APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

KARNAM KANDASAMI PILLAI (PLAINTIFF), APPELLANT,

v.

CHINNABBA *alias* SUBBAROYA PILLAI AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

1920, August 20 and 30.

Mortgagor and mortgagee—Discharge of debt—Oral arrangement—Mortgagee in possession as full owner for more than twelve years after arrangement for discharge of debt—Suit by mortgagor after twelve years to redeem—Bar—Adverse possession of mortgagee—Proof of nature of possession.

Where, under an oral arrangement between the mortgagor and the usufructuary mortgagee, the latter retained possession of a portion of the mortgaged property in full ownership in satisfaction of the mortgage debt, and enjoyed it as full owner for more than twelve years after the arrangement, on a suit being instituted by the mortgagor to redeem the property more than twelve years after the arrangement.

Held, that the mortgagee had acquired by adverse possession an absolute title to the property, and that the mortgagor's right to redeem the property was barred by limitation.

Usman Khan v. *Dasanna*, (1914) I.L.R., 37 Mad., 545; *Govindu* v. *Mallayya*, L.P.A. No. 207 of 1915 (unreported); and *Varada Pillai* v. *Jeevarathnammal*, (1920) I.L.R., 43 Mad., 244 (P.C.), followed.

Ariyaputhira v. *Muthukomaraswami*, (1914) 37 Mad., 423, dissented from.

SECOND APPEAL against the decree of P. A. BOOTY, District Judge of North Arcot, in Appeal Suit No. 556 of 1917, preferred against the decree of K. SAMBASIVA RAO, District Munsif of Chittoor, in Original Suit No. 4 of 1916.

The material facts are set out in the Judgment.

T. L. Venkatarama Ayyar for the appellant.—The defendant got into possession as mortgagee, and that being so he cannot set up a title by adverse possession, when the sale is invalid: *Ariyaputhira* v. *Muthukomaraswami*(1). His possession can be referred to his lawful title as mortgagee, and a trespasser's possession cannot be presumed in his favour: *Khiarajmal* v. *Daim*(2), *Rajai Tirumal Raju* v. *Pandla Muthiah Naidu*(3),

* Second Appeal No. 1755 of 1919.

(1) (1914) I.L.R., 37 Mad., 423. (2) (1905) I.L.R., 32 Calc., 296 (P.C.).

(3) (1913) I.L.R., 35 Mad., 114.

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Byari v. *Puttanna*(1). According to SADASIVA AYYAR, J., even oral evidence to show the nature of possession under the invalid sale is inadmissible: *Ariyaputhira* v. *Muthukomaraswami*(2).

M. S. Venkatarama Ayyar for *S. Jagadisa Ayyar* for respondent.—On the point of admissibility of evidence *Ariyaputhira* v. *Muthukomaraswami*(2) is not law after *Govindu* v. *Mallayya* (3). See also *Varada Pillai* v. *Jeevarathnammal*(4). Though the oral sale is invalid, there is nothing to prevent possession under it from being adverse: *Usman Khan* v. *Dasanna*(5), *Narasayya* v. *Obula Reddi* (6).

T. L. Venkatarama Ayyar in reply.—*Varada Pillai* v. *Jeevarathnammal*(4) is not in point, because it is not a case of change of character of possession but of trespass *ab initio*. *Muthukaruppan Samban* v. *Muthu Samban*(7) is in point. The observations in *Narasayya* v. *Obula Reddi*(6) are obiter.

AYLING, J.

AYLING, J.—This Second Appeal arises out of a suit for redemption. Plaintiff's father and three others mortgaged the suit lands and certain other properties to defendant in 1871. In 1885 an arrangement was made between the mortgagors and mortgagee by which the latter was to give up the other lands and retain possession of the suit lands in full ownership in satisfaction of the mortgage debt and certain other debts. This arrangement was given effect to, the other lands were relinquished and defendant has remained in enjoyment of the suit lands ever since. Plaintiff now sues to redeem his own share of the suit lands.

