

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.06.2015

CORAM

THE HON'BLE MS. JUSTICE R. MALA

S.A.No.1082 of 1988

Date of Reserving the Judgment 02.06.2015	Date of Pronouncing the Judgment 05.06.2015
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1.Unnamalai Ammal
W/o.Vaithi Padayachi

2.Kasi
S/o.Vaithi Padayachi

3.Andiappan
S/o.Mottakullu alias
Pachamuthu Padayachi

... Defendants/Respondents/Appellants

Vs

1.Rangasamy Gounder (Deceased)
S/o.Vemba Gounder

2.Alagappan
S/o.Late Rangasamy Gounder

3.Kandasamy
S/o.Late Rangasamy Gounder

... Plaintiffs/Appellants/Respondents

(RR2 and 3 brought on record as LRs of the deceased
sole respondent vide order of the Court dated 07.04.2015
made in C.M.P.Nos.172 to 174 of 2015)

Prayer:

Second appeal filed under Section 100 of CPC against the judgment and decree dated 24.02.1998 made in A.S.No.141 of 1985 and A.S.No.56 of 1987 on the file of the Subordinate Court, Namakkal, reversing the judgment and decree dated 06.11.1985 in O.S.No.411 of 1980 on the file of the District Munsif Court, Rasipuram.

For Appellants : Mr.C.Jagadish,
for Mr.K.Kuppusamy

For Respondents : Mr.R.Subramani, for R2 and R3

R1 - Died - Steps Taken

J U D G M E N T

The second appeal arises out of the judgment and decree dated 24.02.1998 made in A.S.No.141 of 1985 and A.S.No.56 of 1987 on the file of the Subordinate Court, Namakkal, reversing the judgment and decree dated 06.11.1985 in O.S.No.411 of 1980 on the file of the District Munsif Court, Rasipuram.

2. The first respondent herein as plaintiff has filed the suit for declaration and injunction in respect of the suit property stating that one Arjuna Gounder and his wife Papayee Ammal is the owner of the property. One Vaithi Padayachi, who is the husband of the first appellant and father of the second appellant and brother-in-law of the third appellant had purchased the property under the sale deed dated 22.07.1958. While so, one Ramasamy filed the suit in O.S.No.352/1958 for recovery of money due. The suit was decreed on 17.07.1958. The respondent/plaintiff purchased the suit property in Court auction on 23.09.1959. Whereas the husband of the first defendant and father of the second defendant viz., Vaithi Padayachi purchased the entire 4 acre 12 cents suit property on 22.07.1958. The said Vaithi Padayachi filed the suit in O.S.No.566 of 1959 questioning the sale of the suit property. The said suit was dismissed against which he preferred an appeal in A.S.No.118 of 1961. The appeal was allowed and $\frac{1}{2}$ share in the suit property owned by Papayee Ammal was given to Vaithi Padayachi and the other $\frac{1}{2}$ share was given to the respondent herein. Against the said order, Vaithi Padayachi filed Second Appeal No.1688 of 1962. The said second appeal came to be dismissed confirming the decree and judgment of the first appellate Court on 07.09.1966.

3. In pursuant to the judgment made in the second appeal, the said Vaithi Padayachi who was cultivating in the suit property as waranthur handed over $\frac{1}{2}$ share in the property under Ex.A.6 on 06.01.1980. Thereafter, he purchased the $\frac{1}{2}$ share under Ex.A.4 on 07.05.1980 and he was in possession. While so, the wife, son and brother-in-law of Vaithi Padayachi attempted to interfere with his possession and hence, he came forward with the suit for declaration and injunction. The appellants herein who were the defendants in the suit filed written statement stating that the respondent/plaintiff has never taken possession of the property. Further, Ex.B.6 is not a true and genuine document. The said Vaithi Padayachi left his wife and son viz., D1 and D2 in lurch in the year 1960 and went along with another lady. So, they were in possession and enjoyment of the suit property and hence, they have prescribed title by adverse possession.

It was further stated that even in the year 1976, much before the sale, D2 issued notice to Vaithi Padayachi, who in turn issued reply admitting his possession and claiming share in the property. Hence, the possession was with this appellants/defendants and so, they prescribe title by adverse possession and prayed for dismissal.

4. The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence dismissed the suit against which the respondent herein as appellant has preferred an appeal in A.S.No.141 of 1985. The said appeal in A.S.No.141 of 1985 came to be allowed, against which the present second appeal has been preferred by this appellants/defendants.

5. At the time of admission, the following question of law has been framed.

"Was not the lower appellate Court in error in failing to realise that the plaintiff was never in possession of the suit properties and therefore, as the defendants having perfected title by adverse possession, the findings rendered by it cannot be sustained?"

