

GAHC010293462019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/277/2019

MOZIBAR SK.

S/O- LATE MOHAN ULLAH, R/O- VILL.- ASSAMKATA, P.O. PURAN DIARA,
P.S. MANKACHAR, DIST.- SOUTH SALMARA MANKACHAR, ASSAM, PIN-
783135.

VERSUS

MEHER ALI AND 6 ORS.

S/O- LATE ABDUL SK.

2:ZAKIR HUSSAIN

S/O- LATE ABDUL SK.

3:FAZIBAR SK

S/O- LATE PANUR UDDIN

4:ABDUL BATEN

S/O- LATE PANUR UDDIN

5:ABDUL SALAM

S/O- LATE PANUR UDDIN

6:MUSLIMA BEWA

D/O- LATE BUL UDDIN

ALL ARE RESIDENTS OF VILL.- ASSAMKATA

P.O. PURAN DIARA

P.S. MANKACHAR

DIST.- SOUTH SALMARA MANKACHAR

PIN- 783135

ASSAM.

7:THE STATE OF ASSAM

REP. BY THE DEPUTY COLLECTOR
DHUBRI
DIST.- DHUBRI
PIN- 783301

Advocate for the Petitioner : MS. R CHOUDHURY

Advocate for the Respondent : MR. T R GOGOI(GA, ASSAM)

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGMENT

Date : 28.03.2024

This is the plaintiff's appeal under Section 100 of CPC, 1908 against the judgment and decree dated 31.08.2019 passed by the learned Civil Judge, Dhubri in T.A. no. 45/2018. By impugned order the first appellate court has allowed the defendant's appeal and set aside the judgment and decree dated 20.09.2018 passed by the learned Munsiff, Hatsingimari in T.S. no. 34/2016 by which the suit of the appellant/plaintiff was decreed with cost and mense profit @ Rs. 25 per day from the date of filing of suit till recovery of khas possession by the plaintiff.

2. The case of the plaintiff-appellant is that the plaintiff is the owner of land measuring 19 Bigha 4 K 3 Lechas situated at Assam Kata Village under Khatian no. 151 (T. no. 33). The said land was recorded in the name of the plaintiff-appellant and his mother AjiranNessaBewa in recent settlement operation under Patta no. 138(Old), 192(New). But subsequently the name of the mother was expunged. Hence, the plaintiff is the sole owner of the entire land.

3. Late Abdul Sheikh, the predecessor of the defendant no. 1 & 2, and Late Abdul Gani Sheikh, the predecessor of the defendant nos. 3 to 5, allowed to reside in a part of the land, more or less, 1 Bigha out of the entire land of the plaintiff-appellant i.e.

19B-4K-3L as permissive possessor on condition that they would vacate the said land when asked for. During the lifetime of both Abdul Sheikh and Abdul Gani Sheikh, predecessor of the defendants maintained good relation with the plaintiff. After the death of Abdul Sheikh and Abdul Gani Sheikh they tried to inclusion of their names and the patta showing their possession over the suit land. The plaintiff-appellant knowing about the illegal acts of the defendants-respondents filed an application before the Assistant Settlement Officer, Mankachar Circle for cancellation of the name of the defendants-respondents. The present defendant is residing in the suit land as the permissive occupier under the plaintiff like their deceased predecessor. Though the plaintiff-appellant asked the defendant several times to vacate the suit land but they did not pay heed to his request. Thereafter, the plaintiff-appellant served an advocate notice to the respondent in the year 2012 to vacate the suit land but the defendant on receipt of the said notice, neither vacated the suit land nor sent a reply to the notice.

4. On contesting the case, the defendants have filed their written statement wherein they took the plea that the suit is bad for non joinder of legal heirs of deceased sister of the plaintiff. However, the defendant in their written statement has admitted that the mother of the plaintiff, AsiranNessa was the co-pattadar of the suit land. In the written statement, the defendants stated that the predecessors of the defendants got permanent settlement of the suit land as tenants as to the local customs about 60 years back and since then they have been residing in the suit land by constructing their respective houses. They used to pay the land revenue to the land lord as such they are not the permissive possessor of the suit land and as such the question of vacating the suit land does not arise at all. It is also stated that the plaintiff never asked the defendants to vacate the suit land.

