PRIVY COUNCIL.*

KUTHALI MOOTHAVAR (PLAINTIFF),

v.

PERINGATI KUNHARANKUTTY (DEFENDANT).

1921,
July 18.

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

Limitation—Adverse possession—plaintiff proving title—Both parties having uncertain possession—Indian Limitation Act (IX of 1908), sch. I, art. 144.

Adverse possession in order to bar by limitation a suit for the possession of land must be adequate in continuity, in publicity, and extent, so as to show that it is possession adverse to the competitor. When a person establishes his title to land and proves that he has been exercising during the currency of his title various acts of possession, then the quality of those acts, even though they might have failed to constitute adverse possession against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is required from any person challenging by possession the rightful title.

Radhamoni Debi v. *The Collector of Khulna,* (1900) I.L.R., 27 Calc., 943 (P.C.); L.R., 27 I.A., 136; and *Secretary of State for India* v. *Chellikani Rama Rao,* (1916) I.L.R., 39 Mad., 617 (P.C.); L.R., 43 I.A., 192, applied.

[*Judgment of the High Court reversed.*]

APPEAL (No. 85 of 1919) from a judgment and decree of the High Court (December 3, 1917) so far as it reversed a decree of the Subordinate Judge of Tellicherry.

The appellant sued to establish his title to certain land in Malabar containing thirty-four hills. His title to a group of ten of the hills was negatived by both Courts in India, and the present Appeal related only to the remaining twenty-four hills. The appellant was the head, or karnavan, of a Nayar tarwad, or family, in Malabar; he and his predecessors were referred to as the Kuthali Nayar. The defendant in the suit was, and the present respondent became on his death, the head or karnavan of a Moplah tarwad in the same district; the distinctive name of that tarwad was Peringati.

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* *Present*:—Viscount CAVE, Lord SHAW and Mr. AMEER ALI.

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The nature of the land in question, which had been subject to very little cultivation, and the other facts of the case appear from the judgment of the Judicial Committee.

The Subordinate Judge held that the title of the plaintiff (appellant) to the twenty-four hills was established; he rejected the defendant's claim to have acquired title by adverse possession. He accordingly made a decree in favour of the plaintiff.

The High Court reversed the decision so far as it related to the twenty-four hills. The learned Judges (ABDUR RAHIM and OLDFIELD, JJ.) did not expressly reverse the finding that the plaintiff had at one time a good title; they, however, found that the defendant had made out a better case as to possession and decided in his favour on the issue as to limitation.

De Gruyther, K.C., *Kenworthy Brown*, and *Palat* for the appellant.—The appellant's title to the twenty-four hills was established by the previous litigation, the effect of which was misconstrued in the High Court. The appellant does not admit that he is out of possession. The evidence did not show that the respondent had such exclusive and continuous possession over the whole land in dispute as was necessary to establish a title by adverse possession: *Secretary of State for India* v. *Chellikani Rama Rao*(1), *Radhamoni Debi* v. *The Collector of Khulna*(2), *Secretary of State for India* v. *Krishnamoni Gupta*(3), *Lows* v. *Telford*(4).

Hon. Sir *W. Finlay*, K.C., and *Narasimham* for the respondent.—Neither the previous litigation nor the evidence in the suit established the appellant's title to the disputed land. The evidence showed that the respondent had legally effective possession from 1870 and that after that date the appellant had no effective possession. The High Court rightly held he had a good title under the Indian Limitation Act, 1908. [Reference was also made to Madras Act II of 1864, section 42.]

Kenworthy Brown replied.

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(1) (1916) I.L.R., 39 Mad., 617 (P.C.); L.R., 43 I.A., 192.
(2) (1900) I.L.R., 27 Calc., 943 (P.C.); L.R., 27 I.A., 136.
(3) (1902) I.L.R., 29 Calc., 518 (P.C.); L.R., 29 I.A., 104.
(4) (1876) 1 App. Cas., 414, 426.

