

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.03.2015

CORAM :

THE HON'BLE MS. JUSTICE K.B.K.VASUKI

Second Appeal No.1588 of 1998

1.Shanmugam
2.Veluswamy

.. Appellants/defendants 1 & 2

Vs

1.Mayilathaal
2.Palaniammal
3.Subbulakshmi

.. Respondents/Plaintiff and
Defendants 3 & 4

Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 03.04.1998 made in A.S.No.99 of 1997 on the file of the I Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore reversing the Judgment and Decree dated 30.09.1996 made in O.S.No.726 of 1991 on the file of the III Additional District Munsif, Coimbatore.

For Appellants : M/s.T.R.Rajagopalan, SC
for M/s.Chitra Sampath
For Respondents : Mr.Sriram, SC
for A.S.Kailasam Associates
Mr.Sairam for R2.
Mr.A.Anbarasu for R3.

J U D G M E N T

The appellants herein who are the defendants 1 and 2 have filed this second appeal, challenging the judgment and decree of the lower appellate Court reversing the judgment and decree of the trial court.

2.The suit was filed by the first respondent herein by name Mayilathaal, who is none else than one of the sisters of the defendants 1 to 4. The plaintiff and the defendants 1 to 4 are the children of one Subbu Gounder, who died on 11.06.1963 leaving behind his wife by name Sellammal and his two sons and three daughters, who are the parties herein. The mother Sellammal died on 20.08.1987. The plaintiff/sister has come forward with the present suit in 1981 seeking partition of 1/5th share in the suit items numbering 1 to 3. The suit was preceded by Ex.A1 legal notice dated 15.12.1990 jointly issued by the plaintiff and her other sister by name Subbulakshmi who

was arrayed as the 4th defendant in the suit and in pursuance of Ex.A2 reply dated 23.12.1990 issued by the defendants, the present suit came to be filed for the relief as stated supra.

3.The suit relief was seriously resisted by the defendants 1 and 2 by claiming plea of ouster and adverse possession. According to them, the suit properties forming part of the joint family properties having been allotted to the father in the partition with his brothers and on the death of the father in 1963, succession opened and the father and sons/defendants 1 and 2 got 1/3rd share each and after the death of the father, the defendants 1 and 2 and their mother entered into Ex.B2 partition deed dated 29.7.1911 and the suit properties were allotted to the defendants 1 and 2 and they have been in possession and enjoyment of the same by exercising absolute ownership by obtaining Patta, Chitta, Adangal and by paying kists and by appropriating the income from the land for their own use and by obtaining mining licence and carrying on mining business and by making alienation of half portion of the same in favour of the plaintiff's husband and by mortgaging the property to the knowledge of the sister by having one of the sister's husband as attesor and by discharging the loan of the father etc., and their possession and enjoyment of the suit property is exclusive to the knowledge of the sisters and exclusion of the sisters is well within the knowledge of the sisters and the sisters having not raised any claim for more than the statutory period, lost their right and have come forward with the partition suit without any right to do so. The third defendant sister by name Palaniammal supported the claim of the defendants 1 and 2 regarding their mode of enjoyment by asserting exclusive ownership over the suit properties. The fourth defendant denied such claim of the defendants 1 and 2.

4.The parties have in support of their respective contentions adduced oral and documentary evidence. The trial court found that the suit properties are ancestral properties belonging to the joint family consisting of father and two sons and after the death of the father the two sons partitioned the property alongwith the mother in 1971 and thereafter it is the sons who have been in open, continuous, assertive and effective possession of the entire property by exercising ownership over the same to the knowledge of the sisters and the sisters by not raising any claim and by not participating in the enjoyment or income of the property lost their right by ouster and the defendants have thus prescribed title in respect of the share belonging to their sisters by ouster and adverse possession and the trial Court on the basis of such findings negatived the claim of the sisters for any share in the suit property and dismissed the suit.

5.Aggrrieved against the same, the plaintiff preferred AS.No.99 of 1997 on the file of I Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore. The lower appellate court agreed with the findings of the Trial Court insofar as the ancestral nature of the property the exclusive possession and enjoyment of the defendants 1

and 2 by paying patta, Chitta, Adangal and by making alienations but disagreed with the findings of the Trial Court regarding relinquishment of their right by the sisters for lack of any open assertion of hostile title, that means the requisite animus to possess the property hostile to the title of other co-owners and accordingly rejected the plea of ouster and upheld the claim of the plaintiff/sister for her share in the suit property. Hence, this second appeal by the defendants 1 and 2 before this Court.