5. On the basis of the pleadings of the parties, the learned trial court has framed seven issues. Regarding non-joinder of necessary parties, the trial court has held that though the defendants in their written statement raised the point that the suit is bad

for non-joinder of necessary parties as the legal heirs of the deceased sister of the plaintiff were not impleaded as party in the suit, however, the defendants nowhere mentioned the names of the deceased sisters of the plaintiff nor their legal heirs either by filing a petition or mentioning their names in the written statement. Hence, the trial court has held that though the defendant raised the plea but did not state the names or whereabouts of the legal heirs of the deceased sisters of the plaintiff in the evidence as such the plea taken by the defendants is not sustainable and the suit is not bad for non-joinder of necessary parties.

6. Regarding right, title & interest over the suit land, the plaintiff has produced and exhibited five nos. of documents, vide Ext.-1 :Khatian vide no. 151 showing the name of the plaintiff and his mother as Khantiandar, Ext.-2 is the land revenue receipt of the land measuring 19B-4K-3L for the period of 1990/92 paid by the plaintiff. Similarly Ext.-2(1) & 2(2) are the land revenue receipts showing land revenue paid for the years 2002-2003, 2009-2010, 2010-2011 & 2012-2013. Vide Ext.-3. The plaintiff appellant has produced the katchapatta vide no. 138 (Old) 192 (new) for the land measuring 19B-4K-3L showing the name of the pattadars as plaintiff and his mother. Moreover the suit land i.e. the B-Schedule land covered by dag no. 328 (Old) and 251(New) is also found to be included in Ext.-3 in the name of the plaintiff. It also appears that P.W.4 who is the official witness, proved the Ext.-3 and stated in his cross-examination that final patta relating to Ext.-3 has also been prepared. Accordingly, P.W.6 on behalf of Assistant Settlement Officer, Mankachar Revenue Circle deposed that patta no. 218 i.e. the Ext.-5 covering land measuring 19B-4K-3L is in the name of the present plaintiff-appellant and as per the *jamabandi*, registered under old patta no. 192.

7. On the basis of the aforesaid evidence of the witnesses, the trial court has held that the document of title relating to the entire land i.e. 19B-4K-3L is in the name of the plaintiff and as such he is the owner of the suit land having right, title and interest thereon.

8. The defendants had taken the plea that they were tenants under the mother of the plaintiff and accordingly they paid the rent of the land occupied by them. According to the defendants, they got permanent settlement of the suit land from the plaintiff's mother as tenants about 60 years back. To prove the fact in question, they produced one document i.e. Amolnama vide Ext.-C which appears to be an unregistered document. Having noticed the said document vide Ext.-C, it is an illegible document and the document was not in a position to read. Ext.C was written by one Mostak Ali but he was not examined in the case to prove the contents of the document. The defendant has examined three witnesses vide D.W.1, 2 & 3 but these witnesses i.e. D.W.1, 2 & 3 admitted in their cross examination that they were not present when Ext.-C 'Amolnama' was executed. Though D.W.1 exhibited Amolnama vide Ext.-C but as he was not present when it was executed, it cannot be taken as evidence as D.W.1 has no knowledge regarding contents of the document.

9. The learned trial court has believed the documents of the plaintiff exhibited in the case and decreed the suit in favour of the plaintiff-appellant by declaring right, title and interest over the suit land.

