PRIVY COUNCIL.*

1919,
May 12, 13,
June 20.

VARADA PILLAI AND ANOTHER (PLAINTIFFS),

v.

JEEVARATHNAMMAL (DEFENDANT).

[On Appeal from the High Court of Judicature at Madras.]

Limitation—Adverse possession—Gift, invalidity of, as not following the requirements of sec. 123 of the Transfer of Property Act (IV of 1882)—Evidence as to possession only under it, not of the gift—Joint ownership following intended gift—Limitation Act (IX of 1908), Sch. I, art. 144—Ouster.

The suit from which this appeal arose was brought to establish the title of the appellants to a moiety of a mitta or estate, consisting of two villages which belonged at one time to the ancestor of the parties, and eventually became vested in *G* and *P*, his two younger sons. On the death of *G* in 1879 his share vested in his widow *R* and he left also a daughter *D*. *P* died in 1867 leaving a will which the High Court held gave an absolute interest in the moiety to his widow *A* and their Lordships of the Judicial Committee upheld that construction. On 10th October 1895, R and *A* who were then the registered owners of the two moieties of the mitta, presented to the Collector a petition, which after reciting that they had on 8th October given the two villages of which the mitta consisted to *D*, prayed that an order be made transferring the villages into her name. On the same date (10th October) *D* presented a similar petition to the Collector reciting the gift of the villages to her, and asked for the transfer of them to her on the register, and the Collector thereupon, on 8th May 1896 registered the two villages (being the whole mitta) in the name of *D*, "to hold and enjoy them with power to alienate them by way of gift, mortgage, sale, etc.", and from that date *D* retained possession until her death in 1911, after which the mitta descended to the respondent as her successor.

Held, that the gift was invalid as not being made by a registered deed as required by section 123 of the Transfer of Property Act (IV of 1882); that the recitals in the petitions could not be used as evidence of a gift, but might be referred to as explaining the nature and character of the possession thenceforth held by *D*; and that the evidence proved that she in fact took possession of the mitta in her own right when it was transferred into her name, and retained such possession with receipt of the rents until her death, when the plaintiffs' claim was barred by more than 12 years' adverse possession.

Even if the rule of English law, that the possession of one of several co-parceners, joint tenants, or tenants in common, is the possession of the others so as to prevent limitation affecting them, was applicable to sharers in an unpartitioned agricultural village in India not holding as members of a joint family, which is doubtful, it had on the facts of the case, no application.

* *Present*:—Viscount CAVE, Lord PHILLIMORE, Sir J. EDGE, and Mr. AMEER ALI.

Held therefore, that during the life of *R* the possession of *D* was adverse to both the co-owners *R* and *A*, and this being so, when on *R*'s death she became legally entitled to a moiety of the mitta, the character of her possession of the other moiety as against *A* was not changed. There having been an ouster of *A* before *R*'s death this ouster continued after her death, and the possession of *D* was adverse to *A* throughout.

APPEAL No. 194 of 1917 from a decree (19th November 1915) of the High Court of Madras, which reversed a decree (11th August 1913) of the District Court of Chingleput and dismissed the suit of the appellants with costs.

The suit was brought in October 1912 for, among other reliefs, a declaration of the appellants' title to, and for possession of, a moiety of a mitta called Kariamangalani, consisting of two villages about 30 miles from Madras which prior to 1845 belonged to one Varada Pillai, the grandfather of the appellants, and his two brothers Gopalakrishna Pillai and Parthasarathi Pillai equally. In 1845 partition took place between them, under which Varada Pillai took no share in the mitta. The appellants claimed as heirs-at-law of their deceased grand-uncle Parthasarathi Pillai, and his widow Alangarammal (*alias* Thayarammal). The respondent, Jeevarathnammal, on the other hand, maintained that she is the owner of the property in suit on the following grounds. Parthasarathi Pillai died without issue in 1867, and bequeathed his share of the mitta to his widow Alangarammal. She, on 10th October 1895, applied to the Collector of Chingleput to transfer the portion so bequeathed to Duraisani Ammal her niece as stridhanam. At the same time, Rajammal, the mother of Duraisani Ammal, who owned the other moiety of the mitta, made a similar application regarding her portion: and the Collector on 8th May 1896 ordered the name of Duraisani Ammal to be registered as owner. On the death of Duraisani, on 31st December 1911, the respondent as her only child succeeded to the mitta, and had since enjoyed the same.