6. The learned counsel for the appellants would submit that as per the judgment made in S.A.No.1688 of 1962 confirming the judgment and decree of the first appellate Court made in A.S.No.118 of 1961, it was held that Vaithi Padayachi is entitled to $\frac{1}{2}$ share and the respondent is entitled to $\frac{1}{2}$ share. But from that date onwards, the appellants herein are in possession and enjoyment of the suit property. So, they prescribed title by adverse possession. He further submitted that Ex.B.1/Kist has been paid only by Vaithi Padayachi and the name of the Vaithi Padayachi finds place in Ex.A.5/Adangal, which shows that Vaithi Padayachi is in possession and enjoyment of the suit property. To substantiate his argument, the learned counsel for the appellants relied upon the following decisions:

1. AIR 1973 Supreme Court 2423, Harnandrai Badridas v. Debidutt Bhagwati Prasad and Others.

2. 2010 (4) CTC 161, K.Saraswathy v. The State of Tamil Nadu and Others.

and prayed for setting aside the judgment of the first appellate Court.

7. Resisting the same, the learned counsel for the respondent would submit that in the plaint itself, it has been specifically mentioned in paragraph 4 that the said Vaithi Padayachi was cultivating the suit properties as warramthar from the year 1968. The said Vaithi Padayachi handed over possession of $\frac{1}{2}$ of the suit property as per the document Ex.A.6 on 06.01.1980. Thereafter, the respondent purchased the other $\frac{1}{2}$ share on 07.05.1980 under Ex.A.4.

So, it is true that Vaithi Padayachi alone is in possession and enjoyment of the property from the year 1968, after the disposal of S.A.No.1688 of 1962, as warramthar. So, the appellants have not prescribed title by adverse possession. The learned counsel has also taken me through the judgment of the first appellate Court and submits that the documents Ex.B.2 and Ex.B.3 were concocted with a view to defeat the right of the appellant in the year 1976, whereas the Ex.A.7 document which was marked in the first appeal stage has proved that Vaithi Padayachi and his wife and son were in cordial terms, as Vaithi Padayachi has attested the partition deed which partition took place between his brother-in-law, the third appellant herein and his brothers. So, the first appellate Court has considered the said aspect in proper perspective and decreed the suit. He would further submit that the appellant claims title under the document and so his possession is not adverse to the interest of the appellant. Hence, the learned counsel for the respondent prayed for the dismissal of this appeal. To substantiate his argument, the learned counsel relied upon the following decisions:

1. (2014) 2 Supreme Court Cases 788, Tribhuvanshankar v. Amrutlal.
2. 2007-4-L.W.269, P.T.Munichikkanna Reddy and Others v. Revamma and Others.

8. Considered the rival submissions made by both sides and perused the typed set of papers.

9. The admitted facts are as follows:

Originally the suit properties belong to one Arjuna Gounder and his wife Papayee Ammal. One Vaithi Padayachi, who is the husband of the first appellant and father of the second appellant and brother-in-law of the third appellant had purchased the property under the sale deed dated 22.07.1958. While so, one Ramasamy filed the suit in O.S.No.352/1958 on the file of the District Munsif Court, Salem against Arjuna Gounder for recovery of money due to him and the said suit was decreed on 17.07.1958. Thereafter, the said Ramasamy attached the properties and brought the same for sale. The first respondent herein purchased those properties in the Court auction held on 23.03.1959. So, Vaithi Padayachi filed the claim suit in O.S.No.566 of 1959 on the file of the District Munsif Court, Namakkal. The said suit came to be dismissed against which he preferred an appeal before the Subordinate Court, Salem in A.S.No.118 of 1961. The said appeal was allowed in part holding that Vaithi Padayachi is entitled to $\frac{1}{2}$ share in the property belonging to Papayee Ammal. Against the said judgment, Vaithi Padayachi preferred S.A.No.1688 of 1962 and the same was dismissed on 07.09.1966. So, this aspect is admitted which shows that both Vaithi Padayachi and the respondents herein are entitled to $\frac{1}{2}$ share in the suit property. Further, the properties belonging to Arjuna Gounder was purchased by the respondent herein and the properties belonging to Papayee Ammal has been given to Vaithi Padayachi.

10. Now it has to be seen whether the appellants were in open, continuous and uninterrupted possession of the suit property for more than the statutory period?

From the year 1966, after the dismissal of the second appeal on 07.09.1966, the first respondent has not taken possession either through the Court of law or in person. If the possession is open, continuous and uninterrupted for more than 12 years, they prescribe title by adverse possession. It is a well settled principle of law that the person who claims adverse possession must prove his case that he is in possession of the property openly, continuously, uninterruptedly for more than the statutory period with the knowledge of the true owner and adverse to the interest of the true owner.