The District Munsif dismissed the suit on the ground that "the suit lands were conveyed to defendant by an oral sale more than 30 years ago and that defendant has been in possession all this time as owner." The District Judge on appeal found the above facts (which were not seriously contested) to be true and held that defendant had been holding as owner for more than twelve years. He rejected the chief argument addressed to him that these lands being service inam were inalienable and dismissed the appeal.

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(1) (1891) I.L.R., 14 Mad., 38. (2) 1914 I.L.R., 37 Mad., 423.
(3) L.P.A. No. 207 of 1915 (unreported). (4) (1920) I.L.R., 43 Mad., 244 (P.C.).
(5) (1914) I.L.R., 37 Mad., 545. (6) S.A. No. 1560 of 1913 (unreported).
(7) (1914) I.L.R., 38 Mad., 1158 at 1161, 1162.

Before us, no argument was based on the service character of the lands, but it was contended that the transaction of 1885 was of the nature of an oral sale, that as such it was invalid and could not be proved, that the defendants' possession must be treated as that of a mortgagee and that plaintiff was entitled to redeem.

In support of his contention, appellant's main reliance was on *Ariyaputhira* v. *Muthukomaraswami*(1). This was a case very similar to the one before us in which the learned Judges (MILLER and SADASIVA AYYAR, JJ.) held that the transaction amounted either to a sale or conveyance and was in either case void for want of a registered instrument, that oral evidence to prove it was inadmissible, and that it could not be set up as a bar to the mortgagor's right of redemption. This seems to me to be as far as one of the learned Judges (MILLER, J.) went. SADASIVA AIYAR, J., does consider to some extent the aspects of the case with which we are pressed on respondents' behalf, namely, that although it may be impossible to set up the oral sale (to use a convenient term) as a valid transaction putting an end to the equity of redemption, yet the evidence of it is nevertheless admissible to show the position of the parties and the nature of respondents' subsequent possession that is, to show that respondents' subsequent possession was in the capacity of a full owner, not a mortgagee, that he should be regarded as prescribing for a full title; and that his possession if continued for over twelve years would ripen into a full title and bar the mortgagor's right to redeem.

This aspect of the case is very briefly dealt with by SADASIVA AYYAR, J., in a short paragraph at pages 430 and 431 and his decision is in favour of the mortgagor. No reasons are given, apart from the quotation of four cases which (speaking with all respect) do not appear to me to support the learned Judge's view. It is, however, unnecessary to discuss that case further because the question has been authoritatively determined by a bench of three Judges of this Court in *Govindu* v. *Mallayya*(2). That appeal arose out of a difference of opinion between PHILLIPS and SPENCER, JJ., in *Thotakura Govindu* v. *Repakayala*

(1) (1914) I.L.R., 37 Mad., 423.
(2) L.P.A. No. 207 of 1915 (unreported).

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Malayya(1), in which *Ariyaputhira* v. *Muthukomaraswami*(2) was considered and doubted by PHILLIPS, J., and the learned Judges who decided the Letters Patent Appeal must have had that case prominently in their minds. They say:

"But the question whether possession is adverse or not depends upon the intention or animus of the parties. In the circumstances of this case, whether the defendants entered upon possession of the property at first under the clause in the deed of mortgage or not, their possession certainly since the date of the alleged oral sale was in their own absolute title. The principle of law that a mortgagee who enters into possession in his capacity as such cannot acquire any right by adverse possession against his mortgagor is not applicable to a case where the possession of the mortgagee was treated by the mortgagor himself as being in absolute right and not as mortgagee. Here, the mortgage was a simple and not a usufructuary mortgage and that being so, the decision cited before us, that is, *Khiarajmal* v. *Daim*(3), does not apply."

