In the result the appeals are allowed, with costs throughout, one set in Civil Appeals Nos. 389 and 390 of 1960 and one in Appeals Nos. 391 and 392 of 1960, and one hearing fee.

Appeal allowed.

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Waverly C. v. Raymon & Co. (India) Pvt. Ltd.

Aiyar J.

1962

May 4.

PADMA VITHOBA CHAKKAYYA

v.

MOHD. MULTANI

(K. C. DAS GUPTA, J. R. MUDHOLKAR and T. L. VENKATARAMA AIYAR, JJ.)

Adverse Possession—Usufructuary mortgagee obtaining invalid sale with consent of mortgagor—Mortgagor a minor—Nature of possession of mortgagee if altered.

In 1961 R executed a usufructuary mortgage of the suit lands in favour of M. Later, in 1923 he executed a sale deed of the same lands in favour of Rajanna, uncle of the appellant. The appellant and Rajanna formed a joint Hindu family. As there was difficulty in obtaining possession by Rajanna, he R and M entered into an arrangement under which the sale deed was cancelled by making endorsements on the back of it and the lands were sold by R to M. Rajanna died in 1930 as a minor, and in 1943 the appellant brought a suit against M for possession of the lands on the ground that the cancellation of sale deed of 1923 was ineffective as it was not registered and that accordingly the sale deed in favour of M passed no title to him. M pleaded adverse possession on account of the invalid sale in his favour. The suit for possession was dismissed on the ground that the appellant had filed the suit more than three years after attaining majority.

Held, that though the suit for possession was time barred the appellant could maintain a suit for redemption if M had not prescribed title by adverse possession. M who had entered into possession as a mortgagee could acquire title by prescription if there was a change in the character of his possession under an agreement with the owner. The endorsement of cancellation on the sale deed taken along with the sale deed

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in favour of M were admissible to show the character of possession of M. This arrangement would clearly show that the possession of M was adverse provided Rajanna was not a minor and was capable of giving his consent. Though, in certain circumstances there could be adverse possession against a minor, possession lawful at the inception could not become adverse under an arrangement with a minor. A minor was in law, incapable of giving consent, and there being no consent, there could be no change in the character of possession which could only be by consent and not by unilateral action.

Kanda Sami Pillai v. *Chinnabba* (1920) I.L.R. 44 Mad. 253 and *Varatha Pillai* v. *Jeevarathnammal* (1918) L R. 46 I.A. 285, relied on.

Sitharama Raju v. *Subba Raju*, (1921) I.L.R. 45 Mad. 361, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 620 of 1960.

Appeal by special leave from the judgement and decree dated February 11, 1954, of the former Hyderabad High Court in Second Appeal Suit No. 476/4 of 1954 Fasli.

Gopal Singh and *R. S. Narula*, for the appellant.

A. Ranganatham Chetty, *A. V. Rangam*, *A. Vedavali* and *P. C. Agarwala*, for respondent No. 1.

1962. May 4. The Judgment of the Court was delivered by

Aiyar J.

VENKATARAMA AIYAR, J.—This is an appeal by special leave against the judgment of the High Court of Hyderabad whereby it affirmed the judgment of the Court of the Additional District Judge of Adilabad dismissing the suit of the appellant. The facts are that there was a joint family consisting of one Chakkayya and his younger brother Rajanna. Chakkayya died in year 1923 leaving

behind the appellant his son who it is said was at that time a minor a few months old. On December 21, 1923, Rama Rao second defendant, sold the lands which are the subject-matter of the suit to Rajanna. It appears that as there was some difficulty in Rajanna getting possession of the properties which were stated to have been usufructuarily mortgaged to the first defendant, the transaction of sale was cancelled and the same was endorsed on the sale deed. Thereafter the second defendant executed a fresh sale deed in favour of the first defendant and the latter has ever since continued in possession. The appellant filed the present suit on February 14, 1943, for recovery of possession of these properties from the first defendant on allegation that the first defendant was in management of the properties belonging to the joint family of Chakkayya and Rajanna and himself, that the sale deed in favour of Rajanna dated December 21, 1923, vested title to the suit properties in the joint family, that the first defendant had entered on the management of these properties also as manager on behalf of the joint family, that Rajanna died in 1930 as a minor, that the first defendant was discharged from the management in 1933, that he had not surrendered possession of the suit properties to the family, but was setting up a title to them in himself on the basis of a sale deed executed by the second defendant subsequent to the sale deed dated December 21, 1923 in favour of Rajanna, but that the said sale deed could confer no title on him, as the second defendant had sold the lands previously to Rajanna, and had no title which he could thereafter convey. It was further alleged that the plaintiff became a major some time in June 1940 and that the suit for possession was within three years of his attaining majority and not barred by limitation. The first defendant contested the suit. He pleaded that he was merely a jawan or servant