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The JUDGMENT of their Lordships was delivered by

Lord SHAW.—This is an Appeal from a decree dated December 3, 1917, of the High Court of Judicature at Madras, which allowed in part an Appeal from a decree dated March 20, 1916, of the Court of the Temporary Subordinate Judge of Tellicherry. The suit was brought by the present appellant to establish his title to thirty-four hills in the North Malabar district. The decree of the Subordinate Judge was in favour of the respondent with regard to ten of the hills, comprising, roughly stated, the north and north-east portion of the group of thirty-four. No question is raised in this Appeal with regard to those ten hills, it being conceded that the defendant has a title thereto.

The still outstanding issue between the parties, however, is as to the remaining group of hills, twenty-four in number, which may be said in general terms to form the southern half of the entire group which was originally in suit and to be bounded on the south by the Peruvanna river. With regard to those twenty-four hills, the decree of the Subordinate Judge was in favour of the plaintiff, while the judgment of the High Court favoured the defendant. The plaintiff has appealed to this Board.

The appellant is the head or karnavan of a Nayar tarwad or family, in Malabar, called on the record the Kuthali Nayar. The defendant in the suit was, and the respondent in the present Appeal became on his death, the head or karnavan of a Moplah tarwad in the same district. Shortly put, the question in the Appeal is: Are the lands which are the subject of the Appeal the property of the Kuthali, the appellant's family, or of the Moplah, the respondent's family?

Although the procedings are voluminous, their Lordships desire to say at once that the Appeal in their judgment must be settled by applying a well-known doctrine of law to the complex and somewhat contradictory mass of evidence as to the possession of these hills.

Both parties claim them. Both parties claim to have possessed them. And upon a balance of the evidence it has been found by the High Court that the respondent's possession upon the whole outweighs that of the appellant, and that accordingly the resondent is entitled to prevail.

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Upon this subject of possession much importance attaches to the nature of the property itself. It is forest land—apparently very little of it capable of, or at least, up to the present, subject to, cultivation—and growing here and there stretches of timber. It is quite clear that a property of this nature is far removed as a subject of definite possession from lands under continuous and permanent cultivation, compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases.

Their Lordships sympathize with the difficulties which confronted the Courts below, as to the possession of the property under Appeal, and they agree with what is apparently the view of both Courts that such possession has to be interpreted according to the fairest view of what the property itself was capable of in the way of possession and what upon a broad view would be considered an adequate assertion of title by sufficient occupation. Along with this observation their Lordships desire further to remark that they are not certain that they would have been prepared to reverse—although no definite opinion is here given—the conclusion reached by the High Court had the case before the Board been one merely of a question of the balance of evidence as among rival possessors. How nebulous the situation is may be gathered from these passages in the judgment of the High Court:

"From 1871, the evidence as to possession consists mainly of certain leases either for cutting trees or of the usufruct generally of the hills, for none of the parties seem to have directly exercised any definite acts of possession. Besides these leases, the evidence relates to what is called 'Punam' or fugitive cultivation. Punam cultivation is thus described in the Gazetteer of the Malabar district, Volume 1, paragraph 220: 'It is a most destructive form of cultivation, with ruinous effects upon forest growth. A patch of forest is cleared and burnt, trees too big to be burnt being girdled and left to die. A crop of hill rice, *mixed with which dholl, millet and* plaintains are often grown, is raised, and the ground is then left fallow for some years, the cultivators, generally hill men, moving on to another patch to repeat the process.' As regards punam cultivation, the evidence on either side cannot be said to be very satisfactory, and from the nature of the leases granted for cutting trees acts of

possession of that character would not by themselves be regarded as conclusive evidence in support of the case of either party."

Their Lordships accept the general description of possession as here given.

But when the judgment proceeds :

"But such is the nature of the evidence of possession adduced in the case, and we have to find by comparison of the evidence on both sides, judged in the light of probabilities, who in fact is shown to have been in possession of the property,"

their Lordships cannot apply the rule there laid down. For the Board is of opinion that in the competition of title to this ground the appellant definitely prevails, and that any doctrine of balance where original title was unknown, cannot apply to this case. Upon that subject the High Court expresses itself to the effect that :

"It is not now possible apart from these decrees (of 1864 and 1867) to come to any definite conclusion on the merits of the claim of either party so far as title is concerned."

It is thus necessary to consider these decrees, for one or other of them has been treated by the parties as the foundation of their respective titles.

