

Supreme Court of India

Mamidi Venkata Satyanarayana ... vs Mandela Narasimhaswami And ... on 27 August, 1965

Equivalent citations: 1966 AIR 470, 1966 SCR (1) 628

Author: A Sarkar

Bench: Sarkar, A.K.

PETITIONER:

MAMIDI VENKATA SATYANARAYANA MANIKYALARAO AND ANOTHER

Vs.

RESPONDENT:

MANDELA NARASIMHASWAMI AND OTHERS

DATE OF JUDGMENT:

27/08/1965

BENCH:

SARKAR, A.K.

BENCH:

SARKAR, A.K.

DAYAL, RAGHUBAR

RAMASWAMI, V.

CITATION:

1966 AIR 470

1966 SCR (1) 628

CITATOR INFO :

F 1975 SC1767 (21)

D 1977 SC1123 (10)

ACT:

Indian Limitation Act, Arts 144 and 120-Alienation of share of Hindu Joint family property-Possession of members of family whether adverse to alienee-Period within which suit for partition and possession by alienee must be brought.

HEADNOTE:

A decree was passed in a money suit against N and his four sons who were members of a Mitakshara Hindu joint family. In execution of that decree the shares of the four sons in the joint family properties, described altogether as 4/5 th share, were put up for auction in December, 1936 and purchased by S. N's interest was not put up for sale as it was the subject matter of insolvency proceedings. The sale to S was duly confirmed. S sold the properties to P. On November 6, 1939 an order was made under O. 21 rr. 33(2) and 96 of the Code of Civil Procedure for delivery of joint possession of the properties purchase to P along with the members of the joint family already in possession. This order was carried out and possession was delivered to P by

publishing that fact by beat of drum as prescribed in the rules. Subsequently P retransferred the properties to S. On October 16, 1951 S filed a suit against the then members of the joint family and various alienees asking for a partition of the joint family properties into five equal shares and thereafter for possession of four of such shares by removing the defendants from possession. The trial court decreed the suit but held that S was not entitled to a 4/5th share but only to a 2/3rd share because before the decree a 5th son had been born to N who had not been made a party to the suit or the execution proceedings and whose share had consequently not passed under the auction sale. Some of the defendants filed an appeal to the High Court which allowed the appeal holding that the suit was barred by limitation under Art. 144 of Schedule 1 to the Limitation Act. S had filed a cross-objection in the High. Court on the ground that he should have been held entitled to a 4/5th share of the properties which was dismissed by the High Court without discussion of the merits in view of its decision on the question of limitation. S having died the appellants as his successors in interest appealed to this Court under Art. 133 of the Constitution. The two questions that arose for decision were (1) whether the suit was barred by limitation under Art. 144 or Art. 120 and (2) whether S was entitled to a 4/5th share.

HELD : (Per Sarkar and Raghubar Dayal, JJ.) (i) (a) 'Me view that the suit was barred under Art. 144 of the suit presented great difficulties. The article obviously contemplates a suit for possession of property where the defendant might be in possession of it as against the plaintiff. However, the purchaser of a copartner's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which an partition might be found to fall to the share of the copartner whose share he has purchased. His right to possession would date from the period when a specific allotment is made in his favour.[632 H]

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S was therefore not entitled to possession till a partition had been made. As possession of the defendants could tie adverse to him only if he was entitled to possession the difficulty in applying Art. 144 arose. [633 B]

Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain, [1954] S.C.R. 177, relied on.

Vyapuri v. Sonamma Boi Ammani, (1916) I.L.R. 39 Mad. 81, referred to.

Mahant Sudarsan Das v. Mahan Ram Kirpal Das, (1949) L.R. 77 I.A 42, distinguished.

(b) Even on the assumption that Art. 144 applied the suit was not barred. In the present case the defendants were not in uninterrupted possession for twelve years as required by the Article. By the delivery of symbolical possession under

the order of November 6, 1939, the adverse possession of the defendants was interrupted. Time had therefore to commence to run from that date, and the suit having been brought within twelve years of that date, it was not bared under that article. [633 F-G]

Sri Radha Krishna Chanderji v. Ram Bahadur, A.I.R. (1917) P.C. 197, relied on.

