



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF SEPTEMBER, 2024

PRESENT

THE HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR JUSTICE UMESH M ADIGA

REGULAR FIRST APPEAL NO. 1368 OF 2016

Between:

C.O.Mathews
Since deceased represented by
his Legal Representatives

1. Susheela Mathews
Aged about 55 years,
D/o Late C.O.Mathews
2. Anitha Mathews
Aged about 52 years
D/o Late C.O.Mathews
3. Sam Mathews
Aged about 48 years
S/o Late C.O.Mathews

Appellants No.1 to 3 are
R/at River View Estate
Hadageri Village
Somwarpet Taluk
Pin-571236.

Digitally signed by
VEERENDRA
KUMAR K M
Location: HIGH
COURT OF
KARNATAKA

...Appellants

(By Sri T.V. Vijay Raghavan, Advocate)



And:

1. M/s Srivatsa Estate Pvt. Ltd.,
2. M/s Suryakiran Estate Pvt. Ltd.,

(Respondents No.1 & 2 are
Registered Companies
Represented by its Directors)

3. Shri A.Nanda Belliyappa
Aged about 54 years
S/o Late A.M.Belliyappa

4. Smt. Anitha Nanda
Aged about 45 years
W/o A.Nanda Belliyappa

Respondents No.3 & 4 are
R/at Hadageri Village, Hatti Post
Madapura, Somawarpet Taluk
Kodagu District-571236.

5. Mrs A.Oomen
Since deceased by her LR

Mrs Leelamma Mathews
W/o K.T.Mathews
Aged about 79 years
P.B No.3562, Safat
Kuwaith.

...Respondents

(By Sri K.Shashikiran Shetty, Senior Counsel for
Sri Ismail Zabiulla, Advocate, for R1 to R4;
Sri K.Mohan, Advocate, for R5)

This RFA is filed under section 96 of CPC against the
judgment and decree dated 13.07.2016 passed in
O.S.No.32/2007 on the file of the Senior Civil Judge, Madikeri,
decreeing the suit for declaration and possession and etc.,



Date on which the appeal was reserved for judgment	27.08.2024
Date on which the judgment was pronounced	25.09.2024

This appeal, having been heard & reserved, coming on for pronouncement this day, judgment was delivered therein as under:

CORAM: HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR
and
HON'BLE MR JUSTICE UMESH M ADIGA

CAV JUDGMENT

(PER: HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR)

By judgment dated 13.07.2016 the Senior Civil Judge at Madikeri decreed the suit declaring the plaintiffs to be the owner of the suit properties and directed the legal representatives of the defendant to hand over possession thereof to the plaintiffs within a month and aggrieved by the same the legal representatives of the defendant have preferred this appeal.



2. The substance of the pleadings is as follows :

Under a partition deed dated 11.09.1984, four persons namely Smt. Acheyamma Oomen, C.O.Mathews, K.T.Mathews and Leelamma Mathews effected partition of the suit properties and other properties that belonged to them. The properties described in 'B' and 'C' of the partition deed fell to the share of K.T.Mathews and Leelamma Mathews respectively and the property described in schedule 'A' of the partition deed was allotted to C.O.Mathews, the defendant. On 12.06.1987 K.T.Mathews and Leelamma Mathews jointly sold the properties that fell to their shares to a partnership firm called M/s Carolina Plantations and put it in possession of the properties. Under three sale dates dated 02.09.1991 Carolina Plantations sold all its properties including the suit property to Srivatsa Estate Private Limited, Suryakiran Estate Private Limited and Sri K.N.Murali, and delivered the possession to the purchasers. The plaintiffs purchased all the shares of the companies namely Suryakiran and



Srivatsa Estates and thereafter plaintiffs No.3 and 4 became the directors of the company. Plaintiff No.3 also purchased items 1 and 2 of the suit property from K.N.Murali under registered sale deed dated 31.1.2000. The properties of the plaintiffs and the defendant are situate adjacent to each other. The suit properties were earlier being managed by Smt. Anjana Murali in the capacity of Managing Director of the companies. But she was living in Bengaluru and taking advantage of her absence, the defendant encroached upon the suit properties in June 1998. The plaintiffs approached the defendant on several occasions to demand possession of the suit properties to be delivered to them and in fact the defendant agreed for the survey and delivery of possession if encroachment was traced. But he kept quite. On 21.05.2001 the plaintiffs issued a notice to the defendant who in turn replied to it on 30.5.2001 untenably. The plaintiffs thereafter issued a correction notice on 27.6.2002. Ultimately the plaintiffs had to file



suit for declaration of their title over and possession of the suit properties.