In the year 1864 Kutti Pocker, head of the Moplah family, brought a suit for dispossession of one Kunhassan from the lands, on the ground that a lease of the same for three years from the year 1859 had expired. Kunhassan in defence stated, however, that the lands to which the suit referred were to a large extent over-stated, and that in particular the hills the property of which is now under Appeal were possessed by him under a right conferred, not by the Moplah, but by the Kuthali family. In these circumstances the then head of the Kuthalis, one Achutan alias Achammadathil Nayar, was convened by a supplemental suit as defendant. He was at that time the head of the Kuthali family, but, for some reason not sufficiently explained, he did not defend the action nor take any steps to protect the Kuthali family interest.

The suit proceeded for a period of about three years and was about to be brought to a close by decree, February 13, 1867, when another suit (Original Suit No. 11 of 1867) was raised by Nuchiledathil Krishnan alias Kuthali Chathoth Nayar. It is said that this suit was brought only by a reversioner to the

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Kuthali rights, and this is true, but it must be noted, first, what was the reason for that litigation, and second, what was the true scope of the suit.

As to the reason, there can be no doubt. It is thus recited in the judgment of November 4, 1868 :

"Plaint recited that the two groups are the jenm property of the sthanam of Kuthali Nayar to which plaintiff is entitled to succeed on the death of first and third defendants, that first defendant, the present incumbent of the above sthanam, having allowed third defendant to manage the sthanam and the latter by his extravagance dissipated the sthanam property, plaintiff has already filed Suits Nos. 117 and 120 of 1863 to remove them from the management of the sthanam property, that the said defendants have therefore colluded with second defendant and refused to adduce any proof in Suit No. 25 of 1864 in support of the sthanams' right to the thirty-four hills which the second defendant has fraudulently included in the suit as portions of his two hills, that if first and third defendants, who possess only a life-interest in the sthanam property, be allowed to ruin a portion of it by neglecting to defend the suit, a great injury will result to plaintiff's right of reversion and that he therefore prays that a *declaration protecting his right may be given* under section 15 of the Civil Procedure Code."

If these facts, the substance of which was held to be proved, are accepted, it appears to be plain that the Courts were properly appealed to to prevent a decree being granted against the Kuthali family to its prejudice by reason of neglect amounting to malfeasance upon the part of its head.

Upon the second point, viz., the scope of the suit, there can be no question. Its object was to exclude inter alia the lands which are the subject of this Appeal from falling within the scope of the decree in the suit of 1864, by reason of this, that they belonged to the Kuthalis. This was the true issue in the 1867 case, and the last important point in regard to it is that that suit was fought out, and fought out by the proper contradictors, viz., the Moplah family. The family was represented by the defendants Nos. 4 and 5, viz., Ibrayi and Amanath. Pocker, the head of the Moplahs, had just died, and Ibrayi and Amanath appeared in his stead and defended the 1867 suit, maintaining, in opposition to the plaintiffs therein, that the lands in question were in fact Moplah property.

In these circumstances it appears to their Lordships not only that the suit of the later year, 1867, was one which definitely dealt with the question of property now under Appeal, but that it would be unreasonable to endeavour to found rights under a decree of 1864 by ignoring the proceedings of 1867. In any view of the case it must be admitted that the later proceedings were at least of an interpretative character; they were directed to the avoidance of mistake as to the ambit or scope of the 1864 litigation, and to ignore them, and to treat the 1867 proceedings either as if they had never been brought or were of no avail is in their Lordships' opinion contrary to sound principle. The description of the suit itself in the judgment of 1867 makes it clear that:

"This suit is brought to procure a decree declaring that two cherikkals (groups) consisting of thirty-four hills are not included within the boundaries of second defendant's two hills called Pakkath Villiyari for which he has brought a suit No. 25 of 1864 against third defendant and others and establishing plaintiff's reversionary right to those thirty-four hills valued at Rs. 1,500."

Putting all the proceedings, therefore, together, the question that remains for the Board on title is to see what is the scope of the judgment in the 1867 proceedings, which were conducted between these rival families and *in foro contentioso.*

Upon that subject the judgment in the Court of the Principal Sudder Amin of Tellicherry, November 4, 1868, is clear and is final. The learned Judge says that

"Upon a consideration of these circumstances I am of opinion that the Decree No. 25 of 1864 is not binding upon the plaintiff."