It could not be said that the order of delivery of possession was a nullity though S and his transferee who had purchased an undivided share in copartners property were not entitled in law to any possession at all. In making the order the learned Judge had gone wrong in law but he had acted within his jurisdiction. Such an order has full effect if it is not set aside. [634 A-B]

Yelumalai Chetti v. Srinivasa Chetti, (1906) I.L.R. 29 Mad. 294, distinguished.

Mahadev Sakharam Parkar v. Janu Namji Hatle, (1912) I.L.R. 36 Bom. 373 and fang Bahadur Singh v. Hanwant Singh (1921) I.L.R. 43 All. 520, held inapplicable.

(ii) Article 120 applies to suits for which no period of limitation is provided elsewhere and prescribes a period of six years commencing from the date when the right to sue accrues. [636 D]

The right to sue accrues for the purpose of Art. 120 when there is an accrual of the right asserted in the suit and an unequivocal threat by the respondent to infringe it. In the present case there was nothing to show that the right was ever challenged in any way by the respondents. It was impossible therefore to hold that the suit was barred under Art. 120. [636 F]

Mst. Rukhmabai v. Lala Laxminarayan, [1960] 2 S.C.R. 253 and C. Mohammad Yunus v. Syed Unnissa, A.I.R. 1961 S.C. 808, relied on.

Bai Shevantibai v. Janardan R. Warick, A.I.R. 1939 Bom. 322 disapproved in so far as it held that the right to sue accrued from the date of sale.

(iii) The cross objection had no merit. What S purchased at the auction sale was the share of the sons of S then bom, in the joint family Properties. At the date of the auction sale that share which was originally 4/5th had been reduced to 2/3rd by the birth of another son to N who had not been made a party either to the suit or the execution proceedings. What was purchased at the execution sale was only the shares of the four elder sons of N and their share at the date of sale was 2/3rd. That

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being so S was not entitled to get the 1/6th share of the fifth son also allotted to him in the partition suit. [637 B-C]

Per Ramaswami, J. : (i) The purchaser of a share of joint Hindu family property doe-, not acquire any interest in the property he cannot claim to be put. in possession of any definite place of Property. A suit for partition filed by

the alienee from a is not, in a technical sense, a suit for partition and such a suit have the necessary effect of breaking up the joint ownership of the members of the family in the joint family in the joint property nor the corporate character of the family. Such being the rights of the alienee his right to sue for partition cannot be said to be a continuing right subject to no period of limitation for enforcing it. [638 F-H]

Aiyyagari Venkataramayya v. Aivyagari Ramayya, I.L.R. 25 referred to.

(ii) Though the alienee of an undivided interest of a Hindu is not entitled to joint possession with other copartners or to separate possession of any part of the family property he is entitled to obtain possession of that part of the family property which might fall to the share of his alienor at a partition. [640 B]

In the present case the alienee instituted a suit for general the prayer that he may be put in possession of that part of the family property which may be allotted to his share. It is not right to such a suit as a suit for mere partition. The main relief sought by the plaintiff is the relief of possession of that part of the property which may be allotted to the alienor's share and a relief for partition is only a machinery for working out his right and ancillary to the main relief for possession of the property allotted to the alienor's share. what the plaintiff seeks is actual delivery of possession. Such a suit falls within the of Art. 144 of the Limitation Act. [640 B-D]

Thani v. Dakshinamurthy. I.L.R. 1955 Mad. 1278, approved

(iii) the possession of the non-alienating members of the family cannot be said to be possession on behalf of the alienee also because the purchaser-alienee does not acquire an interest in the property sold and does not become tenant-in-common with the members of the family tier is he entitled to joint possession with them. In the absence of clear acknowledgement of the right of the alienee or participation in the enjoyment of the family property by the alienee the possession of his alienors share. The fact that the alienee has purchased an undivided interest is not inconsistent with the conception of adverse possession, of that interest. [640 E-H]

Sudarsan Das v. Ram Kirpat Das, A.I.R. 1950 P.C. 44, relied on.