3. In the written statement the defendant admitted the plaint averments from paras 2 to 4 in regard to partition deed dated 11.09.1984 and the subsequent sales, but denied the other averments including transfer of shares of the companies to the plaintiffs. The specific contention of the defendant was that on 11.09.1984, there came into existence a Memorandum of Understanding ('MOU') among the parties to the partition deed, and according to this MOU the existing common road would divide the properties allotted to the share of K.T.Mathews and Leelamma Mathews, and the defendant. The properties situate towards the western side of the road as also the properties allotted to him under the partition deed fell to his share and thus he held lawful possession of the suit properties. He denied encroachment as stated by the plaintiffs. Alternatively he pleaded that he perfected his title over the suit properties by adverse possession



because the predecessors in title of the plaintiffs admitted his possession in view of MOU dated 11.09.1984. He also pleaded that the boundaries and the area of the suit properties do not conform to the boundaries and area of the properties described in schedules 'B' and 'C' to the partition deed and with these pleadings he prayed for dismissal of the suit.

4. Out of six issues framed by the trial court, the following three issues were the deciding issues.

"1. Whether the plaintiffs prove that, they are the absolute owners in possession of the suit schedule properties?

2. Whether plaintiffs prove that in June 1998 the defendant encroached and took possession of the suit schedule properties and in illegal possession of the same?

3. Whether the defendants prove that, he has perfected his title to the properties as averred in para-6 of the written statement?



5. The findings of the trial court on these three issues are :

5.1. The defendant does not dispute the partition deed dated 11.09.1984 as per Ex.P1 and the subsequent sale from K.T.Mathews and Leelamma Mathews in favour of M/s Carolina Plantations as per Ex.P2 and in turn in favour of the two companies and K.N.Murali as per Exs.P3 to P5. In this view the plaintiffs were able to prove the title over the properties. Then referring to specific contention of the defendant about MOU dated 11.09.1984 as per Ex.D5 it is held that the said MOU was the subject matter in the other two suits O.S.19/2001 and O.S.35/2001 between the same parties. From the judgment in the said suits, three appeals RA 59/2007, RA 69/2007 and RA 74/2007 arose. In these appeals the MOU or the agreement was rejected holding that it was not admissible in evidence. That apart the contents of Ex.D5 would disclose that it came into existence on the day when the partition deed-Ex.P1 was executed. The



MOU effected modification of shares allotted to the parties in Ex.P1 in such a way that two sharers would take the property on one side of the road and another would take the property on the other side of the road, that means the road would divide the properties of the sharers. If this kind of an understanding came into existence on the same day because of some typographical error in the partition deed, the parties should have gone for rectification deed. Ex.P1 was a registered document and the terms therein cannot be changed or modified by an unregistered document. Defendant has no explanation as to why the parties opted for unregistered document. Therefore the unregistered document would not create any right over the property and hence the possession of the defendant over the suit properties cannot either be treated as permissive possession or lawful possession.

5.2. The plea of adverse possession of the defendant cannot be accepted in as much as he claims possession as per MOU or the supplementary agreement dated



11.09.1984 and he has failed to produce any document to show that he has been in possession over the suit properties since 1984 and therefore he has not been able to prove that his possession is adverse to the interest of the plaintiffs. Since the plaintiffs have proved their title and that the defendant has admitted to be in possession of the suit properties, there was no need to appoint a surveyor as sought in I.A.4 filed under Order 26 Rule 9 of CPC. The suit is not time barred. In view of this the plaintiffs are to be declared as the owners of the suit properties and to be entitled to possession also.