11. At this juncture, it is appropriate to consider the decisions relied on by the learned counsel for the appellant reported in AIR 1973 Supreme Court 2423, *Harnandrai Badridas v. Debidutt Bhagwati Prasad and Others*, wherein it was held that the question of delivery of possession is one relating to the execution, discharge or satisfaction of the decree. It is appropriate to incorporate the relevant portion in paragraph 6 of the said decision.

"6.If a liberal construction be put upon sec. 47 it is difficult to understand why a decree-holder who has been a party to the decree will shed his character as such party merely upon purchasing the property at the execution sale. After all, a decree-holder purchases the property in execution of his decree with the permission of the court. There is no reason why he should not retain his character of a party to the suit until the delivery of possession to him of the property purchased by him. Having regard to this consideration, if any question is raised by the judgment debtor at the time of delivery of possession concerning the nature of the rights purchased and if the judgment debtor offers any resistance to delivery of possession the question must be one which in our view relates to the execution, discharge and satisfaction of the decree and arises between the parties to the suit."

But the above citation is not applicable to the facts of the present case because in the instant case the respondent herein has put forth his case that after the dismissal of the second appeal, Vaithi Padayachi was cultivating in the property as warramthar and he delivered possession under Ex.A.6 on 16.01.1980. To prove Ex.A.6/Delivery receipt, the attestors were examined as P.W.2 and P.W.3. In such circumstances, the document Ex.A.6 can be construed as a true and genuine one. So, the handing over of the possession on 16.01.1980 has been proved by the respondent by way of examining the attestors.

12. It is pertinent to note that the other $\frac{1}{2}$ share of the suit property has been purchased by Vaithi Padayachi under Ex.A.4. Admittedly, till the year 1980, Vaithi Padayachi was in possession and enjoyment of the properties as warramthar, so the Ex.A.5/Adangal stands in the name of Vaithi Padayachi till 1980 and after the said period it has been changed in the name of the respondent. It is also true that Ex.B.1/Kist receipt stands in the name of the Vaithi Padayachi. However, mere paying of the kist is not sufficient to prove possession. Furthermore, in the case on hand, Vaithi Padayachi alone is in possession of the property as warranhar under the respondent which was admitted by him in Ex.A.6. In such circumstances, I am of the view that except the ipse dixit of D.W.1 to D.W.3 which is inconsistent with one another, there is no other evidence. Further, D.W.1 who is none other than the brother of the first defendant has deposed that he is in possession and enjoyment. Whereas the first defendant herein who was examined as D.W.2 has also deposed that he is in possession and enjoyment of the property with the help of his maternal uncle. So, there is contradiction in their evidence.

13. In view of the above stated position, I am of the view that the claim of the appellants that from the year 1968 they are in possession and enjoyment of the suit properties is unacceptable. Furthermore, the Trial Court has rightly held that at the time of purchasing the property in the year 1958 the second appellant was only 3 or 4 years old. Hence, the evidences of D.W.1 and D.W.2 which are contrary to one other will not prove that the appellants are in possession of the suit properties for more than the statutory period.

14. Admittedly, in paragraph 13 of the judgment of the first appellate Court, the learned Judge has given reasoning as to why he had disbelieved that there is no strained relationship between the father and the son. In the course of partition that took place between the third appellant and his brothers, the said Vaithi Padayachi, who is the brother-in-law of the third appellant has signed as an attesor in the partition deed, dated 15.07.1976. Immediately, thereafter Ex.B.2/Notice and Ex.B.3/Reply notice came into existence.

15. So, it is appropriate to consider the Exs.B.2 and B.3. Ex.B.2 notice dated 20.09.1976 was issued by the second defendant. In paragraph 2 of the said notice, it has been stated as follows:

"Inspite of the humble protest made by my clients mother and all well wishers of the family, you never cared to listen them but have been acting against the interest of the family. Thereafter you have left the family abode itself about 10 years before and you have been doing illegal activities. When you left the family house at Singilian Kombai, you have taken away the entire case realised from the money lending business as to the tune about nearly about Rs.15,000/- and also the valuable jewels

belonging to my clients mother."

16. To the said notice, Ex.B.3/Reply was issued on 01.10.1976 wherein he has stated that he was driven away from the house about 7 years ago. Thus, the issuance of the notice and reply took place in the year 1976. However, the suit came to be filed only in the year 1980. It is a well settled dictum of the Hon'ble Apex Court that the person who claims title by adverse possession must prove that he is in possession of the property with the knowledge of the owner of the property, adverse to the interest of the owner of the property for more than the statutory period. But the suit was filed in the year 1980 much before the completion of 12 years statutory period. So, the defence put forth by the appellants that they prescribe title by adverse possession does not merit acceptance.