10. Against the said judgment and order of the trial court, the defendant side has preferred an appeal before the court of Civil Judge, Dhubri vide Title Appeal no. 45/2018. After hearing the learned counsel for the parties, the first appellate court has held that on perusal of the plaint, it reveals that there is no specific time/date when the predecessors of the defendants were allowed to stay over the suit land. There is also no mention who had permitted the predecessors of the defendants to stay over the suit land. The first appellate court also did not believe the exhibited documents submitted by the plaintiff and raised the question that why the defendants were allowed to stay over the suit land. According to the first appellate court, all these aforesaid questions have been answered in the defendants' evidence. The D.W.1 had paid the rent to the mother of the plaintiff vide Ext.-B(1) which was taken by one

Rafikul Master by putting his signature vide Ext.-B(2) to B(5). The first appellate court has accepted the Ext.-C i.e. Amolnama by holding that though Ext.-C is unregistered but the same can be used for collateral purpose as to the fact of possession of the defendants over the suit land. The first Appellate Court, thereafter, has held that by exhibiting the document i.e. Amolnama vide Ext.-C the defendant has proved the fact that their predecessors were settled by the plaintiff's mother over the suit land and decreed the suit in favour of the defendants by reversing the judgment of the trial court.

11. Being highly aggrieved and dissatisfied with the judgment and order dated 31.08.2019 passed by the learned civil Judge, Dhubri, this appeal has been preferred on the following substantial questions of law –

1. Whether in the light of Ext.1 (Khatian,KatchaPatta) and Ext-5 (Patta no. 218), the judgment of reversal passed by the learned first appellate court is sustainable by holding that the appellant plaintiff has failed to prove the right, title and interest over the land described in Schedule A and Schedule B of the plaint.

2. Whether by affirming the finding of the learned trial court on issue no. 3, the first appellate court could have held that the suit was bad for non-joinder of the appellate-plaintiff's sister's children.

3. Whether the first appellate court's judgment and decree is sustainable in the light of admission made by respondents-defendants in their written statement to the effect that the mother of the appellant-plaintiff was the co-pattadar of the suit land whose name was illegally deleted from the patta without inclusion of the names of her sisters died leaving their legal heirs.

12. Learned counsel for the appellant has argued that the appellant plaintiff is the owner of the entire land including the suit land. The respondents were the permissive

occupier in the suit land with the condition to vacate the same as and when required by the appellant. Though several times the appellant had approached before the respondent to vacate the suit land, but they did not pay heed to his request and remained in the suit land. It is also submitted that the respondents as defendants were examined before the trial court, had admitted that the mother of the plaintiff i.e. Ajiran Nessa is the co-sharer of the disputed land. In view of such admission, it can be said that the respondents were allowed to live in the suit land as permissive occupier. Hence, the learned trial court has rightly passed the judgment and decree which is liable to be restored.

13. Per contra, learned counsel for the respondents submits that in the judgment of Munsiff there is mention of Ext.-C i.e. 'Amolnama'. It also appears from cross-examination of D.W.1 that the said 'Amolnama' is the deed for giving settlement of the suit land which was executed by Asiran Nessa Bewa i.e. mother of the present plaintiff. Though the said 'Amolnama' was not registered, however, since its execution in the year 1964, on the strength of the said 'Amolnama', the respondents are in continuous possession of the suit land.

14. Learned counsel for the respondents has also contended that though a document like the 'Amolnama' in the present case even though unregistered and not admissible in evidence, can be looked into for collateral purposes. In the present case, the collateral purpose to be seen is the nature of the possession of the defendants-respondents over the suit land.

15. Learned counsel for the respondents has also pointed out that the defendants asserted their title to the suit land when the plaintiffs asked them to vacate the said

land. These lend support to the plea of adverse possession. It would be seen from clear and clean chit evidence on record that the defendants were in continuous and uninterrupted possession of the suit land since 1964 and they had been setting up a hostile title thereto as against the plaintiffs. According to learned counsel for the respondents, the plea of adverse possession raised by the respondents-defendants is, thus, clearly established.

16. It is also the submission of the learned counsel for the respondents that the respondents are not the permissive occupier under the plaintiff-appellant. The mother of the plaintiff-appellant had settled the disputed land in favour of the respondents as tenants by executing Ext.-C and since then they have been in continuous possession of the suit land. The court definitely can take the judicial notice of adverse possession if it comes of evidence even if not pleaded.