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in the service of the family, that he was not in management of the joint family properties, that the suit lands had been usufructuarily mortgaged to him in 1916 for Rs. 800/- long before they were sold to Rajanna in 1923, that the sale in favour of Rajanna had been cancelled with his consent he having been paid back the consideration, that it was thereafter that the second defendant sold the properties to him, and that he had therefore acquired a good title to them, and that further as he had been in possession of the properties thereafter for over the statutory period in assertion of a title as owner, he had acquired title to them by prescription and that the suit was barred by limitation. He denied that Rajanna was a minor at the relevant dates as stated in the plain. On these pleadings the District Munsiff framed the following issues : —

> (1) Whether according to the suit (plaint), the suit lands have been sold by defendant No. 2 in favour of Padma Rajanna through registered sale deed dated 17th Bahman 1334-F (corresponding to 21st Dec. 1923) ?
>
> (2) Whether as stated by the plaintiff in his suit, the family of the plaintiff and Padma Rajanna was joint ? And whether on account of the death of the said Rajanna, the plaintiff is entitled to the suit lands ?
>
> (3) Whether the defendant No. 2 has executed the sale deed dated 3 Farwardi 1334-F (corresponding to 4th February 1925-AD) and what is its legal effect on the sale deed dated 17th Bahman 1334-F. (corresponding to 21st December 1923) ?
>
> (4) Whether at the time of the execution of the sale deed dated 3rd Farwardi 1334-F (21. 12. 1923) the plaintiff was minor? And whether this suit is within limitation ?

(5) To what relief are the parties entitled to ?

The learned District Munsiff, Nirmal, who tried the suit held that as the endorsement of the cancellation of the sale deed in favour of Rajanna was unregistered, no title passed to the second defendant by reason of that endorsement and that accordingly the sale by him in favour of the first defendant conferred no title on him and further that the suit had been instituted within three years of the plaintiff's attaining majority and that it was in time and so he decreed the suit. Against this Judgment and decree there was an appeal by the respondents to the Additional District Court of Adilabad, which held that the plaintiff had not established that he had attained majority within three years of the suit and on the finding the appeal was allowed. The appellant took the matter in second appeal to the High Court of Hyderabad which agreeing with the District Judge, held that the suit was instituted more than three years after the plaintiff had attained majority and dismissed the appeal. It is against this Judgment that the present appeal by special leave has been filed.

The first contention that is urged on behalf of the appellant is that the finding that the plaintiff had attained majority more than three years prior to the suit was erroneous. But there are concurrent findings on what is a question of fact, and we see no sufficient reason to differ from them.

The contention strongly urged by Mr. Gopal Singh in support of the appeal is that the first defendant had been put in management of all the properties belonging to the plaintiff's family and that having entered into the possession of the suit lands as manager on behalf of the family, it was not open to him to set up a title by adverse possession, unless he first surrendered possession of

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the properties. On this point the learned Judges of the High Court held that there was no satisfactory proof that the first defendant had been in management of the properties as agent of the plaintiff and his family. The contention of the appellant is that there is a large body of evidence in support of the allegations in the plaint that the first defendant was not a mere servant but manager of the properties, that he had not gone into the box and denied them and that under the circumstances it must be held that he entered into possession of the properties as manager and it was not competent for him to set up a claim by adverse possession.

The respondent argues that he was merely a jawan in the service of the family of appellant and that he had nothing to do with the management of the properties and that as there was no evidence worth the name in support of the allegations in the plaint, there was no need for him to enter into the box and give evidence that he was not in management of the lands. If the fact of this appeal turned on a determination of this question, we should, on the materials before us, feel considerable difficulty in agreeing with the decision of the learned Judges. The failure of the first defendant to go into the box would have been sufficient to shift the burden of proving that he was not the manager on to him. Vide *Murugesam Pillai* v. *Manickavasaka Pandara*(1) and *Guruswami Nadar* v. *Gopalaswami Odayar* (2).

But then it is pointed out by the respondent that the suit lands had come into his possession under a usufructuary mortagage executed by the second defendant in 1916, that there was no allegation that this mortagage was obtained by him while he was the manager of the family properties or on

(1) [1917] L.R. 44 I.A. 98. (2) [1919] I.L.R. 42 Mad. 629.

behalf of the family, and that when once his possession has been traced to the usufructuary mortgage of 1916, there could be no question thereafter of his having entered into possession of the properties as manager on behalf of the family. Before us the appellant did not dispute the truth of the usufructuary mortgage in favour of the first respondent nor did he contend that in taking that mortgage the first defendant acted on behalf of the family. Such a contention would be untenable as at that time Chakkayya the father of the plaintiff and the manager of the joint family was alive. That being so the question whether the first defendant is precluded as manager from acquiring title by adverse possession does not arise for decision because he entered into possession of the properties in his own right as usufructuary mortgagee.

