APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

SINGARAVELU MUDALIAR (FIRST DEFENDANT), APPELLANT,

1922, April 24.

v.

CHOKKALINGA MUDALIAR (PLAINTIFF), RESPONDENT.*

Limitation Act (IX of 1908), art. 124—Suit to recover choultry building by one alleging to be hereditary trustee—Declaratory decree as to title, effect of, on adverse possession of another.

A suit to recover possession of a choultry building belonging to a charity by one alleging himself to be its hereditary trustee is governed by article 124 of the Limitation Act. *Pattaikara Manakkal Kuppan* v. *Choorakkapatti Munda Kottil* (1912) 14 I.C., 168, followed.

A judgment of a Court declaring that a party in possession of immoveable property has no title to it has not the effect of interrupting the continuity of his adverse possession as against the real owner. If he continues in possession for 12 years before suit his title is perfected; *Mir Akbar Ali* v. *Abdul Ajij* (1920) I.L.R., 44 Bom., 934, not followed, *Raghunatha Chariar* v. *Tiruvengada Ramanuja Chariar* (1910) 9 M.L.T., 171 and *Ayissa* v. *Lakshmana Prabhu* (1911) 9 M.L.T., 420, followed.

SECOND APPEAL against the decree and judgment of T. G. RAMASWAMI AYYAR, Acting Subordinate Judge of Tanjore, in Appeal Suit No. 2 of 1921, preferred against the decree of R. S. SUBRAHMANYA AYYAR, District Munsif of Tiruvālūr, in Original Suit No. 226 of 1917.

The facts are given in the judgment of VENKATASUBBA RAO, J.

K. Rajah Ayyar for defendant-appellant.—As hereditary trusteeship was in question article 124 of the

* Second Appeal No. 1164 of 1921.

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Limitation Act applies. *Pattaikara Manakkal Kuppan* v. *Chooralkkapatti Munda Kottil*(1). The previous suit by plaintiff was only for a declaration of his title and as the decree merely declared his right to the properties and was not capable of execution it did not interrupt my actual adverse possession which had been perfected by enjoyment for 13 years before the present suit was filed. *Raghunatha Chariar* v. *Tiruvengada Ramanuja Chariar*(2), *Ayissa* v. *Lakshmana Prabhu*(3), *Akbar* v. *Tabu*(4), *Shaikh Mukbool Ali* v. *Shaikh Wajed Hossein*(5), *Ram Lal* v. *Masum Ali Khan*(6), and *Vyapuri* v. *Sonamma Boi Ammani*(7). The decision in *Mir Akbar Ali* v. *Abdul Ajij*(8) relied on by the lower Court is not good law.

N. Muttuswami Ayyar for respondent.—From the pleadings and the issues it is clear that the trusteeship was not in question in this suit, and that the right to the choultry building alone was in question, hence article 124 cannot apply. Moreover there was no continuity of adverse possession for 12 years. The first defendant's right to possession was questioned and my right was established in the rent suit brought by first defendant in 1907 and in the suit filed by me in 1912, i.e., within 12 years of the present suit. This interruption prevents adverse possession taking effect. See *Mir Akbar Ali* v. *Abdul Ajij*(8), *Babaji Akoba* v. *Dattu Laxman*(9).

JUDGMENT.

SPENCER, J.

SPENCER, J.—I agree with the judgment which my learned brother is about to deliver. The question whether possession in any particular case is adverse is a

(1) (1912) 14 I.C., 168.
(2) 1910) 9 M.L.T., 171.
(3) (1911) 9 M.L.T., 420.
(4) (1914) 22 I.C., 805.
(5) (1876) 25 W.R., 249.
(6) (1903) I.L.R., 25 All., 35.
(7) (1916) I.L.R., 39 Mad., 811 at 824 (F.B.).
(8) (1920) I.L.R., 44 Bom., 934.
(9) (1913) I.L.R., 37 Bom., 64.

question of fact. A judgment in a prior suit may operate as *res judicata* in a subsequent suit between the same parties or their representatives in interest if it decides what was the character of the possession of any person who was a party to that suit, e.g., whether it was tnen adverse or permissive possession or whether it was separate or joint possession. But I am with due respect quite unable to understand how the judgment of a Court declaring that one of the parties has no legal title to the properties in suit, can have the effect of causing his possession to cease to be adverse to the opposite party from the moment of its pronouncement, so long as possession remains undisturbed. Such a judgment would rather appear to emphasise the adverseness of the possession of the trespasser as against the true owner. It cannot benefit the true owner who omits for some reason or other to take steps to eject the trespasser before the latter completes the period of possession required for the establishment of a prescriptive title. The judgment relied upon in this case, Original Suit No. 151 of 1912, was a judgment in a suit brought by the present defendant. It decided a question of title without declaring the character of his possession. As in the result the suit was dismissed, the present plaintiff could not make use of it for ejecting the present defendant in execution of that decree. He waited too long to institute this suit with the consequence that when he came to a Court as a plaintiff he found himself barred by the statute of limitations. We must follow the decisions of this Court in preference to that in *Mir Akbar Ali* v. *Abdul Ajij*(1). The article governing limitation in this suit was rightly taken to be article 124. Vide *Pattaikara Manakkal Kuppan* v. *Chooraekapatti Munda Kottil*(2).