According to the third column of Art. 144, time begins to run from the date when the possession of the defendant becomes adverse to the plaintiff. In the present case, therefore, adverse possession begins to run from the date of purchase of the undivided share i.e. from December 21, 1936. [640 E; 641 FF]

(iv) However the grant of symbolic possession by the court in favour of P after notice to defendants 2 to 5 was tantamount in law to delivery of actual possession and therefore sufficient to break up the continuity of adverse

"scion in favour of the defendants. Even assuming that the grant of symbolic possession ought not to have been made and that,

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the executing court acted illegally in making such an order, it could not be argued that the executing court had no jurisdiction to make the order or that the act of symbolic possession was a nullity in the eye of law. [642 B]

Yelumalai Chetti v. Srinivasa Chetti, I.L.R. 29 Mad. 294, referred

Sri Radha Krishna' Chanderii v. Ram Bahadur, A.I.R. 1917 P.C. 197, relied on.

According the suit of the plaintiff was not barred by limitation under Art. 144 of the Limitation Act and the view taken by the High Court on this part of the case was not correct. [642 D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 420 of 1963.

Appeal from the judgment and decree dated September 9, 1960 of the Andhra Pradesh High Court in Appeal Suit No. 300 of 1955.

M. Suryanarayana Murti and T.V.R. Tatachari, for the appellant.

K.R. Chaudhuri, for respondents 1 to 13.

The Judgment of Sarkar and Raghubar Dayal, JJ. was delivered by Sarkar J. Ramaswami, J. delivered a separate Opinion.

Sarkar, J. In a certain money suit, being Small Cause Suit No. 9 of 1953. a decree had been passed against Narasimhaswamy and his four sons who were members of a Mitakshara Hindu joint family. In execution of that decree the shares of the four sons in the joint family properties, described altogether as 4/5th share, were put up to auction on December 21, 1936 and purchased by one Sivayya whose successors-in-interest are the appellants. The father Narasimhaswamy's share had not been put up for sale because= an application for his adjudication as insolvent was then pending. The sale to Sivayya was duly confirmed. Thereafter Sivayya sold the properties purchased by him at the auction to one Prakasalingam. On November 6, 1939, an order was made. under O. 21, rr. 35(2) and 96 of the Code of Civil Procedure for delivery of joint possession of the properties purchased to Prakasalingam along with the members of the joint family in actual possession. This order was duly carried out and possession was delivered to Prakasalingam by publishing that fact by beat of drum as prescribed in these rules. Subsequently, Prakasalingam re- transferred the properties to Sivayya.

On October '16, 1951, Sivayya filed the suit out of which this appeal arises, against the then members of the joint family whose Sup./65 12 number had by that time increased, and various

other persons holding as alienees from them, asking for a partition of the joint family properties into five equal shares and thereafter for possession of four of such shares by removing the defendants from possession. The trial Court decreed the suit but held that Sivayya was not entitled to a 4/5th share but only to a 2/3rd share because before the decree a 5th son had been born to Narasimhaswamy who had not been made a party to the suit or the execution proceedings and whose share had not consequently passed under the auction sale. Some of the defendants appealed to the High Court of Andhra Pradesh from this judgment. The High Court allowed the appeal on the ground that the suit was barred by limitation under Art. 144 of Schedule 1 to the Limitation Act. Sivayya had filed a cross-objection in the High Court on the ground that he should have been held entitled to a 4/5th share of the properties which was dismissed by the High Court without a discussion of its merits in view of its decision on the question of limitation. Sivayya having died pending the appeal in the High Court, the appellants as his successors-in-interest, have come up to this Court in further appeal under Art. 133 of the Constitution.

Various questions had been raised in the trial Court but only two survive after its decision. They are, whether the suit was barred by limitation and whether Sivayya was entitled to a 4/5th share.