On the finding reached above that the first defendant entered into possession of the properties as usufructuary mortgagee in 1916, the question is what are the rights of the appellant. On the basis of the sale deed by the second defendant in favour of Rajanna he would be entitled to redeem the mortgage. But the present suit is not one for redemption of the mortgage but for ejectment, and that by itself would be a ground for dismissal of the suit. But in view of the fact that this litigation had long been pending, we consider it desirable to decide the rights of the parties on the footing that it is a suit to redeem the usufructuary mortgage, without driving the parties to a separate action. We have now to consider the defence of the first defendant to the suit, treating it as one for redemption. Now the contention of Mr. Ranganathan Chetty for the respondent is that he had been in possession of the properties as owner ever since 1923, when the second defendant sold them to him, that he had thereby acquired a prescriptive title to them, and that the right of the appellant to

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redeem was thereby extinguished. It is not disputed that when a person gets into possession of properties as mortgagee, he cannot by any unilateral act declaration of his prescribe for a title by adverse possession against the mortgagor, because in law his possession is that of the mortgagor. But what is contended is that if the mortgagor and mortgagee subsequently enter into a transaction under which the mortgagee is to hold the properties thereafter not as a mortgagee but as owner that would be sufficient to start adverse possession against the mortgagor if the transaction is for any reason inoperative under the law. This contention, in our opinion, is well founded. Though there was at one time a body of judicial opinion that when a person enters into possession as a mortgagee he cannot under any circumstances acquire a title by prescription against the owner, the law is now fairly well settled that he can do so where there is a change in the character of his possession under an agreement with the owner, vide *Kanda Sami Pillai* v. *Chinnabba* (1). Now the question is was there such an arrangement ? The contention of the respondent is that the agreement between Rajanna and the two defendants under which Rajanna received back the sale consideration and made an endorsement cancelling the sale followed, as part of the transaction, by the sale of the properties by the second defendant to the first defendant would be sufficient to start adverse possession.

The endorsement of cancellation on the back of the sale deed in favour of Rajanna dated December 21, 1923, has been held, as already stated, to be inadmissible in evidence as it is not registered. The result of it is only that there was no retransfer of title by Rajanna to the second defendent, and the family would in consequence continue to be the owner, and that is why the appellant is

(1) (1920) I.L.R. 44. Mad. 253.

entitled to redeem. But the endorsement, taken along with the sale deed by the second defendant in favour of the first defendant is admissible in evidence to show the character of possession of the latter. Vide *Varatha Pillai* v. *Jeevanathammal* (1). And that was clearly adverse to the owners. The answer of the appellant to this contention is that Rajanna himself was a minor at the time when this arrangement is stated to have taken place and that in consequence no title by adverse possession can be founded on it. We agree that if Rajanna was a minor when he entered into this arrangement that would not operate to alter the character of possession of the first defendant as mortgagee. The respondent contended that there could be adverse possession against a minor in certain circumstances, and relied on the decision in *Sitharama Raju* v. *Subba Raju*(2), in support of this position. That is not questioned, but the point for decision is whether possession lawful at the inception can become adverse under an arrangement entered into by a minor. Now a minor is in law incapable of giving consent, and there being no consent, there could be no change in the character of possession, which can only be by consent, and not by any unilateral act. Therefore the crucial point for determination is whether at the time of the cancellation of the sale deed dated December 21, 1923, Rajanna was minor or major. According to the respondent he was a major and there is evidence also on record in support of this contention. According to the appellant Rajanna was a minor at that time and he died a minor in 1930. On this disputed question of fact there has been neither an issue framed nor evidence adduced. Under the circumstances we think it desirable that the matter should be remanded to the Court of District Munsiff for a fresh inquiry on this question. The plaintiff should

(1) [1918] L.R. 46 I.A. 285. (2) (1921) I.L.R. 45 Mad. 361.

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on remand be required to suitably amend the plaint so as to convert the suit into one for redemption of the usufructuary mortgage of the year 1916. The first defendant will then file his written statement in answer thereto. An issue will be framed whether Rajanna was a major at the time when the sale deed was cancelled. If it is held that he was a major then the possession of the first defendant thereafter would be adverse and on the findings given by the Courts below the suit will have to be dismissed as barred by limitation. But if it is held that Rajanna was then a minor, then there would be no question of adverse possession and the plaintiff would be the entitled to redeem the mortgage. The decree of the lower court is accordingly set aside and the matter remanded to the Court of the District Munsiff for fresh disposal as stated above. Costs incurred throughout in all the Courts will abide the result.

Case remanded.