

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Kumaraswami Sastriyar.

VELAYUTHAM PILLAI (THIRD DEFENDANT), APPELLANT,

v.

SUBBAROYA PILLAI AND THREE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2, 4 and 5), RESPONDENTS.*

1914.
December
21 and
1915.
September
17 and 23.

Adverse possession—Co-owners—Notice of hostile claim, if necessary—Possession, hostile at commencement—Subsequent accrual of title as co-owner—Possession continued, not hostile—(Indian) Limitation Act (IX of 1908), Sch. II, arts. 134 and 144.

The plaintiff and the third defendant were the reversionary heirs of one C who had mortgaged the suit properties to one P. The third defendant's father purchased the properties from P in 1833 without notice of the mortgage and had been in possession of the same ever since. The widow of C died on the 6th September 1900. The plaintiff brought this suit on the 2nd September 1912 to redeem the properties. The third defendant pleaded that the suit was barred by limitation:

Held, that the suit was not barred by limitation.

Possession held by one of the co-owners will not be adverse to the others until they have notice of the hostile claim.

Though possession was hostile when it commenced, still such possession would not continue to be hostile on the accrual of a peaceful title before the completion of the adverse possession.

SECOND APPEAL against the decree of P. AYYASWAMI MUDALIYAR, the temporary Subordinate Judge of Cuddalore, in Appeal No. 20 of 1913, preferred against the decree of T. KRISHNAN NAYAR, the District Munsif of Vriddhachalam, in Original Suit No. 910 of 1912.

The properties in dispute in the suit originally belonged to one C. He sold the properties to one P and obtained from him an agreement to reconvey the properties to him. P sold the properties in 1893 to the father of the third defendant who was put in possession on that date, and after his death, the lands continued in the possession of the third defendant. On the death of C, the plaintiff, as one of the reversionary heirs of C, brought a suit in 1885 (Original Suit No. 371 of 1885) against C's widow

* Second Appeal No. 70 of 1914.

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and the purchaser *P* for a declaration that the transaction with *P* was only a mortgage and not an absolute sale and obtained a decree that he was entitled to redeem the properties as on a mortgage to *P* in case the widow of *C* should not do so in her lifetime. The widow died on the 6th September 1900 without redeeming the properties. On her death, the plaintiff and the third defendant were the heirs of her husband. Plaintiff instituted this suit for redemption on the 2nd September 1912. The third defendant pleaded *inter alia* that the suit was barred by limitation, that as he and his father were in possession since 1893 under a sale from a mortgagee (*P*), they had perfected their title by prescription against the plaintiff at the date of the suit and relied on article 134 of the Limitation Act. The lower Appellate Court decreed the claim, holding that the suit was not barred by limitation. The third defendant preferred a second appeal. The High Court called for a finding on the following issue:—“Had the defendant’s adoptive father any actual or constructive notice of the decree obtained by the plaintiff in Original Suit No. 371 of 1885 against the widow or of the nature of the right of his vendor under the sale deed and the counter-agreement referred to in the pleadings in this case?” The lower Appellate Court returned a finding in the negative. On the receipt of the finding, the High Court delivered the following judgment.

C. Padmanabha Ayyangar for the appellant.

C. V. Anantakrishna Ayyar for the first respondent.

Others were not represented.

The following judgment of the Court was delivered by

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SASTRIYAR, JJ.

SESHAGIRI AYYAR, J.—The properties in suit belonged to one Chella Pillai. He sold the properties to one Palamalai and obtained an agreement to reconvey the properties. After the death of Chella Pillai, the plaintiff as one of the reversioners sued his widow and the purchaser Palamalai in 1885 for a declaration that the property was only subject to a mortgage and that the alleged sale did not pass an absolute interest to the purchaser. The decree in that suit was that the plaintiff was entitled to redeem the properties after the death of the widow in case she did not redeem the properties herself. After this decree, Palamalai sold the properties in 1893 to the father of the third defendant and put him in possession. The widow died in 1900. On her death, the heirs of her husband were the plaintiff and

the third defendant. Plaintiff instituted this suit for redemption. The third defendant pleaded among other things that as he and his father were in possession since 1893 under a sale from a mortgagee they had perfected their title by prescription against the plaintiff at the date of the suit. Article 134 of the Limitation Act was relied on. The District Munsif dismissed the suit on the ground that the legal representative of the original mortgagee was not impleaded. On appeal, the Subordinate Judge differed from the lower Court on this question and decreed the claim, holding that the suit was not barred by limitation. In Second Appeal, we called for a finding whether the father of the third defendant had knowledge of the decree obtained by the plaintiff in 1885. The finding is in the negative.

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We agree with the conclusion of the lower Appellate Court. It is true that the possession taken by the father of the third defendant, could have been perfected under article 134, as the property was sold to him by a mortgagee. But before twelve years were over, a new right accrued to the third defendant. He became the heir to the property with the plaintiff in 1900. The plaintiff, is entitled to say that when succession opened to him, a co-parcener of his was in possession and that that possession was not adverse to him unless and until he was excluded notoriously. If the third defendant wanted to rely upon his right as a purchaser from the mortgagee, he should have put that forward to the knowledge of the plaintiff. There are not many authorities bearing on the question.

In *Tarubai v. Venkata Rao*(1), BARRY, J., says: "In the second, when there has been no such ouster as to give notice of the adverse nature of the possession, it is incumbent on the person alleging that the title set up against him is barred by twelve years' adverse possession, to show, not only that his possession has lasted for twelve years, but that it has *all the time* been in open conflict with the title on which the plaintiff relies. The result is, as above indicated, if there has been no ouster or "open and notorious act of taking possession," then the person relying on his possession to defeat title, must show that it was of such a nature, and involved the exercise of rights so *irreconcilable with those claimable by the plaintiff*, as to give the plaintiff occasion

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to dispute that possession (or, in other words, that it was such as to give a cause of action or right to sue for possession) *throughout the twelve years next preceding the suit.*" The language of article 144 which speaks of possession "becoming adverse" supports this view. Reference may also be made to *Asanab Ravulhan v. Vamana Rzu*(1) and *Moidin v. Oothumanganni*(2). The decision in *Ponnuswamy Iyer v. Permaye*(3) is in favour of this position. There is no doubt that possession held by one of the co-owners will not be adverse to the others until they have notice of the hostile claim. The difficulty in this case arises from the fact that possession was hostile when it commenced. We have not been referred to any authority which shows that such a possession continues to be hostile notwithstanding the accrual of a peaceful title before the completion of the adverse possession. Possession should be *prima facie* attributed to a lawful title; we think the third defendant on the death of the widow must be deemed to have held the property on behalf of the plaintiff as well.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Srinivasa Ayyangar.

MURUGESA MUDALY AND TWO OTHERS (RESPONDENTS
Nos. 2, 3 AND 5), PETITIONERS,

v.

RAMASAMI CHETTY (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 3 and 8—Extension of time for paying mortgage amount only upon good cause—Non-passing of a foreclosure decree, not a good cause for extension—Civil Procedure Code (Act V of 1908), sec. 115—No interference, even with an order passed without jurisdiction, if justice does not require.

Extension of time for payment of the mortgage amount due under a decree in suits instituted either by the mortgagor or the mortgagee can be given only where good cause is shown therefor and a party is not entitled to it as a matter of right, under Order XXXIV, rules 3 and 8, of the Code of Civil Procedure.

(1) (1878) I.L.R., 2 Mad., 223.

(2) (1888) I.L.R., 11 Mad., 416.

(3) (1914) 16 M.L.T., 630.

* Civil Revision Petition No. 1076 of 1914.