On the question of limitation, two articles of the Act were pressed for our consideration as applicable to the case. They are Arts. 144 and 120. We consider it unnecessary to decide in this case which of the two articles applies for in our view, the suit was not barred under either. As earlier stated the High Court held that Art. 144 applied. The application of this article seems to us to present great difficulties to some of which we like to refer. That article deals with a suit for possession of immovable property or any interest therein not otherwise specially provided for and prescribes a period of twelve years commencing from the date when the possession of the defendant becomes adverse to the plaintiff. This article obviously contemplates a suit for possession of property where the defendant might be in adverse possession of it as against the plaintiff. Now, it is well-settled that the purchaser of a copartner's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession "would date from the period when a specific allotment was made in his favour": *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain* (1) It would, therefore, appear that Sivayya was not entitled to possession till a partition had been made. That being so, it is arguable that the defendants in the suit could never have been in adverse possession of the properties as against him as possession could be adverse against a person only when he was entitled to possession. Support for this view may be found in some of the observations in the Madras full bench case of *Vyapur v. Sonamm Boi Ammani* (2).

In the case in hand the learned Judges of the High Court thought that the applicability of Art. 144 to a suit like the present one was supported by the decision of the Judicial Committee in *Mahant Sudarsan Das v. Mahan Ram Kirpal Das* (3). We feel considerable doubt that the case furnishes any assistance. It held that Art. 144 extends the conception of adverse possession to include an interest in immovable property as well as the property itself. In that case a purchaser of an undivided share in a property which was not coparcenary property, had obtained possession of that share and he was held to have acquired title to it by adverse possession. That was not a case of a person who was not

entitled to possession. We are not now concerned with adverse possession of an interest in property. Having expressed our difficulties on the matter let us proceed on the assumption without deciding it, that Art. 144 is applicable. Even so, it seems to us that the suit is not barred. It is not in dispute that in order that the suit may be barred under the article the defendant must have been uninterrupted possession for twelve years before the date of the suit. Now, in the present case that was not so. By the delivery of symbolical possession under the order of November 6, 1939, the adverse possession of the, defendants was interrupted. Time has, therefore, to commence to run from that date and so considered, the suit having been brought within twelve years of that date, it was not barred under that article. That would follow from the case of Sri Radha Krishna Chanderji v. Ram Bahadur (4) where it was held that delivery of formal possession also interrupted the continuity of adverse possession.

It was however said that the order for delivery of possession (1) [1954] S.C.R. 177,188.

(3) (1949) L.R. 77 I.A. 42.

(2) (1916) I.L.R. 39 Mad. 811.

(4) A.I.R. 1917 P.C. 197.

made in the present case was a nullity because Sivayya and his transferee who had purchased an undivided share in coparcenary property were not entitled to any possession at all. We agree that the order cannot be supported in law but we do not see that it was for this reason a nullity. It is not a case where the order was without jurisdiction. It was a case where the learned Judge making the order had, while acting within his jurisdiction, -one wrong in law. Such an order has full effect if it is not set aside, as it was not in this case. Yelumalai Chetti v. Srinivasa Chetti(1) to which we were referred, does not support the contention that the order was a nullity There a purchaser of an undivided share in coparcenary property at an execution sale had applied for possession under S. 318 of the Code of Civil Procedure of 1882 which corresponds to O 21, r. 95 of the present Code. That application was dismissed as barred by limitation. Later, the purchaser who had subsequently acquired the interest of the other coparceners in the property under a private sale, filed a suit for possession of the whole. it was contended that the suit was barred under S. 244 of the old Code (= s. 47 of the present Code) as the purchaser could only proceed by way of execution. In dealing with that contention it was said that though the purchaser of an undivided share in coparcenary property was only entitled to ask for a partition, it was not competent to a court on a mere application for execution by a purchaser of such a share at a court sale, to order a partition and, therefore, the dismissal of the application under S. "II 8 of the old Code had no effect by way of yes judicature on the second Suit for Possession. This case said nothing about the legality of an order under O. 21, rr. 35, 95 or 96.