The appellants challenged the respondent's title on the grounds: (*a*) that the will of Parthasarathi Pillai in favour of his widow conferred on her only a life estate for her maintenance, and that the remainder of his portion of the mitta was undisposed of by him, and had become vested in them as his heirs, (*b*) that consequently Alangarammal had no power to give away her

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portion of the mitta to Duraisani, (*c*) that the gift to Duraisani, the mother of the respondent, was not valid, the requirements of the Registration Act not having been observed and (*d*) that in any event Duraisani's possession of the mitta since 1896 was not adverse to, but permissive and representative on behalf of her mother and aunt who remained owners thereof.

The respondent replied that the Registration Act was absolute in its terms, that Duraisani's title was protected by the Limitation Act, and that her mother's possession after 1896 was adverse to that of the transferors in 1896, and exclusive of them.

The District Judge decided in favour of the appellants, giving them a decree for a moiety of the mitta in suit with mesne profits and costs.

The appeal of the respondent to the High Court was heard by SANKARAN NAIR and COUTTS TROTTER, JJ., who differed, the former being in favour of upholding the judgment of the District Judge, and the latter in favour of reversing it. They accordingly made a reference of the case to a Full Bench for their opinion on the following question: Whether the petition of 10th October 1895 (Exhibit XII) though inadmissible to prove the gift, is admissible to prove the nature of the subsequent possession of Duraisani's? SANKARAN NAIR, J., was of opinion that it could not be given in evidence to show the nature of Duraisani's possession after 1896, and that independent of the petitions there was no evidence whatever admissible to support the alleged gift to Duraisani as stridhanam. COUTTS TROTTER, J., on the other hand, thought that the petition was admissible, not for the purpose of proving a gift by the widows to Duraisani, but in order to disprove the suggestion that her possession of the mitta after 1896 was permissive of and not adverse to the widows.

The case was heard by a Full Bench (Sir J. WALLIS, C.J., ABDUR RAHIM and SESHAGIRI AYYAR, JJ.) who gave the following opinion:

"We think the petition is not a document requiring registration under section 17 of the Registration Act. It refers to a gift on 8th October, some days previously, and in spite of the concluding passage, cannot in our opinion be considered as declaring the right of the parties within the meaning of section 17: see *Sakharam*

Krishnaji v. *Madan Krishnaji* (1). It is therefore not rendered inadmissible by the terms of section 49 of the Registration Act."

The Appellate High Court (COUTTS TROTTER and SRINIVASA AYYANGAR, JJ.), gave judgment and in accordance with the above opinion allowed the appeal and dismissed the suit with costs.

ON THIS APPEAL

De Gruyther, K.C., and *Kenworthy Brown*, for the appellants, contended that on the proper construction of the will of Parthasarathi Pillai his widow did not take an absolute heritable interest, and no gift by her and no long possession adverse to her could be a bar to the appellants' title as heirs of Parthasarathi on her death. If she did take an absolute estate, no proof of the gift alleged to have been made by her was admissible, as the gift had not been made by a registered document, according to the requirements of the Transfer of Property Act, section 123. As to adverse possession, neither the respondent nor her mother derived title under a gift or devise from Parthasarathi's widow, whose title to a moiety of the mitta remained in her until her death, and neither the respondent nor her mother was in possession of the moiety adversely, nor at all. There was no ouster of the widow, and whatever intention and expectation her co-owners had, limitation did not run in their favour. The alleged copies of the petition of 10th October 1895 were not admissible in evidence to prove a gift or possession under a gift, or adverse possession in the character of donee. From 1901 when Duraisani succeeded under Rajammal's will to the other moiety of the mitta, and she and Alangarammal became joint owners of the mitta, there was no adverse possession against the latter. Reference was made to *Corea* v. *Appuhamy* (2); and *Muttunayagam* v. *Brito*(3).