This seems to me to be conclusive of the point with which we are dealing in the present case and we are bound to follow this pronouncement in preference to the ruling in *Ariyaputhira* v. *Muthukomaraswami*(2). Apart from authority, however, I am in respectful agreement with the view of the learned Judges in *Govindu* v. *Mallayya*(4) and may refer to my judgment in *Narasayya* v. *Obula Reddi*(5) in which my learned brother PHILLIPS, J., concurred. I may also cite *Usman Khan* v. *Dasanna*(6) to the same effect. Lastly, I would rely on the decision of the Privy Council in *Varada Pillai* v. *Jeevarathnammal*(7) in support of the proposition that although it may, in consequence of section 123 of the Transfer of Property Act, and section 91 of the Indian Evidence Act, be impossible to prove a transfer of property, yet nevertheless evidence of its nature may be adduced to show the character of the subsequent possession of the property and to prove that that possession ripened into a title by prescription. Their Lordships in that case were dealing with a gift effected without registered instrument. They say:

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(1) (1915) 31 I.C., 678. (2) (1914) I.L.R., 37 Mad., 423.
(3) (1905) I.L.R., 32 Calc., 296 (P.C.).
(4) L.P.A. No. 207 of 1915 (unreported).
(5) S.A. No. 1560 of 1916 (unreported). (6) (1914) I.L.R., 37 Mad., 545.
(7) (1920) I.L.R., 43 Mad., 244 (P.C.).

"It was not contended before the Board that the above transactions effected a valid gift of the property to Duraisa ; 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 defendants' 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 successor, and accordingly that the plaintiff's 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."

Applying this principle to the case before us, the transaction of 1885, by whatever name it be called, cannot be set up as a transaction having effect of itself to transfer any interest in the property, but it is permissible to consider it, as showing the nature of defendants' subsequent possession—that it was not as mortgagee, but as full owner. That being established, it would, after the expiry of twelve years, ripen into a full title and bar plaintiff's right of redemption. *Muthukaruppan Samban* v. *Muthu Samban*(1), on which appellant relies, cannot be followed in this connexion, after the Privy Council ruling just referred to. I would dismiss the Second Appeal with costs.

ODGERS, J.—This was a suit for redemption of an usufructuary mortgage, dated 1st April 1871. The defendant pleads that his possession as mortgagee continued till 1885 and that then there was an oral arrangement that the mortgagor and others should sell part of the mortgaged property to the defendant and that the latter should give up part and put the mortgagor in possession. This was done and the defendant has been in possession of the suit lands as owner under this oral sale (so-called) since 1885.

The learned District Judge finds as a fact that the defendant has for over twelve years been in possession as owner.

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(1) (1914) I.L.R., 38 Mad., 1158.

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The only argument for the appellant before us is that the oral sale being clearly invalid, there can be no change in the character of the possession of the defendant as mortgagee and that therefore he can be redeemed. Of the cases relied on by the appellant I do not think *Byari* v. *Puttanna*(1) helps him. The question in that case was in fact whether anything passed by the sale at all. It has no bearing on the case before us.

The case most relied on by the appellant was *Ariyaputhira* v. *Muthukomaraswami*(2). The defence there was adverse possession on the part of the mortgagee for more than twelve years, the mortgage having been extinguished by an oral arrangement (similar to the one pleaded here) between the parties. MILLER, J., there held that the intention to discharge the mortgage in that case involved the intention to make certain transfers and that it could not be said that if those transfers failed both parties nevertheless intended to discharge the mortgage. He does not discuss the admissibility of the evidence. SADASIVA AYYAR, J., held that if the mortgagee in question continued to hold as mortgagee, owing to the alleged sale having been ineffectual to convey to him the equity of redemption, he could not by merely asserting possession as owner under the invalid sale convert his possession as mortgagee into possession as owner, even granting that the mortgagee knew and acquiesced in his assertion. He also held that oral evidence of the alleged discharge was inadmissible. This was doubted by PHILLIPS, J., in *Thotakura Govindu* v. *Repakayala Malayya*(3), where he held that oral evidence of a sale by the mortgagor to the mortgagee is admissible to prove discharge though the sale is invalid and does not effect any legal transfer of the property. His view was approved in the Letters Patent Appeal preferred against that decision. There, the Court held that the question whether possession was adverse or not depends on the intention or animus of the parties and that the principle of law that the mortgagee who enters into possession in his capacity as such cannot acquire any right by adverse possession against his mortgagor is not applicable to a

(1) (1891) I.L.R., 14 Mad., 38.
(2) (1914) I.L.R., 37 Mad., 423.
(3) (1915) 31 I.C., 678.

case where the possession of the mortgagee was treated by the mortgagor himself as being in absolute right and not as mortgagee.