It seems to us that the question of adverse possession is one of fact. If the person against whom adverse possession is set up, should that he had in fact obtained possession, whether lawfully or not, that would interrupt any possession held adversely against him. The question is whether there was in fact an interruption of the adverse possession and not whether that interruption was justifiable in

law. Under the order for delivery of symbolical possession, whether it was legal or otherwise, Prakasalingam did obtain possession and this was an interruption of the adverse possession by the respondents. In respect of the present suit time under Art. 144 must, therefore, commence from that interruption. We wish to observe here that this aspect of the matter exposes the anomaly that seems to arise from the application of Art. 144 to this case. If Prakasalingam's possession under the order of (1) (1906) I.L.R. 29 Mad. 294.

63 5 November 6, 1939 was no possession in law because, as is contended, he was not entitled to possession at all, then it would be difficult to hold that at that time somebody else was holding the property adversely to him. Since Prakasalingam or his successor Sivayya was not entitled to possession till after the decree in a suit for partition brought by him, Art. 144 would seem to be inapplicable to that suit.

Learned counsel for the respondents referred us to Mahadev Sakharan Parkar v. Janu Namji Hatle(1) and Jang Bahadur Singh v. Hanwant Singh(1) to show that the delivery of symbolical possession does not avail the appellants. On behalf of the appellants it was said that these decisions are no longer good law in view of the judgment of the Judicial committee in Sri Radha Krishan Chanderji's (3) case. Apart however from the merits of this contention which no doubt, deserve consideration, the principle of these cases does not seem to us to be applicable to the present case. That principle was expressed in the case of Jang Bahadur Singh (2)-which also is clearly to be implied from the decision in the case of Mahadev Sakharan Parkar(1)- in these words, "If possession was delivered in accordance with law that undoubtedly would, as between the parties to the proceedings relating to delivery of possession, give a new start for the computation of limitation and the possession of the defendants would be deemed to be a fresh invasion of the plaintiff's right and a new trespass on the property. But if possession was not delivered in the mode provided by law, that delivery of possession cannot, in our opinion, give a fresh start to the plaintiff for computing limitation." By the words "in accordance with law" the learned Judges meant, in accordance with the Code of Civil Procedure and not any other law. These cases dealt with an order for delivery of symbolical possession where an order for actual possession could have been made under the Code. Because of this, it was held that the order for delivery of symbolical possession did not interrupt the adverse possession of the defendant. That is not the case here. The only order for delivery of possession that could possibly be made under the Code in the present case was under O. 21 rr. 35(2) and 96 because the other members of the family whose share had not been sold were certainly entitled to remain in possession. The fact that ;I view of the provisions of the Hindu law the order made is illegal, is irrelevant for the present purpose. That would not bring the case within the principle of either the Bombay case or the Allahabad case.

(1) (1912) I.L.R. 36 Bom. 373.

(2) (1921) I.L.R. 43 All. 520.

(3) A.I.R. 1917 P.C. 197.

Learned counsel for the respondents however contended that

o. 21, r. 35(2) only applied where there was a decree for joint possession and it did not apply to the present case because here there was only an order for delivery of joint possession and not a decree. This contention cannot be accepted because under s. 36 of the Code the provisions relating to the execution of decrees are applicable to execution of orders. In any case, the order is clearly within the terms of o. 21, r. 96. The delivery of symboli- cal possession made in this case was quite in terms of the Code and so amounted to an interruption of the respondent's adverse possession and the period of limitation for the purpose of the application of Art. 144 would start from the date of such delivery. As the suit was brought within twelve years from the date of that delivery of possession, Art. 144 even if it applies, does not bar it. We then turn to Art. 120. In *Bai Shevantibai v. Janardan R. warick*(1) it has been held that to a suit like the present, this is the article that applies. Learned counsel for the respondents himself contended that this was the appropriate article to be applied. This article applies to suits for which no period of limitation is provided elsewhere and prescribes a period of six years commencing from the date when the right to sue accrues. Learned counsel for the respondents relied on the observation in *Shevantibai's*(1) case that in a suit like the present one. the period of limitation under Art. 120 commences to run from the date of the sale. This the case no doubt held, but we think in that respect it did not lay down the law correctly. It has been held by this Court in *Mst. Rukhmabai v. Lala Laxminarayan* (2) and *C. Mohammad Yunus v. Syed Unnissa*(3) that the right to sue accrues for the purpose of 120 when there is an accrual of the right asserted in the suit and an unequivocal threat by the respondent to infringe it. Now whatever the nature of the plaintiff's right in the present case, there is nothing to show that right was ever challenged in any way by the respondents. It is impossible, therefore, to hold that his suit was barred under Art. 120.