(1920) I.L.R., 44 Bom., 934.

(2) (1912) 14 I.C., 168.

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The appeal is allowed with costs of appellant here and in the lower appellate Court to be paid by plaintiff, and the decree of the District Munsif dismissing the suit with costs will be restored.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—The dispute relates to a charity known as Abiraman Thiruvasal Choultry. The plaintiff (respondent before us) brought the suit for recovery of possession of a choultry building belonging to the said charity alleging that he was the trustee thereof. The first defendant resisted the suit on the ground that the plaintiff was not the trustee and the right if any which the plaintiff possessed to the trusteeship became barred by limitation. The first issue framed is:

"Whether the plaintiff is the trustee of the suit charity"

and the second

"whether the plaintiff's claim to the trusteeship is time-barred?"

The institution is thus described by the Subordinate Judge:

"The plaint Thiruvasal is a small building at Sikkal near Negapatam where Paradesis take rest. The origin of the Thiruvasal is not known. The trust owns the choultry and a few house-sites. It has only an income of about Rs. 10 or 11 per annum."

The history of this institution so far as it is relevant to the facts of this case may be briefly set forth. One Mangan Paradesi was managing the choultry. During his time a stranger Kathan Paradesi was living with him in the choultry. Some time after Mangan's death about 1898 disputes arose between the plaintiff, who is Mangan's first cousin, and the first defendant who is Mangan's sister's son. The first defendant was not at first serious in regard to denying the plaintiff's title for when he received information about Mangan's death, the first defendant authorized Kathan to act under the

plaintiff. So Kathan obtained registered lease deed in the name of the plaintiff from tenants occupying the house-sites belonging to the trust. The first defendant soon after asserted that he was the trustee, ousted Kathan from the choultry in 1901 and himself took actual possession. From 1907 the plaintiff has been disputing the title of the first defendant to the trusteeship of the charity. In 1901 the first defendant executed certain mortgage deeds for loans borrowed for repairing the choultry. The creditor brought Original Suit No. 87 of 1907 on the file of the Negapatam District Munsif's Court against the first defendant and others and on objection taken by some defendants, the present plaintiff was also impleaded as the ninth defendant. It was found by the Court that though the present plaintiff had legal title to the trusteeship the first defendant was the de facto trustee or manager from 1901. Subsequently several rent suits were filed by the first defendant against the tenants for the recovery of rents in respect of trust properties. The finding in effect in those suits was that the present plaintiff had a better title to the office of the trusteeship, that the present first defendant was de facto trustee from 1901 and that the plaintiff's title was not barred by limitation as the first defendant had not acquired a valid title by adverse possession for the full period of 12 years. On this finding, the suits for rent were dismissed. The first defendant thereupon filed Original Suit No. 151 of 1912 on the file of the Negapatam District Munsif's Court for a declaration that he was the trustee. It was found that the present plaintiff had the legal title and that the present first defendant had mere possession. In consequence of this finding, the suit was dismissed on 27th June 1913. The first defendant continued to remain in possession, and the plaintiff brought the present suit on 21st July 1914.

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The District Munsif fully discussed the evidence and recorded his findings on the two issues mentioned above that the plaintiff had the legal title to the office of trustee, but that the first defendant had had the effective control of the choultry and its management in his own right as trustee from the year 1901 and that the title of the plaintiff was therefore barred under article 124 of the Limitation Act. The Subordinate Judge accepted the findings of the District Munsif that the plaintiff is the trustee and that the possession of the first defendant was adverse from 1901.

From the wording of the issues framed and from the discussion of the evidence, it is abundantly clear that both the District Munsif and the Subordinate Judge have applied their minds to the question of the trusteeship of the suit charity and not merely to the right to the choultry building which is only one item of the properties belonging to the trust. The contention therefore of the respondent that the lower Courts have not considered the applicability of article 124 is utterly untenable. The District Munsif expressly refers to that article at the end of paragraph 7 of his judgment.