16.1. In support of his submission, learned counsel has placed reliance on the following case laws –

- (i) AIR 2003 SC 1905 (Bondar Singh vs. Nehal Singh)
- (ii) AIR 1951 Supreme Court 469 (Collector of Bombay vs. Municipal Corporation of the city of Bombay and others)
- (iii) (1963) 3 SCR 229 (Padma Vithobha Chakkayya vs. Md. Multani and another)
- (iv) AIR 1997 Himachal Pradesh 70 (Kartari Devi and others vs. Udham Singh and others)

17. Apparently, the admitted position of the fact is that the plaintiff and his mother

are owner of the entire land i.e. 19B-4K-3L out of which around 1 Bigha of land is the disputed land as mentioned in the plaint as B Schedule land. If permission is treated not to confer status of a tenant, then at best the defendants-respondents were allowed to reside in the disputed land as a 'licencee'. By all means, possession is permissive and that being so, this Court has no hesitation to state that possession of the respondents-defendants were permissive. Once the possession of person is permissive, question of title by adverse possession does not arise.

18. A person other than the owner, if continues to have possession of an immovable property for a period as prescribed in the statute providing limitation, openly without any interruption and interference from the owner, though he had knowledge of such possession, would crystallize in ownership after the expiry of the prescribed period of limitation, if the real owner has not taken any action for re-entry and he shall be denuded of his title to the property in law. Permissive possession shall not mature a title since it cannot be treated to be an adverse possession. Such possession, for howsoever length of time be continued, shall not either be converted into adverse possession or a title. It is only the hostile possession which is one of the conditions for adverse possession.

19. In the case of ***Thakur Kissan Singh vs. Arvind Kumar***, reported in ***AIR 1995 SC 73*** the court said as follows –

‘.. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession.’

20. In *Saroop Singh vs. Banto and others* reported in (2005) 8 SCC 330, the court held that –

“Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period of prescription does not commence.....”.

21. In the case of ***T Anjanappa and others vs. Somalingappa and another***, reported in **(2006) 7 SCC 570**, the preconditions for taking plea of adverse possession has been summarized as under –

“It is well recognized proposition of law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent to as to show that it is adverse to the true owner. The classical requirements of accusation of title by adverse possession are that such possession in denial of the true owner’s title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of well known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former’s hostile action”.

22. In another case, ***Annakili vs. A. Vebanayagam and others***, reported in ***AIR 2008 SC 346***, the court pointed out that a claim of adverse possession has two elements – (i) the possession of the defendants becomes adverse to the plaintiff and

(ii) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi is held to be a requisite ingredient of adverse possession, well known in law. The court held –

“It is now a well settled principal of law that mere possession of the land would not ripen into possessor title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more do not ripen into a title”.

23. In the case of ***Chote Khan and others vs. Mal Khan and others***, reported in ***AIR 1954 SC 575***, the court observed that no question of adverse possession arises where the possession is held under an arrangement between the co-sharers.

24. A plea of adverse possession must be pleaded with proper particulars such as when the possession became adverse. The court is not to travel beyond pleading to give any relief, in other words, the plea must stand on its own feet. It was held in the case of ***Rajeshwari vs. T.C. Saravanabava***, reported in 2004 (1) SCC 551 that -

“..... A plea not properly raised in the pleadings or its issues at the stage of trial, would not be permitted to be raised for the first time at the stage of appeal...”.

25. The claim of independent title and adverse possession at the same time amount to contradictory pleas. The case of ***Annasaheb Bapusaheb Patil vs. Balwant***, reported in (1995) 2 SCC 543 elaborated this principle as follows-

“Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another’s title. One who holds possession on behalf of another, does not by mere denial of that other’s title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession have been a lawful title, cannot divest another of that title by pretending that he had no title at all.”

26. This principle was upheld in the case of ***Mohan Lal (deceased) through His Lrs Kachru vs. Mirza Abdul Gaffar***, reported in 1996) AIR (SC) 910 which is reproduced as below:-

‘As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent, hostile, adverse possession to the knowledge of the transferrer or his successor in title or interest and that the later had acquiesced through his illegal possession during the entire period of 12 years i.e. up to completing the period of his title by prescription. Since the appellant’s claim is founded on Section 53A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby, the plea of adverse possession is not available to the appellant.”