The result is that the suit was not barred whether Art. 144 or Art. 120 applied to it.

It remains now to deal with the cross-objection. We do not think that it has any merit. Both the courts below have held that what Sivayya purchased at the auction sale was the share of the four sons of Narasimhaswamy in the joint family properties. At the date of the auction sale that share which was originally (1) A.I.R. 1939 Bom. 322.

(3) A.I.R. 1961 S.C. 808.

(2) [1960] 2 S.C.R. 253.

4/5th had been reduced to 2/3rd by the birth of another son, Venugopal, to Narasinihaswamy who had not been made a party either to the suit or the execution proceedings. It is irrelevant to enquire whether after his birth the fifth son's share could be proceeded against in the execution of the decree in suit No. 9 of 1933. It is enough to say that was not in fact done. What was purchased at the execution sale was only the shares of Venugopal's four brothers at the date of the sale and this was 2/3rd. That being so, we think Sivayya was not entitled to get Venugopal's 1/6th share also allotted to hi-in in the partition suit. The crossobjection must fail. We may add that no claim has been made against Narasimhaswamy's share whose insolvency once ordered, appears subsequently to have been annulled. In the result we would allow the appeal, set aside the judgment and decree of the High Court except as to the dismissal of the cross-objection and restore that of the learned trial Judge. The appellants will be entitled to proportionate costs here and in the High Court.

Ramaswami, J. The question of law involved in this appeal is what is the period of limitation applicable to a suit filed by an alienee of a coparcener of an undivided share in the joint family property for general partition. The appellants are the legal representatives of the deceased plaintiff-Mamidi China Venkata Sivayya. The suit was filed by him on October 16, 1951 for partition and separate possession of the 4/5th share in the joint family properties. It is alleged that he purchased the undivided share of defendants 2 to 5 at a Court auction sale held on December 21, 1936 in execution of a decree of the Court of Small Causes. The sale was confirmed on February 23, 1937. Later on i.e., on March 5, 1939 the purchaser Sivayya sold the right he had purchased to one Prakasalingam who, it is alleged, obtained symbolic delivery of possession of the undivided share of the joint family properties on November 6, 1939. It appears that Sivayya obtained a reconveyance of the right from Prakasalingam on April 11, 1945. Sivayya brought the present suit on October 16, 1951 against the other coparceners and alienees from some of the coparceners. The suit was filed by Sivayya for general partition. The main defence of the contesting defendants was that the suit was barred by limitation. The trial court held that the suit was governed by Article 144 of the Limitation Act and Article 120 did not apply. The trial court also found that there was symbolic delivery of possession in favour of Prakasalingam on November 6, 1939 and there was break up of adverse possession of defendants 1 to 5 and that the suit was, therefore, brought within time. The trial court held that the 1/6th share of the 6th defendant one of the coparceners did not pass to the plaintiff as the 6th defendant was born before the Court sale and he was not implement as a party in the present case. The trial court accordingly gave a decree for partition and separate possession to the plaintiff of 2/3rds share of the properties mentioned in Sch. 'A' of the plaint. The defendants preferred an appeal before the High Court of Andhra Pradesh against the judgment and decree of the trial court. The plaintiff also filed a Memorandum of Cross Objections claiming the 1/6th share of the 6th defendant also. The High Court held that Article 144 of the Limitation Act applied to the suit and the adverse possession of the defendants commenced from the date of the auction sale and that the suit was barred by limitation as it was filed on October 16, 1951 i.e., more than 12 years after the auction sale. The High Court also held that the symbolic delivery had no legal effect and did not break the adverse possession of the defendants. Accordingly the High Court allowed the appeal and the suit was dismissed with costs throughout. The present appeal is presented on behalf of the legal representatives of the deceased plaintiffs against the judgment and decree of the High Court of Andhra Pradesh.