6. Sri T.V.Vijay Raghavan, learned counsel for the appellants, while arguing contended firstly that, according to the plaintiffs themselves the cause of action first arose in June 1998 and at that time the plaintiffs had not purchased the suit properties. If really there was illegal encroachment, the predecessors in title of the plaintiffs would have initiated action to take possession of the encroached portion and the very fact that they kept quite



would show that there was no encroachment by the defendant and his possession of the suit properties was lawful. Before instituting the suit, the plaintiffs should have applied for survey to ascertain the extent of encroachment if there was really encroachment according to them. In fact in Ex.P16, the notice issued by the plaintiffs, it is stated that the defendant agreed for survey to be conducted. That means the plaintiffs were not sure whether there was encroachment or not and without its ascertainment, the suit should not have been instituted.

6.1. His second contention is that the plaintiffs 3 and 4 just purchased the shares of plaintiffs 1 and 2 companies as per Ex.P15. It appears that the entire consideration of the shares was not paid to K.N.Murali and Anjana Murali. There is no document in this regard. Moreover what they purchased under Ex.P15 was only shares, there was no transfer of immovable property under this document. In schedule 'B' to Ex.P15, 13 items are shown to have been sold. An immovable property



cannot be sold under unregistered document. Therefore the plaintiffs did not derive any title over the suit property under Ex.P15. This is not a document in proof of their title. He also referred to Ex.P6 to argue that plaintiffs 3 and 4 purchased only 4 items of the properties in Sy.Nos. 107/2, 80, 81 and 75 from K.N.Murali. For this reason plaintiff No.3 cannot claim to have become owner of the other properties. Plaintiffs 3 and 4 claim to be representing plaintiffs 1 and 2 companies. As per Ex.P15 they only purchased the shares and became directors of the companies, but there is no document evidencing the authorization given to plaintiffs 3 and 4 to institute a suit on behalf of the companies. Even there is no proof in regard to transfer of shares as per Ex.P15 and their becoming directors as per Company Law. Therefore the suit is not maintainable for this reason. The evidence on record discloses that the plaintiffs did not acquire any title over all the suit properties and for this reason possession cannot be delivered to them because the suit for possession is based on title.



6.2. The defendant has also taken the plea of adverse possession. He can set up inconsistent defence being the defendant. The findings of the trial court on this issue are wrong. In the sale deeds Exs.P3 to P6 and Ex.P15, boundaries of the properties are not mentioned. Without boundaries, properties cannot be identified. The commissioner was also not appointed. With these infirmities the suit should not have been decreed.

7. Sri Shashikiran Shetty, learned Senior Counsel arguing on behalf of respondents 1 to 4, submitted that plaintiffs 3 and 4 purchased lands from K.N.Murali that he had purchased under Ex.P4. The plaintiffs 1 and 2 companies had already become owner of the other properties as per Exs.P3 and P5. The plaintiffs 3 and 4 then purchased the shares of the plaintiffs 1 and 2 companies and became directors in regard to which Form No. 32 was filed before the Registrar of Companies. Therefore the suit is filed by both the companies and the plaintiffs 3 and 4. The defendant does not dispute the sale



deeds and also the fact that he is in possession of the suit properties. The plaintiffs 3 and 4 represent the companies as directors. In this view all the plaintiffs are entitled to claim possession of the suit properties as their title is not disputed by the defendant. Once title is admitted, the true owner would become entitled to possession. Defendant has failed to prove adverse possession, and he cannot contend about adverse possession because he claims to be in lawful possession of the suit properties by referring to MOU-Ex.D5. Therefore the plea of adverse possession is not available to him. The entire argument of Sri Vijay Raghavan was contrary to the contents of the written statement. For this reason appeal deserves to be dismissed.

8. From the above argument, the following points arise for discussion :

(i) Has the trial court erred in holding that the plaintiffs have proved their title over suit properties?



(ii) Has the trial court rightly rejected the defendant's plea of adverse possession?