C. R. Christie, K.C., and *W. Ingram*, for the respondent (called upon only as to the last contention). The possession of the mitta by Duraisani, from 1896 until her death, was in accordance with her title, and was wholly in her own right, and not merely permissive or representative. When Duraisani and Alangarammal became together owners, each in her own right, of

(1) (1881) I.L.R., 5 Bom., 232. (2) [1912] A.C., 230.
(3) [1918] A.C., 895.

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the whole mitta, limitation did not cease to run. The possession of Duraisani being adverse to her mother and her aunt, when she succeeded to a moiety in her own right her possession was adverse to Alangarammal.

The JUDGMENT of their Lordships was delivered by

VISCOUNT CAVE.

VISCOUNT CAVE.—This is an appeal by the plaintiffs from a decree of the High Court of Madras, dated 19th November 1915, reversing a decree of the District Court of Chingleput, dated 11th August 1913, and dismissing the suit.

The suit was brought to establish the title of the plaintiffs to a moiety of a *mitta* or estate situated about thirty miles from Madras and known as the mitta of Kariamangalani. The *mitta* at one time belonged to Narayanaswami Pillai, an ancestor of the parties, and on his death it passed to his three sons as members of a joint family. In the year 1845 a partition took place, under the terms of which the eldest son relinquished all interest in the *mitta*, which thereupon became vested in the two younger sons, Gopala Krishna Pillai and Parthasarathi Pillai, in equal shares. No question arises as to the share of Gopala Krishna; but it is material to state that, on his death in the year 1879 his share became vested in his widow, Rajammal, and that he left issue one child only, a daughter named Duraisani.

Parthasarathi died in the year 1867, having made a will upon which a question of construction arises. Clause 3 of the will was in the following terms:—

> "I have given my half share in Kariamangalani mitta to my wife, Nayar Alangarammal *alias* Thayarammal, on account of her maintenance and other absolute use. She is at liberty to enjoy the same with powers of alienation by sale, etc."

By clause 4 of the will the testator gave his property (in general terms) to the two infant sons of his eldest brother, who are now represented by their sons, the plaintiffs. The plaintiffs contend that the effect of the will was to vest the moiety in question in the testator's wife, Alangarammal, for her life only, and that on her death (which occurred in the year 1912) it passed under clause 4 to the plaintiffs; but it was held both in the District Court and in the High Court that clause 3 gave an absolute interest in the moiety to the testator's wife, and that the fourth clause operated upon the remaining property only. Their

Lordships agree with this construction of the will; and they accordingly hold that, on the death of Parthasarathi, his moiety of the *mitta* vested in his widow, Alangarammal, absolutely.

But the plaintiffs have an alternative claim. It appears that they were the persons entitled to succeed on the death of Alangarammal to her property not disposed of during her lifetime or by her will, and they contend that the moiety in question was in fact undisposed of at the death of Alangarammal, and accordingly vested in them as her heirs. The defendant, on the other hand, contends that, in consequence of certain events which happened during the lifetime of Alangarammal, the moiety in question passed to Duraisani, and through her to her daughter the defendant, and accordingly that the plaintiffs have no right thereto. These events must now be stated.