"The next question," he adds, "is one of boundaries."

The learned Judge discusses that, and after referring to the report of a Commissioner who held a local investigation, he concludes:

"Upon the above grounds I am of opinion that the middle stream in the Commissioner's plan represents the Alamb river mentioned in the defendant's documents and that the twenty-four hills situated on the southern banks of that river constitute the Pannikottur group. . . . For the foregoing reasons I declare that the plaintiff (*i.e.*, the Kuthali family) is entitled to the reversion of the first twenty-four hills which are proved to be the jenm of Kuthali sthanam and reject his claim to the remaining hills (twenty-five to thirty-four)."

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In the opinion of the Board it is thus definitely settled that the title to the twenty-four hills, the property of which is under Appeal, is in the Kuthali family.

Their Lordships think that the High Court erred in not treating the case from this point of view. It is not a case of doubtful title, but of clear title. Had the High Court been of the opinion that the title of the appellant was clear, it is very probable that they would have reached the result on a review of the evidence and of the law about to be stated, that no contrary right to these properties has been acquired by the Moplah family by reason of possession. The rule stated by this Board in *Radhamoni Debi* v. *The Collector of Khulna*(1) seems to be very applicable to the present case. It is as follows :

"It is necessary to remember that the onus is on the appellant, and that what she has to make out is possession adverse to the competitor. That persons deriving from her any right they had have done acts of possession during the twelve years in controversy may be conceded, and is indeed evidenced by the dispute which ended in the magistrate's order of 1885. But the possession required must be adequate in continuity, in publicity, and in extent, to show that it is possession adverse to the competitor. The appellant does not present a case of possession for the twelve years in dispute which has all or any of these qualities. The best attested cases of possession do not cover the whole period, and apply to small portions of the ground."

The Board thinks that the learned Temporary Subordinate Judge of Tellicherry approached the case correctly from this point of view, and so approaching it the Board, after full consideration, accepts his analysis of the evidence and is of opinion that possession upon the part of the respondent of these hills has not been adequate "in continuity, in publicity, and in extent" so as to "show that it is possession adverse to the competitor." That competitor is the appellant, and the foundation of his title is the judgment of 1868 which has just been cited.

Their Lordships cannot part with the case without referring to and following the doctrine of *onus probandi* in such cases, as laid down by this Board in *Secretary of State for India* v. *Chellikani Rama Rao*(2). Standing a title in "A," the alleged

(1) (1900) I.L.R., 27 Calc., 943 (P.C.); L.R., 27 I.A., 136.
(2) (1916) I.L.R., 39 Mad., 617 (P.C.); L.R., 43 I.A., 192.

adverse possession of "B," must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves, as in their Lordships' view he does with some fulness prove in the present case, that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds.

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Their Lordships will humbly advise His Majesty that the Appeal be allowed, the decree of the High Court set aside with costs, and the decree of the Subordinate Court restored. The respondent will pay the costs of the Appeal.

Solicitors for appellant: *Chapmans-Walker and Shephard.*

Solicitor for respondent: *Douglas Grant.*

A.M.T.

APPELLATE CIVIL—FULL BENCH

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

1921, March 29.

MUTHOORA PALLIATH PURAKKOT PARU *alias* PATHUMMA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

MUTHOORA PALLIATH PURAKKOT RAMAN NAMBIAR AND OTHERS (DEFENDANTS NOS. 1 TO 9 AND 11 TO 17), RESPONDENTS.*

Malabar Law—Conversion of a member of Marumakkattayam tarwad to Muhammadanism—Right of convert to partition of tarward property—Removal of Caste Disabilities Act (XXI of 1850), effect of.

A member of a Marumakkattayam tarwad does not, by reason of his conversion to Muhammadanism, acquire right to a partition of the tarwad property: Observation of WILSON, J., in *Matungini Gupta* v. *Ram Rutton Roy* (1892) I.L.R., 19 Calc., 289 (F.B.) at 291, followed. *Kunhichekkan* v. *Lydia Arucanden* (1912) M.W.N., 286 and *Abraham* v. *Abraham*, (1863) 9 M.I.A., 195, explained.

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* Second Appeal No. 256 of 1920.