Privy Council Appeal No. 154 *of* 1917.

N. Varada Pillai and another - - - - - - *Appellants*

v.

Jeevarathnammal - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JUNE, 1919.

Present at the Hearing:

VISCOUNT CAVE.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal by the plaintiffs from a decree of the High Court of Madras, dated the 19th November, 1915, reversing a decree of the District Court of Chingleput dated the 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 Narayanasami 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 Karianangalani 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 the 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 the 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 the 8th October, 1895, and requesting that they should be transferred into her name. The Collector accordingly, on the 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 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 *muchilikas* 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 zamindarini 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 rely upon the will of Rajammal dated the 2nd April, 1901. By this will the testatrix referred expressly to the petition of the 1st October, 1895, and the subsequent transfer of the two villages to the name of Duraisani, and added: "and the above villages are being enjoyed by the said Duraisani Ammal." She then proceeded as follows:—

"My daughter, the said Duraisani Ammal, *alias* Duraisani Ammal, shall take the above two villages and shall either amicably or through Court recover and take all arrears, jewels, etc., due to me, viz., the Zamin sircar and arrears in the said villages up to past Fasli 1305 upon account 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 under her will or by succession to her moiety of *mitta*, and accordingly that as from that date possession of the villages must be deemed to have been held by her as part owner not adversely. This contention was founded upon the English rule of law, which was abrogated by the statute 3 and IV. c. 27, sec. 12, that the possession of one of several coheners, joint tenants or tenants in common, is the possession of the others so as to prevent the statutes of limitation from running against them. Whether this rule is applicable to sharers in partitioned agricultural village in India not holding their members of a joint family, it is unnecessary for the present case to decide; for upon the facts of the case has no application. The limits of the rule were defined in *Doe d. Taylerson* v. *Doe d. Taylerson* (11 A. and E. at p. 1014) as follows:

"Generally speaking, one tenant in cannot maintain an ejectment against another tenant 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 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.

In the Privy Council.

N. VARADA PILLAI AND ANOTHER

v.

JEEVARATHNAMMAL.

DELIVERED BY VISCOUNT CAVE.

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