27. The settled position of law is that the burden of proof rest on the person claiming adverse possession. In the case of P.T. Munni Chikkanna Reddy vs. Revamma, it was held that initially the burden lies on the land owner to prove his title and thereafter, it shifts on the other party to prove the title by adverse possession. It was observed –

“The law in this behalf has undergone a change. In terms of Article 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit land that he had title and possession of the land, whereas in terms of Article 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change in so far as the onus is concerned; once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession.....”

28. The Court reiterated this principle in the case of ***Janta Dal Party vs. Indian National Congress***, reported in 2013 0 Supreme (Kar) 643:-

“...The entire burden of proving that the possession is adverse to that of the plaintiff, is on the defendant....”

29. Reverting to the instant case, according to the plaintiff, the defendants are residing in the suit land as the permissive possessor under the plaintiff like their deceased predecessor. Though the plaintiff asked the defendants to vacate the suit land but the defendants did not comply with the request. In support of his case, the plaintiff has submitted the documents before the trial court vide Ext.-1, Khatian no. 151 showing the name of the plaintiff and his mother as the Khantiandar. P.W.5, the official staff from the Revenue Department, RKG Branch, Dhubri proved the Ext.-1 to be genuine. Ext.-2 is the land revenue receipt of the entire land measuring 19B-4K-3L for the period of 1990-1992 paid by the plaintiff. Similarly, Ext.-2(1) and Ext.-2(2) are the land revenue receipts showing land revenue paid by the plaintiff for the suit land in the years 2002-2003, 2009-2010, 2010-2011 & 2012-2013. Further, Ext.-3 is the KatchaPatta no. 138 (Old), 192(New) for the land measuring 19B-4K-3L showing the names of the pattadars as the plaintiff and his mother. Moreover, the suit land i.e. the

B-Schedule land in the plaint covered by dag no. 328(Old) and 251(new) is also found to be included in Ext.-3 in the name of the plaintiff. P.W.4 who is the official witness proved the Ext.-3 and also replied in his cross-examination that final patta relating to Ext.-3 has also been prepared. Apparently, it reveals from the documents available in the record that the entire land i.e. 19B-4K-3L is in the name of the plaintiff. It is interesting to note that the defendants did not raise any objection to the documents regarding title over the property.

30. The plea of the defendants in the case is that they got their permanent settlement over the suit land as tenant under mother of the plaintiff. In support of the fact the defendants had exhibited one document vide Ext.-C, unregistered 'Amolnama'. Though the D.W.1 has exhibited the document vide Ext.-C, but it appears from the evidence of the defendants i.e. D.W.1, 2 & 3 that they were not present when the Ext.-C was executed. Ext.-C is an illegible document from which it cannot be ascertained who are the witnesses present at that time when the said document was executed by the mother of the plaintiff. It appears from Ext.-C that it was written by one Mustak Ali but he was also not examined by the defendant's side to prove the contents of the document. Ultimately, the contents of Ext.-C is not proved showing that the defendants were occupying the land as tenant under the mother of the plaintiff and paid the rent to the landlord.

31. In the case in hand, the defendants' side nowhere claimed their title over the suit Schedule property and also set up a plea of adverse possession. The defendants cannot set up a plea of title and plea of adverse possession simultaneously and would amount to contradictory plea. The material on record would prove otherwise that he has been in possession of the suit Schedule property as a permissive possessor and

not adverse to the title of the plaintiff. The plea of adverse possession would not be available to the defendants unless it has been asserted and pointed out that it is hostile animus against the true owner and the entire exercise of the defendants is contrary to the material placed before the court. During argument on second appeal the defendants first time raised the point of adverse possession.