17. At this juncture, it is appropriate to consider the decision relied on by the learned counsel for the appellant reported in 2010 (4) CTC 161, K.Saraswathy v. The State of Tamil Nadu and Others, wherein it was held that the appellant has to be establish long, open, continuous and uninterrupted possession, having animus to possess property against the true owner. It is appropriate to incorporate paragraph 33 of the said decision:

"33. The following distinctive features emerge on a careful scrutiny of the circumstances of the case:

- a. The Appellant had been in possession and enjoyment of the property from 1983 to 1996.
- b. Evidence are not available to show that the original owners used to visit the suit property often so as to avoid encroachments therein, and the presumption drawn shows that the true owners had direct knowledge of the possession of the Appellant, even after getting Ex.B-3-Patta.
- c. Without interruption, continuously the Appellant had been in open possession for over 12 years.
- d. The original owners earlier to 1996 had not moved their little finger to question the possession of the Appellant during 1983-1996."

However, in the instant case there is no evidence to show that the appellants are in continuous possession adverse to the interest of the true owner.

18. Now, it is appropriate to consider the decisions relied on by the learned counsel for the respondents:

18.1. In the decision reported in 2007-4-L.W.269, P.T.Munichikkanna Reddy and Others v. Revamma and Others, it was held in paragraphs 30, 38, 39 and 50 as follows:

"30. Animus possidendi is one of the ingredients of

adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus.

38. With the expanding jurisprudence of the European Court of Human Rights, the Court has taken an unkind view to the concept of adverse possession in the recent judgment of J.A. Pye (Oxford) Ltd v. the United Kingdom [2005] ECHR 921, which concerned the loss of ownership of land by virtue of adverse possession.

39. In the instant case the applicant company was the registered owner of a plot of 23 hectares of agricultural land. The owners of a property adjacent to the land, Mr. and Mrs. Graham ("the Grahams") occupied the land under a grazing agreement. After a brief exchange of documents in December 1983 a chartered surveyor acting for the applicants wrote to the Grahams noting that the grazing agreement was about to expire and requiring them to vacate the land.

50. Therefore it will have to be kept in mind the Courts around the world are taking an unkind view toward statutes of limitation overriding property rights."

18.2. In the decision reported in (2014) 2 Supreme Court Cases 788, Tribhuvanshankar v. Amrutlal, it was held that the ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario. It is appropriate to incorporate paragraphs 34 and 37 of the said decision:

"34. The conception of adverse possession fundamentally contemplates a hostile possession by which there is a denial of title of the true owner. By virtue of remaining in possession the possessor takes an adverse stance to the title of the true owner. In fact, he disputes the same. A mere possession or user or permissive possession does not remotely come near the spectrum of adverse possession. Possession to be adverse has to be actual, open, notorious, exclusive and continuous for the requisite frame of time as provided in law so that the possessor perfects his title by adverse possession. It has been held in Secy. Of State for India in Council v. Debendra Lal Khan that the ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario.

37. It is to be borne in mind that adverse possession, as a right, does not come in aid solely on the base that the owner loses his right to reclaim the property because of his wilful neglect but also on account of the possessor's

constant positive intent to remain in possession. It has been held in P.T.Munichikanna Reddy v. Revamma."

19. Considering the facts of the present case in the light of the above decisions, in the instant case there is no evidence to show that the appellant is in possession and enjoyment of the suit properties with the knowledge of this respondent for more than 12 years openly, continuously and uninterruptedly. Hence, I am of the view that the first appellate Court has rightly held that the appellant herein has not prescribed title by adverse possession. The respondent herein who is the Court auction purchaser entitled to $\frac{1}{2}$ share in the suit property as per the judgment of the second appeal made in S.A.No.1688 of 1962 and the other $\frac{1}{2}$ share purchased under Ex.A.4 on 07.05.1980 has also filed Ex.A.5/Adangal document to show that he is in possession and enjoyment of the suit property. Only after the year 1980, the Adangal document was transferred. So, as on the date of the filing of the suit, the appellants were not in possession and enjoyment and hence, the respondents are entitled for declaration and injunction as prayed for in the suit. The substantial question of law is answered accordingly. Thus, the judgment of the first appellate Court is a well reasoned judgment and the same does not suffer any illegality or irregularity and hence, it does not warrant interference by this Court.

20. In fine,

- (a) The Second Appeal is dismissed. No costs.
- (b) The judgment and decree passed by the first appellate Court is hereby confirmed.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

To

- 1.The Subordinate Judge, Namakkal.
- 2.The District Munsif, Rasipuram.
- 3.The Record Keeper, V.R.Section, High Court, Chennai.

1 cc to Mr.K.Kuppusamy , Advocate Sr.No.26890

1 cc to Mr.R.Subramani, , Advocate Sr.No.26813

S.A.No.1082 of 1988

sai(co)

pmk.15.6.2015