(iii) Are there grounds to interfere with the impugned judgment? What order?

Point No. (i)

9. The documentary evidence is more evincing than oral evidence of witnesses. Defendant does not dispute paras 1 to 4 of the plaint. The defendant was one of the parties to the partition deed-Ex.P1, but he states about contemporaneous transaction of effecting certain modifications to Ex.P1 by all the parties to the partition in accordance with MOU marked Ex.D5 which will be dealt with later. The obtaining picture from Exs.P1 to P6 is this: After partition as per Ex.P1, K.T.Mathews and Leelamma Mathews sold away their properties allotted to each of them to a partnership firm called 'Carolina Plantations'. This is evidenced by sale deed dated 12.06.1987 marked Ex.P2. Thereafter Carolina Plantations executed three sale deeds on 02.09.1991 as per Exs. P3 to



P5. Ex.P3 evidences sale of eight items of properties in favour of Srivatsa Estates Private Limited. Ex.P4 shows that Carolina Plantations sold four items of properties to Sri K.N.Murali. And Ex.P5 shows that Surya Kiran Estates Private Limited was purchaser of five items of properties from M/s Carolina Plantations. These three deeds make it very clear that Carolina Plantations sold away all the properties that it purchased from K.T.Mathews and Leelamma Mathews. Then Ex.P6-a sale deed dated 31.01.2000 shows that Sri K.N.Murali sold the properties that he had purchased under Ex.P4 to Sri Nanda Belliappa, i.e., plaintiff No.3.

10. Ex.P15 is not a sale deed, it is a document evidencing transfer of shares from Sri K.N.Murali and his wife Smt. K.Anjana Murali to Sri A.Nanda Belliappa and Smt. Anita Nanda. Precisely stated, contents of Ex.P15 are that K.N.Murali and Anjana Murali sold away whole of their equity shares in two companies Srivatsa Estates Private Limited and Suryakiran Estates Private Limited to



Nanda Belliappa and Anita Nanda for a certain consideration and agreed to deliver possession of plantations belonging to two companies. That means Nanda Belliappa and Anita Nanda i.e., plaintiffs 3 and 4 respectively having purchased equity shares of two companies from K.N.Murali and Anjana Murali, became directors of the companies, and probably this could be the reason for transferring the possession of the plantations to them. It is true, as argued by Sri Vijay Raghavan that Ex.P15 is not a sale deed in relation to transfer of plantations to plaintiffs' 2 and 3. It is just a document evidencing transfer of shares; the properties purchased by the companies under Ex.P3 and Ex.P5 remained with the companies only. Though it is written in Ex.P15 that possession of plantations was agreed to be handed over, it only amounted to handing over management of the plantations to plaintiffs 2 and 3, and nothing more. The argument of Sri Vijay Raghavan that there is no proof for having paid entire consideration regarding transfer of shares as stipulated in Ex.P15 cannot be accepted because



if at all consideration had not been paid, Sri K.N.Murali and Smt. Anjana Murali should have raised that issue, and the defendant has no right to question it.

11. It may not appear inappropriate if it is opined here that plaint is inarticulate, para 6 of the plaint is extracted here to demonstrate that it conveys ambiguous meaning.

"6. The plaintiffs purchased all the shares of the company viz., Suryakiran and Srivatsa Estates and Nanda Belliappa and Anitha Nanda Belliappa became the Directors of the Company. The Memorandum of transfer of shares is produced herewith. Nanda Belliappa and Anitha Nanda are the Directors of the Company and Form No. 32 is produced herewith."