In *Rajai Tirumal Raju* v. *Pandla Muthiah Naidu*(1), the ruling in *Khiarajmal* v. *Daim*(2), was quoted:

"As between mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years nor any acquiescence of the mortgagor not amounting to a release of the equity of redemption will be a bar or a defence to a suit for redemption if the parties were otherwise entitled to redeem."

The question has also been considered by this Court in *Narasayya* v. *Obula Reddi*(3) where the learned Judges say:

"But there is nothing to prevent the mortgagor and mortgagee from agreeing between themselves that the future possession of the mortgagee should be adverse to the mortgagor and if thereafter the said possession endures to the statutory period, a good title is acquired by the mortgagee."

This is most clearly laid down by SUNDARA AYYAR and SADASIVA AYYAR, JJ., in *Usman Khan* v. *Dasanna*(4). In the last-mentioned case it was said that there is no principle of law which prevents both parties from agreeing what the character of the possession of the mortgagee should be from a certain date.

The Privy Council decision, *Khiarajmal* v. *Daim*(2), was considered in both *Narasayya* v. *Obula Reddi*(3) and in *Govindu* v. *Mallayya* (5) and held not to apply. On the facts of that case their Lordships of the Privy Council held that no possession adverse to the mortgagor's had been proved and consequently the possession of the property had been that of the mortgagee throughout. Further, the Privy Council in *Varada Pillai* v. *Jeevarathnammal*(6) has held that where a gift is invalid as not being by registered instrument, nevertheless the instrument might be referred to as explaining the nature and character of the possession of the alleged donee, and that though the latter may have acquired no legal title under the transactions referred to she in fact took possession of the property when it was transferred to her name and retained such possession

(1) (1912) I.L.R., 35 Mad., 114.
(2) (1905) I.L.R., 32 Calc., 296 (P.C.).
(3) S.A. No 1560 of 1916 (unreported).
(4) (1914) I.L.R., 37 Mad., 545.
(5) L.P.A. No. 207 of 1915 (unreported).
(6) (1920) I.L.R., 43 Mad., 245 (P.C.).

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till her death, after which date it passed to defendant as her successor, and accordingly plaintiff's claim was barred by upwards of 12 years' adverse possession.

ODGERS, J.

It seems to me that this case together with *Usman Khan* v. *Dasanna*(1), lays down the correct principle to be followed, and that where it is found (as here) that the defendant has been in possession for over twelve years as owner and that that title can be ascribed to an arrangement come to between the parties in 1885—whether it be by invalid sale or otherwise—it is now too late to disturb it and the defendant must be taken to have acquired a good title by prescription. I should add that, in my opinion, *Muthukaruppan Samban* v. *Muthu Samban*(2), has now been overruled by the Privy Council in *Varada Pillai* v. *Jeevarathnammal*(3).

I agree in dismissing the Second Appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1920, August 20, 23 and 31.

MAREYYA (DEFENDANT), APPELLANT,

v.

RAMALAKSHMI (PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption of an orphan—'Factum valet', applicability of.

The adoption of an orphan is invalid under the Hindu Law and the doctrine of '*factum valet*' cannot be invoked to validate it.

Lakshmappa v. *Ramana*, (1875) 12 Bom., H.C.R., 364, at 398 and *Ganga Sahai* v. *Lakhraj Singh*, (1887) I.L.R., 9 All., 253 at 297, followed.

SECOND APPEAL against the decree of G. GANGADHARA SOMAYAJULU, Temporary Subordinate Judge of Ellore, in Appeal No. 424 of 1917, filed against the decree of V. PURNAYYA, Additional District Munsif of Narasapur, in Original Suit No. 83 of 1916.

This was a suit brought by the respondent for a declaration that the alleged adoption of the appellant by the respondent's deceased husband was not true, and even if true was invalid in

(1) (1914) I.L.R., 37 Mad., 545. (2) (1914) 38 Mad., 1158.
(3) (1920) I.L.R., 43 Mad., 244 (P.C.).
* Second Appeal No. 16 of 1920.