Before dealing with the question as to which Article of the Limitation Act applies to the present case it is necessary to examine the legal position of persons like Sivayya who purchase shares of some of the coparceners of the Hindu Joint Family. It is wellsettled that the purchaser does not acquire any interest in the property sold and he cannot claim to be put in possession of any definite piece of family property. The purchaser acquires only an equity to stand in the alienor's shoes and work-out his rights by means of a partition. The equity depends upon the alienation being one for value and not upon any contractual nexus. The purchaser does not become a tenant in common with the other members of the joint family. He is not entitled to joint possession with them. The alienee's suit for partition must be one for partition of the entire property and not for the partition of any specific item of, or interest in, the family property. Such a suit, however, will not be technically on a par with a suit for partition filed by a coparcener. Such a suit would not have the necessary effect of breaking up the joint ownership of the members of the family in the remaining property nor the corporate

character of the family. (Mayne's Hindu Law, eleventh edition, page 489).

On behalf of the appellants learned Counsel put forward the argument that the right of the alienee to sue for partition is a continuing right and there is no period of limitation for enforcing such right. In my opinion, there is no warrant for this argument. A suit for partition filed by the alienee from a coparcener is not, in a technical sense, a suit for partition and, as already stated, such a suit will not have the necessary effect of breaking up the joint ownership of the members of the family in the joint property nor the corporate character of the family. As observed by Bhashyam Ayyangar, J. in *Aiyyangari Venkataramayya v. Aiyyagari Ramayya* "The vendee's suit to enforce the sale by partition is not a suit for 'partition', in the technical sense in which 'partition' or 'vibhaga' is used in the Hindu law. A suit for partition, in the technical sense, can be brought only by an undivided member of the family. The right to such partition is personal to him and not transferable. Such a suit can be brought only in the lifetime of the coparcener and even if so brought, it will abate if he should die before final decree, without leaving male issue. A partition in the technical sense, whether effected amicably or by decree of Court, breaks up not only the joint ownership of property, but also the family union, i.e., the corporate character of the family. Each member thereafter becomes a divided member with a separate line of heirs to himself. An undivided member of a family, though he may alienate either the whole (*Gurulingappa v. Nandappa*-I.L.R. 21 Bom. 797), or any part of his undivided share will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the family property other than what he has transferred..... The transferee, however, does not step into the shoes of the transferor as a member of the family and there will be no community of property between him and all or any of the members of the family in respect either of the property transferred to him or the rest of the family property".

In my opinion, a suit like the present one will fall within Article 144 of the Limitation Act.

(1) I.L.R. 25 Mad. 690 at p. 717.

64 0 It is true that an alienee of an undivided interest of a Hindu coparcener is not entitled to joint possession with the other coparcener and he is also not entitled to separate possession of any part of the family property. But the alienee is entitled to obtain possession of that part of the family property which might fall to the share of his alienor at a partition. What the alienee acquires by a purchase is not any interest in specific family property but only an equity to enforce his right in a suit of partition and have the property alienated set apart for the alienor's share, if possible. In the present case the alienee has instituted a suit for general partition with the prayer that he may be put in possession of that part of the family property which may be allotted to his alienor. It is not right to consider such a suit as a suit for more partition. The main relief sought by the plaintiff is the relief for possession of that part of the property which may be allotted to the alienor's share and a relief for partition is only a machinery for working out his right and ancillary to the main relief for possession of the property allotted to the alienor's share. What the plaintiff seeks is actual delivery of possession. In my opinion, such a suit falls within the purview of Article 144 of the Limitation Act and the law on this point is correctly stated in *Thai v. Dakshinamutthy*(1). If Article 144 is the proper article applicable, when does time commence to run ? According to the third column of Article 144,

time begins to run from the date when the possession of the defendant becomes adverse to the plaintiff. As I have already pointed out, the possession of the non-alienating members of the family cannot be deemed to be possession on behalf of the alienee also, because the purchaser-alienee does not acquire any interest in the property sold and does not become tenant-in-common with the members of the family nor is he entitled to joint possession with them. It is clear that in the absence of a clear acknowledgment of the right of the alienee or participation in the enjoyment of the family property by the alienee, the possession of the nonalienating coparceners would be adverse to the alienee, from the date on which he became entitled to sue for general partition and possession of his alienor's share. The fact that the alienee has purchased an undivided interest of joint family property is not inconsistent with the conception of adverse possession of that 64 1 interest. As Lord Radcliffe observed in *Sudarsan Das v. Ram Kirpal Das*(1) :