On 10th October 1895, Rajammal and Alangarammal, who were then the registered owners of the two moieties of the *mitta,* presented a petition to the Collector, whereby, after reciting that they had, on 8th October 1895, given away the two villages constituting the *mitta* as *stridhanam* to Duraisani *alias* Alamelu, they prayed that orders might be passed for transferring the villages into her name. The petition concluded: "The said Alamelu Ammal shall hold and enjoy them with power to alienate them by way of gift, mortgage, sale, etc." Duraisani on the same date also presented a petition to the Collector reciting the gift of the villages to her on 8th October 1895, and requesting that they should be transferred into her name. The Collector accordingly, on 8th May 1896, registered the *mitta* in the name of Duraisani.

It was not contended before the Board that the above transactions effected a valid gift of the property to Duraisani; for such a gift must, under section 123 of the Transfer of Property Act, be made by registered deed. Nor, having regard to section 91 of the Evidence Act, can the recitals in the petitions be used as evidence of a gift having been made. But the defendant's case is that Duraisani, although she may have acquired no legal title under the transactions referred to, in fact took possession of the property when it was transferred into her name and retained such possession until her death in December 1911, after which date it passed to the defendant as her

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successor, and accordingly that the plaintiffs' claim is barred by upwards of twelve years' adverse possession. The High Court upheld this contention; and their Lordships, after considering the evidence, have arrived at the same conclusion.

There was a considerable body of evidence showing that Duraisani was in possession or receipt of the rents and profits of the *mitta* during the period above referred to. At or about the date of the attempted gift, Duraisani, who until then had lived with her husband in Madras, came to live with her mother and her aunt, Alangarammal, in the neighbourhood of the *mitta*, and thenceforward spent the greater part of the year with them. From the same date, all *pattas* were granted and *muchilkas* taken in the name of Duraisani alone; and the property was managed by agents appointed by her, who accounted to her for the rents. It was contended on behalf of the plaintiffs that, assuming Duraisani to have been in actual possession of the land, she held such possession, not in her own right, but as trustee or manager only for her mother and aunt, and accordingly that her possession was not such adverse possession as to give a title under the Limitation Act; and in support of this contention the plaintiffs relied upon the evidence of a former *manigar* of the estate, who stated that during the life of Rajammal (who died in 1901) he "used to pay collections to her". But the witness in question prefaced his evidence above referred to by the statement that Duraisani "had confidence in Rajammal"; and he stated emphatically that Duraisani was Zamindarni from 1896. Having regard to these statements and to the remainder of the evidence in the case, the proper inference appears to be that, if any rents were in fact paid to Rajammal after 1896, they were so paid by the direction of her daughter Duraisani (who lived with her) and in order that they might be applied to the joint household expenses.

The plaintiffs also relied upon the will of Rajammal, dated 2nd April 1901. By this will the testatrix referred expressly to the petition of 10th October 1895, and the subsequent transfer of the two villages into the name of Duraisani, and added: "and the above two villages are being enjoyed by the said Duraisani Ammal." The will then proceeded as follows:—

"My daughter, the said Alamelu Ammal, *alias* Duraisani Ammal shall take the above two villages and shall either amicably or

through Court recover and take all the following arrears, jewels, etc., due to me, viz., the Zamin Circar arrears due to me in the said villages up to past fasli 1305, upon account from the tenants of the said villages, etc."

It was held by the District Judge that these words amounted to a devise of the two villages to Duraisani, and accordingly that they afforded evidence that in the view of the testatrix no beneficial gift had been previously made to her, but the High Court held that there was in fact no devise of the villages. In the absence of the original text of the will, which was no doubt seen by the Judges in India, their Lordships are unable to say which construction is correct. But even if the devise included the testatrix' interest in the two villages, it would appear to be reasonably clear that the gift was by way of confirmation only, and affords no evidence that Duraisani was a trustee of the property. In any case the recitals contained in the will are strong evidence of the possession of the property by Duraisani.