32. In the present case, though the defendants took the plea of adverse possession for the first time before this court but has failed to place material when his permissive possession has become hostile and adverse to the true and real owner. The other averment in the written statement as pleaded is that they were in possession of the suit property as tenants on the basis of 'Amolnama' vide Ext.-C. According to the defendants, they got permanent settlement over the land from the mother of the plaintiff. From the statement of the defendants, it transpires that the land originally belongs to the plaintiff. The first appellate court has totally misread the entire pleadings and has arrived at a conclusion that the document vide Ext.-C is a valid deed and the possession under the said deed can be held to be in adverse possession and goes to the extent of holding the possession of the suit property, on the basis of Ext.-C, is totally misinterpreted by the first appellate court without taking note of the averments and pleadings of the defendants.

33. The judgments relied on by the learned counsel appearing for the respondents-defendants in the case of Bondar Singh (Supra) was considered in Avinash Kumar Chauhan vs. Vijay Krishna Mishra, reported in (2008 0 Supreme (SC) 1881) which reads as under –

“the contention of learned counsel for the appellant is that the document was admissible for collateral purpose, in our opinion, is not correct. In Bondar Singh, this court was not concerned with the provision of the act. Only the interpretation of the provision of the Registration Act, 1908 was in question. It was opined that – ‘the main question, as we have already noted is the question of continuous possession of the plaintiffs over the suit land. The sale deed dated 09.05.1931 by Fakir Chand, father of defendants in favour of Tola Singh, the predecessor-in-interest of the plaintiffs, is an admitted document in the sense its execution is not in dispute. The only defence set up against the said document is that it is unstamped and unregistered and therefore, it cannot convey title to the land in favour of the plaintiffs. Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case, the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land. The sale deed in question at least shows that the initial possession of the plaintiffs over the suit land was not illegal or unauthorized.....”

34. The Registration Act, 1908 provides for such a contingency in terms of the proviso appended to Section 49 thereof, which reads as under –

“Section 49. Effect of non-registration of documents required to be registered. - No document required by section 17 or by any provision of the transfer of property Act, 1882 to be registered shall-

(a) affect any immovable property comprised therein or

(b) confer any power to adopt or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered, provided, that an unregistered document affecting immovable property and required by this act or the Transfer of Property Act, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument.”

35. Section 35 of the Act, however, rules out applicability of such provisions as it is categorically provided therein that a document of this nature shall not be admitted for any purpose whatsoever. If all purposes for which the document is sought to be brought in evidence are excluded, we fail to see any reason as to how the document would be admissible for collateral purposes.

36. The view finds support from the decision in ***Ram Rattan vs. Parmananda***, reported in AIR 1946 PC 51, wherein it was held –

“That the words for any purpose in Section 35 of the Stamp Act, should be given their natural meaning and would include a collateral purpose and that an unstamped partition deed cannot be used to corroborate the oral evidence for the purpose of determining even the factum of partition as distinct from its terms”.

37. The said decision has been followed in a large number of decisions by the said court. In ***Bhaskara Botla Padmanabhaiah vs. B. Laxmi Narayana***, reported in AIR 1962 AP 132, it has been held that –

“In this case, the learned subordinate judge has observed that what the plaintiff was trying to prove was not the division in status but to show that the property was

divided under the partition deed. In any case, the fact that the document is inadmissible due to want of being stamped is clear. In *Ram Rattan (supra)*, the privy counsel held that the words 'for any purpose' in Section 35 of the Stamp Act should be given their natural meaning and effect and would include a collateral purpose and that an unstamped partition deed cannot be used to corroborate the oral evidence for the purpose of determining even the factum of partition as distinct from its terms'."

38. It was furthermore held –

"In the result, I agree with the learned Munsiff Magistrate that the document is an instrument of partition under Section 2(15) of the Stamp Act and is not admissible in evidence because it is not stamped. But I further hold that if the document becomes duly stamped, then it would be admissible in evidence to prove the division in status but not the terms of the partition."

