second Appeal No. 1369 of 1888.

The plaintiff claimed the land under exhibit A—a sale-deed, dated 1879, which reserved a right of re-purchase by the vendors till 29th October, 1882—executed to him by defendants Nos. 1 and 2 and their late father. He also alleged a oral demise by him to defendants Nos. 1 and 2, which, however, he failed to establish.

Defendants Nos. 1 and 2 were *ex parte*.

Defendant No. 3 denied all knowledge of the sale and the oral lease set up. She contended that the northern moiety of the property was her husband's self-acquisition, and that the southern moiety was given to her for defraying the expenses of family ceremonies. She also pleaded that the suit was barred by the law of limitation; and further claimed to be entitled to retain possession on account of her maintenance.

The Munsif found that the plea of self-acquisition and reservation for family ceremonies was not made out, and held that there was no limitation bar inasmuch as the possession was never adverse. As to the sale he said that it had taken place without the co-operation of either Bhadru or his widow, and that "though the plaintiff showed that the purchase money was paid in discharge of a mortgage of 1873—exhibit B—there was nothing to show that the debt received by the mortgagee was of such a nature as to be binding on defendant No. 3." Moreover, no issue was framed as to the nature of the debt. On the above findings, and on the authority of *Venkatammal v. Andyappa*(1) the Munsif decreed that, subject to the third defendant's right to the possession during her life, of the plaint house and other buildings, the plaintiff do recover possession of the immovable property and that upon the death of defendant No. 3 the plaintiff shall be entitled to take possession of the buildings.

On appeal by the defendant No. 3 the District Judge expressed his concurrence in the findings of the Munsif on the questions of the letting and self-acquisition; but being of opinion on a consideration of the whole evidence that the plaint property had been in the exclusive possession of Bhadru after his death and defendant No. 3 for 26 years, and finding that there was no evidence on the record which showed that the husband of defendant No. 3 had left any property sufficient for the maintenance of defendant No. 3, he reversed the Munsif's decision and dismissed the plaintiff's suit.

(1) I.L.R., 6 Mad., 130. As to this case see *Ramanadan v. Rangammai*, ante p. 260 (Reporter's Note).

IMAM
v.
BALAMMA.

The plaintiff preferred this second appeal.

K. Narayana Rau for appellant.

Neither the possession of Bhadru nor of defendant No. 3 was adverse to the plaintiff. So long as no partition is come to, the possession of one member is permissive as far as all the other members of the joint family are concerned. In the case of exclusive possession the continuing consent of the other co-sharers is implied. Exclusive possession is one thing and adverse possession another. *Sheo Pershad Sing v. Leelah Singh*(1), *Shunfun-nissa Bibee Chowdhraïn v. Kylash Chunder Gungopadhya*(2).

The District Judge ought to have recorded a finding as to whether the debt discharged by the sale in plaintiff's favor was binding on defendant No. 3; and should also have ascertained whether the plaintiff had notice of her charge for maintenance at the time of sale.

Subba Rau for respondent.

The further facts of the case and the further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusami Ayyar and Shephard, JJ.).

JUDGMENT.—The first and second defendants are brothers, and the third defendant is the widow of their father's brother Bhadru. The property in dispute consists of a garden and a house and a well, and it is found by the Judge to have been in the exclusive possession of Bhadru and after his death of the third defendant for upwards of 26 years. The three defendants constituted together a joint Hindu family governed by the Mitakshara law. On 29th October 1879 the first and second defendants and their father sold the property in dispute to the plaintiff, reserving, however, a right of re-purchase till 29th October 1882, but as they failed to re-purchase the garden within the stipulated time, the sale in favor of the plaintiff became absolute. He brought the present suit to recover possession of the garden and the house, alleging his purchase and also an oral letting to the first and second defendants. Both the Courts below have found that the oral letting has not been proved and we dismiss it, therefore, from our consideration. The third defendant, who alone resisted the claim, contended that the northern moiety of the garden was self-acquisition and that

(1) 20 W.R., 160.

(2) 25 W.R., 53.

the southern moiety, though joint family property, was allotted to her husband for defraying the expenses of certain family ceremonies. Both Courts found that these allegations were not proved. The third defendant claimed to be entitled to retain possession of the property on account of her maintenance as the widow of Bhadru, and the Judge upheld the contention, observing that there was no evidence on the part of the plaintiff that there was any other property of the third defendant's husband sufficient for her maintenance. On this ground and on the ground that the third defendant and her late husband had had exclusive possession for nearly 30 years, the District Judge dismissed the suit with costs. It is contended that the Judge has recorded no finding as to whether the debt discharged by the sale in plaintiff's favor was binding on the third defendant, that neither the possession of Bhadru nor that of the third defendant was adverse to the plaintiff and that the Judge has not ascertained if the plaintiff had notice of the third defendant's charge for maintenance at the time of the sale.

It is true that the Judge does not state explicitly that the debt evidenced by exhibit B is not binding on the third defendant, but we have no doubt that he intended to adopt the Munsif's finding. He observes that the Munsif is doubtless correct in his finding that the first defendant is in collusion with the plaintiff with a view to dispossessing the third defendant and that the alleged oral lease, even if proved, must be taken to be a sham. He has also found that the first and second defendants have not lived in commensality with the third defendant or her husband for nearly 30 years. Though the possession of the third defendant or of her husband is not necessarily adverse to the plaintiff's vendors, yet the separate possession of family property by a widow of a joint Hindu family is notice that she has some interest therein and if the plaintiff had enquired he would have acquired a knowledge of her possession in her right of maintenance. The finding that there was collusion negatives the contention that the purchase was *bona fide* and without notice. As the suit is in ejectment and the title to present possession is not made out, the decision of the District Judge is right, but this of course will not preclude the plaintiff from suing to recover possession on determination of the life estate.

We dismiss this second appeal with costs.