The plaintiffs also relied upon a draft will which was prepared for Alangarammal just before her death in 1912, but which has been held by the Courts in India not to have been adopted by her as her will. This draft will contained recitals similar to those contained in the will of Rajammal, and these recitals were followed by a gift of the villages to the defendant, who had then succeeded to the estate of Duraisani. It may be doubted whether any valid argument can be founded upon a draft will not signed or adopted by the person for whom it was prepared, but in any case the observations which have been made concerning the will of Rajammal apply to this draft will also.

It should be added that, although the petitions of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani. In other words, although the petitions and order do not amount to a gift of the land, they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of donee and owner of the land, and therefore in her own right and not as trustee or manager for her mother and aunt.

Lastly, the plaintiffs put forward the contention that on the death of Rajammal in 1901 Duraisani became entitled either

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under her will or by succession to her moiety of the *mitta*, and accordingly that as from that date possession of the villages must be deemed to have been held by her as part owner, and not adversely. This contention was founded upon the English rule of law, which was abrogated by the statute 3 & 4 Wm. IV., c. 27, section 12, that the possession of one of several co-parceners, joint tenants or tenants in common, is the possession of the others so as to prevent the statutes of limitation from affecting them. Whether this rule is applicable to sharers in an unpartitioned agricultural village in India not holding their shares as members of a joint family, it is unnecessary for the purposes of the present case to decide; for upon the facts of the case the rule has no application. The limits of the rule were defined in *Culley* v. *Deo*(1) as follows:—

> "Generally speaking, one tenant in common cannot maintain an ejectment against another tenant in common, because the possession of one tenant in common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant in common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster: . . . and, if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his ejectment for an entirety."

In the present case, it is plain that during the life of Rajammal the possession of Duraisani was adverse as against both co-owners; and this being so, there is no reason for holding that when on the death of Rajammal she became legally entitled to a moiety of the property, the character of her possession of the other moiety as against Alangarammal was changed. There having been an ouster of Alangarammal before the death of Rajammal, this ouster continued after her death, and the possession of Duraisani was adverse to Alangarammal throughout. This contention therefore also fails.

For the above reasons and upon a review of the whole of the evidence their Lordships have arrived at the conclusion that

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(1) (1840) 11 Ad. & E. 1008.

the decision of the High Court is right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants: *Chapman, Walker and Shephard.*

Solicitor for the respondent: *D. Graham Pole, S.S.C.*

J.V.W.

PRIVY COUNCIL.*

ARUNACHELLAM CHETTY AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VENKATACHALAPATHI GURUSWAMIGAL (PLAINTIFF), RESPONDENT.

1919, May 1, 2, 5, 6, 8 and June 26.

[On appeal from the High Court of Judicature at Madras.]

Hindu law—Endowment—Religious institution—Property of mutt, right to possession of—Custom and usage of mutt—Adverse possession—Limitation.

This appeal arose from a suit brought by the respondent "to declare that the defendants" (appellants) "have no right to the village of Patharakudi, and that the plaintiff as head of the mutt is entitled to the possession of the village, and to receive the income of the same from the hands of the receiver." The village was part of the property of the mutt, and had been for a long time in the possession of, and under administration, by the defendants, who were Nagara Chetties, as hukdars, trustees and managers, though the head of the mutt appointed in 1867 was the plaintiff, who made his claim by virtue of that office, and alleged that the defendants held the position of trustees as his agents. The defence was that the defendants and their predecessors, who had held the village for about 80 years, not for their own advantage but for the benefit of the mutt, were entitled to be continued in possession and management of it; and that the suit was barred by limitation. The respondent proved no management by the defendants as his agents. On the contrary, there was documentary evidence strongly in favour of the defendants which the Judicial Committee accepted as proof of their long possession and proper management.

Held, that the plaintiff was not entitled to the village in suit. On the evidence he had entirely failed to prove his right to possession either by himself or the defendants as his agents; nor was his right to possession supported by the history of the land.

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* *Present*:—Viscount CAVE, Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE and Mr. AMEER ALI.