The Subordinate Judge, however, reversed the decision of the District Munsif, and the ground on which he set aside that decision involves the determination of a question of some importance and interest. In the opinion of the Subordinate Judge the judgment in Original Suit No. 151 of 1912, dated 27th June 1913, breaks the continuity of the first defendant's adverse possession; and for this proposition he relies upon the authority of *Mir Akbar Ali* v. *Abdul Ajij*(1). The Subordinate Judge says:

"Then the question is whether, because of the failure of the first defendant in getting a declaration in his favour as trustee

(1) (1920) I.L.R., 44 Bom., 934.

in Original Suit No. 151 of 1912, his adverse possession ceased from the date of that decree (June 1913) and he cannot tack on his previous possession from 1901 to mature his title by adverse possession. The decision in *Mir Akbar Ali* v. *Abdul Ajij*(1), clearly supports the plaintiff's contention."

He concludes

"Following the decision in *Mir Akbar Ali* v. *Abdul Ajij*(1), I find that first defendant cannot tack on the period of his possession prior to the decision in Original Suit No. 151 of 1912."

I may at once state that this reasoning is unsound; for in his view the adverse possession of the first defendant ceased from the date of the decree. The question of "tacking on" does not arise at all because there are no two periods of adverse possession referred to by the Subordinate Judge. According to him the decree in Original Suit No. 151 of 1912 had the effect of preventing the statute of limitation from running and the Subordinate Judge was misled into using the expression "tacking on" by some observations which were made in *Mir Akbar Ali* v. *Abdul Ajij*(1). I shall presently refer to the cases that bear upon the subject, but on principle, it seems to me, with great respect, that the decision on which reliance was placed by the lower appellate Court is wrong. Adverse possession is a question of fact and always implies that the right to immediate possession subsists in the true owner and not in the person having adverse possession. An adjudication that the true owner had a good title to possession is entirely consistent with the fact that actual possession is with another party who ousted the true owner and has been holding possession as against the true owner on his own behalf. I therefore fail to see how a decree which negatived the first defendant's right could possibly be regarded in the nature of an interruption of the continuity of possession. In *Mir Akbar Ali* v. *Abdul Ajij*(1) MACLEOD, C.J., assumes that when there is a

(1) (1920) I.L.R., 44 Bom., 934.

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decree of Court deciding that a certain party has no right, he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree, because his losing the suit puts an end to his previous adverse possession. The learned Chief Justice bases this conclusion upon the ground that it cannot be presumed that the party having adverse possession intended, the moment the decree was passed negativing his rights, to continue to hold adversely to the successful party and in effect in contempt of the decree aforesaid. The judgment proceeds to say that it is quite possible that the party relying upon adverse possession might, finding that the successful party was remiss in seeking to execute the decree, gather fresh courage and might, after a certain period had elapsed from the date of the decree determine to set up again a title in himself against the successful party in the suit. These in short are the grounds of the decision in *Mir Akbar Ali* v. *Abdul Ajij*(1). If the Court comes to a conclusion that as a fact the adverse possession ceased and that the party setting up adverse possession, on account of his respect for the decision, determines not to hold the property adversely, there is then no continuity of adverse possession because the party deliberately ceased to hold the property adversely. But the decision of the Bombay High Court appears to be based upon a presumption that a decree against the party in possession *ipso facto* determines adverse possession. The learned Chief Justice does not support his view by reference to any authority, and with great deference I am unable to follow the decision above referred to.

With the exception of the case quoted, the authority seems to be entirely on the side of the appellant.

(1) (1926) L.R., 44 Bom., 934.

In *Shaik Mukbool Ali* v. *Shaik Wajed Hossein*(1) Sir RICHARD GARTH, C.J., and BIRCH, J., held that where a person was in actual possession of property from the time when the deed conveyed it to him the decision which declared that deed to be fraudulent did not have the effect of putting another claimant in possession. GARTH, C.J., observed :—

"Whatever the decree might have been, the defendant's possession could not be considered as having ceased in consequence of that decree, unless he were actually dispossessed. The fact that there is a decree against him does not prevent the statute of limitation from running."

Ram Lal v. *Masum Ali Khan*(2) also supports the appellant's contention.

Babaji Akoba v. *Dattu Laxman*(3) has been relied upon by the plaintiff. It must be said that this is not a direct authority on the question under consideration. But the following observations of BATCHELOR, J., have some bearing:

"In 1898 it was held that he was a member of a joint family. But it was not decided that he was in possession of any part of the family property either directly or constructively; and at a given moment a Hindu may be a member of a joint family entitled on partition to his share and may still be in process of being excluded to his knowledge. That is what has happened here. Possession is a mere matter of fact, and adverse possession, as I understand it, means possession held by some person on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. To say, therefore, that in 1898 the plaintiff had a good title to possession is perfectly consistent with saying that in fact possession was with the defendants, who were ousting the plaintiff to his knowledge and in spite of his title."