"Now it is the respondents' case-it is in fact their main contention on this issue-that the appellant has never at any time had 'adverse' possession against them because, the disputed property being a fourteen undivided share, his possession has been throughout no more than a joint possession with them. And the joint possession which coparceners enjoy in respect of the undivided property involves that, prima facie, the exclusive possession of any one of them is not adverse to the others. Their Lordships have no doubt of the validity of this general rule : but they are unable to think that it will be in any way departed from if they hold that in respect of the disputed property itself the appellant's possession has been adverse to the owners of the other shares. In truth there is some confusion involved in the argument. What is in question here is not adverse possession of the block of property in which the various undivided interests subsist but adverse possession of one undivided interest. Article 144 certainly extends the conception of adverse possession to include an interest in immovable property as well as the property itself nor was it disputed in argument by the respondents that there could be adverse possession of an undivided share, given the appropriate circumstances."

In the present case, therefore, adverse possession began to run from the date of purchase of the undivided share i.e., from December 21, 1936 but it was submitted on behalf of the appellants that Prakasalingam obtained symbolic delivery and possession of the undivided share on November 6, 1939 after notice to defendants 2 to 5 and there was a fresh cause of action to Sustain the present suit for possession. It was contended on behalf of the respondents that the symbolic delivery was illegal and the executing court was not competent to make an order of delivery of possession, either symbolic or actual with regard to the sale of an undivided interest of joint family property. In support of this argument reliance was placed on the decision in *Yelumalai Chetti v. Srinivasa Chetti* (2) in which it was held that the purchaser at a Court sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member (1) A.I.R 1950 C.44at p. -47.

(2) I.L.R. 29 Mad. 294.

and the Court cannot, on a mere application for execution by such purchaser, enforce his right by an order for partition. It was further held that no such order can be made under section 318 of the Code of Civil Procedure and the dismissal by the Court of an application by the purchaser under S. 318 cannot be a bar to a suit by the purchaser for partition. Even assuming that the grant of symbolic delivery of possession ought not to have been made and that the executing-court acted illegally in making such an order, it cannot be argued that the executing court had no jurisdiction to make the order or that the act of symbolic possession was a nullity in the eye of law. I am, therefore, of the opinion that the grant of symbolic possession by the court in favour of Prakasalingam after notice to the defendants 2 to 5 was tantamount in law to delivery of actual possession and, therefore, sufficient to break up the continuity of adverse possession in favour of the defendants. In *Sri Radha Krishna Chanderji v. Ram Bahadur*(1) it was held by Lord Sumner that symbolic possession was available to dispossess a party sufficiently where he was a party to the 'Proceedings in which it was ordered and given. I am accordingly of the opinion that the suit of the plaintiff is not barred by limitation under Article 144 of the Limitation Act and the view taken by the High Court on this part of the case is not correct and must be overruled.

On behalf of the appellants it was also argued that a decree for 5/6th share of the joint family properties and not merely for 2/3rds share should have been granted. The claim of the appellants was rejected by the trial court. It is not disputed by the plaintiff that the 6th defendant was born before the Court sale and it is also not disputed that the execution case was taken out only against defendants 2 to 5. It is manifest that the plaintiff is not entitled to recover the possession of the share of the 6th defendant in execution proceedings and there is no merit in the cross-objection filed on behalf of the plaintiff in the High Court. I am unable to accept the argument advanced by the appellants' on this point.

For these reasons I hold that the judgment and decree of the High Court should be set aside and the judgment and decree of the trial court should be restored and a preliminary decree of partition of the properties should be granted as mentioned in the trial court's decree. The appeal is accordingly allowed with costs, Appeal allowed.

(1) A.I.R.1917 P.C. 197.