12. This is a mistake committed by the advocate. The meaning that can be gathered from para 6 is that all the plaintiffs purchased the shares of the two companies. But from Ex.P15, it becomes clear that only plaintiffs 3 and 4 purchased the shares and they having become directors



of the companies, represented the companies. It was argued by Sri Vijay Raghavan that no proof was produced indicating change in management of the companies and in this regard he has placed reliance on a judgment of the Supreme Court in ***State Bank of Travancore vs M/s Kingston Computers (I) Private Limited [2011 AIR SCW 1948]***, and of a judgment of Delhi High Court in ***M/s Nibro Limited vs National Insurance Company [AIR 1991 Del 25]***. It may be stated with all humility that these two judgments operate in different factual context, and here the plaintiffs 3 and 4 being directors of private limited company are entitled to represent the companies. If Exs.P31 to P33 are seen it becomes clear that information in Form 32 of the Companies Act was given to the Registrar of Companies regarding change in directorship of the companies. The names of plaintiffs 2 and 3 are written in Form No. 32.

13. The actual factual position as to ownership of properties is,



(i) Plaintiff No.1 is the owner of properties sold to it under Ex.P3.

(ii) Plaintiff No.2 is the owner of properties sold to it under Ex.P5.

(iii) Plaintiff No.3 is the owner of properties sold to him under Ex.P6.

(iv) Plaintiff No.3 also represents the companies as its director, and instead of indicating Smt. Anita Nanda as another director representing the companies, she was made a party individually.

14. Now if the properties described in plaint schedule i.e., suit properties are seen, what becomes further clear is that they are part of some of the properties comprised in Exs.P3, P5 and P6. That means plaintiffs could have filed the suits separately, but they joined together in instituting the suit which is permitted according to Order 1 Rule 1 of CPC which reads as below :



"Order 1. Parties to suits

1. Who may be joined as plaintiffs.—*All persons may be joined in one suit as plaintiffs where—*

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and

(b) if such persons brought separate suits, any common question of law or fact would arise."

The position in this case fits into above rule.

15. If Ex.D5 is considered, it appears that subsequent to partition as per Ex.P1, the parties agreed for effecting change in distribution of properties. This document has been rightly disbelieved by the trial court. Very pertinently it may be mentioned here that O.S. 19/2001 and O.S. 35/2001 were the two suits filed by Srivatsa Estates Private Limited and C.O.Mathews against each other and in these suits the MOU was projected by



the defendant, and his plea based on it was not accepted. A First Appeal arising from one of the suits, O.S.35/2001 has been dismissed and therefore defendant cannot contend the same point again.

16. Ex.P1 and Ex.D5 bear the same date. If allocation of shares was not proper and was found inconvenient to the parties, they could have thought of it before execution of Ex.P1, or if they did not think of it at that time, they should have executed a rectification deed. Any subsequent change or modification in a registered instrument can be made only through a registered instrument. Therefore Ex.D5 is of no consequence. That apart the defendant admits Exs.P1 to P5, that means he does not dispute their contents. He cannot contend to vary the allocation of shares as made in Ex.P1 and dispute the title of plaintiffs 1, 2 and 3.

17. It is true that in Exs.P1 to P6, the boundaries of the properties are not given. It is for this reason Sri Vijay Raghavan argued that without identification of the



properties with boundaries, title cannot be declared. This line of argument cannot be accepted because in Ex.P1, through which his share became crystallized, boundaries of the properties are not mentioned and for this reason the defendant cannot take an objection if the boundaries are not mentioned in the sale deeds to which he is not a party. But the suit properties i.e., encroached portions are described with boundaries, and the defendant admits to be in possession of suit properties.

18. Though plaintiff filed an application under Order 26 Rule 9 of CPC for conducting survey probably to ascertain the encroachment, the trial court did not consider it in view of clear admission by the defendant that he is in possession of the extent of lands shown in the plaint schedule. If he had disputed his possession over suit properties there was need for appointment of commissioner. There is no infirmity in the finding of the trial court that there was no need to appoint a commissioner.



19. Therefore conclusion is that the plaintiffs 1 to 3 have proved their title over properties that belong to each of them. The trial court has rightly answered issue No.(i) and consequently point No.(i) is answered in negative.