39. In ***Sanjeeva Reddy vs. Johan Putra Reddy***, reported in AIR 1972 AP 373 it has been held –

"While considering the scope of Section 35 of the Stamp Act, we cannot bring in the effect of non-registration of a document under Section 49 of the Registration Act. Section 17 of the Registration Act deals with documents, the registration of which is compulsory and Section 49 is concerned only with the effect of such non-registration of the documents which require to be registered by Section 17 or by any provisions of the Transfer of property Act. The effect of non-registration is that such a document shall not affect any immovable property covered by it or confer any power to adopt and it cannot be received as evidence of any transaction affecting such property or conferring such power. But there is no prohibition under Section 49 to receive such a document which requires registration to be used for a collateral purpose i.e. for an entirely different and independent matter. There is a total and absolute bar as to the

admission of an unstamped instrument whatever be the nature of the purpose or however foreign or independent the purpose may be for which it is sought to be used unless there is compliance with the requirements of the provisos to Section 35. In other words, if an unstamped instrument is admitted for a collateral purpose, it would amount to receiving such a document in evidence for a purpose which Section 35 prohibits.....”

40. In ***T. Bhaskar Rao vs. T. Gabriel***, reported in AIR 1981 AP 175, it has been held –

“... It is now well settled that there is no prohibition under Section 49 of Registration Act, to receive an unregistered document in evidence for collateral purpose. But the document so tendered should be duly stamped or should comply with the requirement of section 35 of the Stamp Act, if not stamped, as a document cannot be received in evidence even for collateral purpose unless it is duly stamped or duty or penalty are paid under Section 35 of the Stamp Act.”

41. In the present case, the defendants are relying on an unregistered Amolnama. The Apex Court in the case of Avinash Kumar Chauhan (supra) has held that the registered sale deed which required payment of stamp duty could not be admitted for any purpose whatsoever.

42. In the instant case, the defendants have not claimed their title over the suit land but on an unregistered 'Amolnama' they are in possession claiming adverse to the knowledge of the plaintiff.

43. As held by the Hon'ble Apex Court in the case of Dagadabai (Dead) by legal

representatives vs. Abbas @ Gulab Rustum Panjari, reported in (2017) 13 SCC 705 –

“the person raising plea of adverse possession must necessarily first admit the ownership of the true owner of relevant property to the knowledge of that owner. In the instant case the defendants in their written statement have admitted the ownership of the plaintiff over the suit schedule property. Apart from the defendants raising the plea of adverse possession and admitting the ownership of the true owner of relevant property to the knowledge of the said owner, they should also prove that their possession is an actual, open, exclusive, hostile and continued over statutory period by wrongful dispossession of rightful owner. Thus, animus possidendi is essential. Therefore, mere possession cannot be deemed to be adverse possession violative of basic rights of actual owner. Until the defendant’s possession becomes adverse to that the real owner, the defendants continue in permissive possession of the property. Only if the defendant’s possession becomes adverse to the interest of the real owner and the real owner fails to file the suit for possession within 12 years as prescribed under Article 65 of the Limitation Act, from the point of time the possession by the defendants becomes adverse to the plaintiff, the real owner loses his title over the property. Every possession is not an adverse possession. The defendants will not acquire adverse possession by simply remaining in permissive possession for howsoever long it may be.”

44. The Apex Court has held that when a person contends that he is in possession under an agreement and continue to remain in possession till the date of the suit, the plea of adverse possession is not available to the defendants unless and until he has asserted and pointed out a hostile animus of retaining possession as an owner after getting in possession of the land.

45. In the light of law declared by the Hon’ble Apex Court and the judgments of the

other High Courts, this Court is of the view that the mere possession for a long time does not convert a permissive possession into adverse possession and accordingly, the first appellate court was not justified in reversing the judgment and decree of the learned trial court. The substantial questions of law framed by this court need to be answered in favour of the appellant. Accordingly, this Court delivers the following order --

- (1) the regular second appeal filed by the plaintiff is hereby allowed.
- (2) the judgment and decree of the first appellate court dated 31.08.2019 in T.A. no. 45/2018 is hereby set aside and the judgment and decree of the trial court dated 20.09.2018. In T.S. no. 34/2016 stands confirmed.
- (3) the respondents-defendants are directed to hand over possession of the suit property to the appellant/plaintiff forthwith.

46. The trial court records be sent back.

JUDGE

Comparing Assistant