Raghunatha Chariar v. *Tiruvengada Ramanuja Chariar*(4) deals with the question of adverse possession

(1) (1876) 25 W.R., 249.
(2) (1903) I.L.R., 25 All., 35.
(3) (1913) I.L.R., 37 Bom., 64.
(4) (1910) 9 M.L.T., 171.

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under article 124. As in the case on hand, there also it was the effect of a declaratory decree that had to be considered, and the learned Judges observed:

"And no authority has been cited in support of the proposition that the passing of a declaratory decree in favour of the plaintiff will stand in the way of the defendant in the suit acquiring title to the property by adverse possession, such possession having commenced before institution of the suit for title and continued afterwards for the period required by law."

There is an observation in the judgment which may be said to involve the inference that the result would be different if the decree were a decree for possession. But I do not think that there is any warrant for this distinction. This case is a direct authority against the respondent and has not been referred to in the judgment of the lower appellate Court. The same view was taken in *Ayissa* v. *Lakshmana Prabhu*(1) and the following observation is made in the course of the judgment:

"This Court has more than once held that a decree in favour of a party with regard to property does not by itself stop the running of limitation when the property continues to be in the possession of the defendant. It is, therefore, possible that, though the former suit was not barred when it was instituted, the present suit may be barred by limitation."

I may observe that no distinction is to be found in this judgment between a declaratory decree and a decree for possession.

In *Akbar* v. *Tabu*(2) the Punjab Chief Court followed *Ayissa* v. *Lakshmana Prabhu*(1). The question arose with reference to adverse possession of a co-sharer. It was found that the plaintiff was in exclusive possession but it was contended on behalf of the opposite party that there was a break in the adverse possession as a result of

(1) (1911) 9 M.L.T., 420.

(2) (1914) 22 I.C., 805.

the decree which negatived the plaintiff's right. The Court in dealing with this contention said that a decree in favour of the defendants

"not accompanied by actual effective assertion of right and taking of possession of those rights",

was of no avail to them.

Hans Raj v. *Maulu*(1) is a recent decision of the Lahore High Court, and though it is not quite in point it is useful as containing that Court's approval of the passage in *Akbar* v. *Tabu*(2), where relying upon *Ayissa* v. *Lakshmana Prabhu*(3), the learned Judges laid down the proposition that a mere bringing of an action and a judgment thereon not accompanied by an entry does not break the continuity of adverse possession.

I have referred to the last two cases because the view taken by the Madras High Court was accepted in them.

The proposition set forth above may be inferred from the following passage in the judgment of SRINIVASA AYYANGAR, J., at page 824, of *Vyapuri* v. *Sonamma Boi Ammani*(4) ;

"A simple suit for declaration of the mortgagee's right when such a right is denied by the trespasser may probably be brought, but that is a proceeding which the mortgagee is not bound to take, and a decree in such a suit cannot save the rights of the mortgagee from becoming barred, if otherwise they would be."

Passages from certain other judgments of this Court have been relied upon by the appellant in order to show that the same inference can be drawn from them. But I do not propose to refer to them as the cases containing the said passages are not direct authorities on the point and as moreover in the cases that have been already

(1) (1921) 63 I.C., 881.
(2) (1914) 22 I.C., 805.
(3) (1911) 9 M.L.T., 420.
(4) (1916) I.L.R., 39 Mad., 811.

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referred to the question has been considered and decided.

Both on principle and on authority I am of the opinion that the first defendant is bound to succeed and my judgment is therefore for him. I would allow the appeal, set aside the decree of the lower appellate Court and dismiss the plaintiff's suit for possession.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

1922, September 18.

RAMASWAMI GOUNDAN (FIRST RESPONDENT), PETITIONER,

v.

MUTHU VELAPPA GOUNDER AND TWO OTHERS (FIRST AND SECOND PETITIONERS AND SECOND RESPONDENT), RESPONDENTS,

and

RAMASWAMI GOUNDAN (RESPONDENT), PETITIONER,

v.

SRINIVASAN CHETTIAR (PETITIONER), RESPONDENT.*

Madras Local Boards Act XIV of 1920, *ss.* 55 *to* 57—*Rule* 10 *of Transitory Provisions—Nomination of a retiring President as a member of the new Board under Act XIV of* 1920, *legality of—Election of the nominated member as President of new Board—Order of District Judge setting aside his election as President on a wrong construction of statute—District Judge, a Court, and not* persona designata—*Decision of District Judge declared "final" by Act XIV of* 1920—*Revisional powers of High Court under section* 115, *Civil Procedure Code, and section* 107, *Government of India Act.*

Under a notification of the Government, the members of a Taluk Board, constituted under the Madras Local Boards Act, 1884, were to lay down their offices on 1st March 1922 and new

* Civil Revision Petitions Nos. 341 and 342 of 1922.