Point No. (ii)

20. Defendant can take inconsistent pleas. In this case also defendant has pleaded about adverse possession. But the defendant cannot claim to have perfected title by adverse possession because he does not admit plaintiffs 1 to 3 to be true owners of suit properties. Para 6 of the written statement shows that defendant claims adverse possession referring to MOU dated 11.09.1984 i.e., Ex.D5. As already discussed, Ex.D5 shows effecting modification of shares that means he claims lawful possession. But Ex.D5 is held to be not acceptable. Trial court has correctly rejected the defendant's claim of adverse possession. Sri T.V. Vijay Raghavan has placed reliance on some decided cases, viz., ***L.N.Aswathama and Another vs P.Prakash [(2009)***



13 SC 229]; Constancio Luis Caetano Rubina Lobo vs Leandrina Antao and Others [(2021) SCC Online Bom 12180], and Sarvinder Singh and Another vs Vipul Tandon [(2022) SCC Online Del 2046]. In all these decisions, the principle set out is that defendant is entitled to take alternative plea of adverse possession. Since this is a settled principle of law, there is no need to refer to every one of these decisions, however it is necessary to refer to one para in **Aswathama** where it is held as under :

"17. The legal position is no doubt well settled. To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are



mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. (Vide : Periasami vs. P. Periathambi - 1995 (6) SCC 523, Md. Mohammad Ali (dead) by LRs. vs. Jagdish Kalita - 2004 (1) SCC 271 and P.T. Munichikkanna Reddy vs. Revamma - 2007 (6) SCC 59)."

(emphasis supplied)

21. That means even if plea of adverse possession is taken, *animus possidendi* must be forthcoming and the evidence must disclose it. In the case on hand possession is claimed referring to Ex.D5, and even PW1 is more questioned based on Ex.D5. Very interestingly DW1 has stated nothing about being in adverse possession of the suit properties in his affidavit filed in lieu of examination-in-chief, and instead admits the sale deeds executed in favour of the companies. He has stated that the plaintiffs took over management of the properties. These



averments firstly dislodge the plea of adverse possession and secondly the whole argument of Sri T.V.Vijay Raghavan about competency of the plaintiffs 3 and 4 to file suit without authorization by Board of Directors. The conclusion therefore is that the defendant cannot plead adverse possession; the trial court has not erred and hence point No. (ii) is answered in affirmative.

Point No. (iii)

22. In para 10 of the plaint it is stated that defendant encroached upon the suit properties in the year 1998 itself. Sri Vijay Raghavan, therefore, made it a point of argument that since the defendant was in possession in the year 1998 itself, suit filed in the year 2007 was beyond 12 years and plaintiff cannot claim possession. In regard to this argument the answer is that the suit is for declaration of title and possession. Possession cannot be ordered unless title is proved. Limitation question arises if defendant succeeds in establishing adverse possession. If adverse possession is not pleaded and if pleaded, but not



proved, limitation of 12 years cannot be applied. Here as discussed on point No.2, plea of adverse possession has not been established. Therefore though dispossession was in the year 1998, the plaintiffs being the true owners are entitled to possession. The trial court may not have discussed the issue in detail, but its final conclusions to decree the suit is not incorrect.

23. Before giving conclusion, interest of justice requires to mould the reliefs specifying title of each of plaintiffs 1 to 3 in accordance with sale transactions in Exs.P3, P5 and P6. Therefore,

(i) Plaintiff No.1 is declared as absolute owner of items 3 and 4 of plaintiff schedule.

(ii) Plaintiff No.2 is the absolute owner of items 5 and 6 of the plaintiff schedule.

(iii) Plaintiff No.3 is the absolute owner of items 1 and 2 of plaintiff schedule.



(iv) Plaintiffs 1 to 3 are entitled to possession of their respective properties and the defendant has to hand over possession.

(v) Plaintiff No.4 being one of the directors of plaintiff 1 and 2 can join with plaintiff No.3 to execute the decree if defendant does not deliver possession forthwith.

(vi) To obviate further complications it is made clear that a joint execution petition can be filed even though individual title of plaintiffs 1 to 3 is declared.

24. In the result appeal fails. It is dismissed with costs.

Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE

Sd/-
(UMESH M ADIGA)
JUDGE

CKL
List No.: 1 Sl No.: 1