6.The Second Appeal is admitted on the following substantial question of law :

Whether the lower Appellate Court is correct in reversing the judgment of the trial court without even considering the fact that in the partition deed Ex.B2, the husband of the plaintiff had attested and without considering the recitals in Ex.B3.

7.The two additional substantial questions of law framed at the time of hearing are as follows :

(i)Whether the learned Additional District Judge was correct in rejecting the evidenciary value of patta, adangal and the other revenue records produced by the defendants as unreliable?

(ii)Whether the learned Additional District Judge was right in omitting to consider the fatal admissions and contradictions of evidence of PW2 with regard to the point of ouster by defendants?

8.Heard the rival submissions made on both sides and perused the records.

9.Both the courts below have concurrently found that the suit properties are ancestral properties and the father and the two sons had each 1/3 shares and after the death of the father in 1963, the defendants 1 and 2 who are the sons have been in exclusive possession and enjoyment of the property in the manner as described in the written statement and as spoken by the first defendant as DW1 in the witness box. The exclusive and effective possession of the defendants 1 and 2 are also evident from the documents produced herein as Exs.B1 to B73 patta, chitta, adangal, kist updating resurvey etc., in the name of the defendants in respect of the suit properties.

10.It cannot be disputed that but for the plea of ouster, the plaintiff and the defendants 3 and 4 are each entitled to 1/15 shares and the defendants 1 and 2 are entitled to each 6/15 shares. While the trial Court accepted the plea of ouster raised by the defendants 1 and 2 on the strength of documents Exs.B1 to B73, the lower appellate Court reversed such finding of the trial Court mainly on the ground that the defendants failed to establish the Animus possidendi to asserting hostile title and claim ownership in one self.

11.It is well settled law that in order to constitute the plea of ouster possession required must be adequate in continuity, in publicity and in extent to show that it is adverse possession to the competitor, as the possession of one co-heir is considered to be on the basis of joint co-heir. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title.

12.It is held in (2006) 11 SCC 600 Govindammal V. R.Perumal Chettiar

"In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case."

13.It is again held in (2006) 7 SCC 570 T.Anjanappa V.Somalingappa

"12. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property."

14.The Apex Court has in para 4 of the judgment reported in AIR 1957 SC 314 - P.Lakshmi Reddy V. L.Lakshmi Reddy clearly observed that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir' takes no steps to vindicate his title.

15.As far as the present case is concerned, it is at the risk of repetition stated that the defendants 1 and 2 have been in exclusive and effective possession and enjoyment of the property on the strength of Exs.B1 to B73 patta, chitta, adangal and kist receipts. It is also clearly made out that there was no participation in any manner by other sisters either in the enjoyment of the property or in the appropriation of the income derived and the plaintiff/sister has not adduced any evidence to prove the same.

16.Here is the case, wherein the father died during 1963 and mother died in 1987 and the suit notice was issued at the fag end of 1990 and the suit came to be filed in 1991. Between 1963 and 1991 the defendants 1 and 2 have been continuously openly and uninterruptedly in possession and enjoyment of their property for more than 28 years and their exclusive possession and enjoyment of entire property has been more than 20years from the date of Ex.B2 partition deed which is between the sons and the mother. It is not in dispute that Arusamy/DW2 who is none else than the husband of one of the sisters/Subbulakshmi/D4 was the attesor in Ex.B2 partition deed between two sons and mother and also in Ex.B17 pronote, under which, the defendants 1 and 2 borrowed money for discharging the loan due to the father. The defendants 1 and 2 also sold the portion of the suit property to PW2 Ramasamy who is the husband of the plaintiff Mayilathal for valuable consideration under registered sale deed and the plaintiff and her husband have been running poultry farm in the property sold to them.

17.Further the facts made available herein would also reveal that out of the three sisters, two sisters have been living very nearby to the house put up by the defendants 1 and 2 in the suit property. It is the admitted case that the brothers and sisters have been maintaining cordial relationship and have been on visiting and talking terms. The two of the sisters, who have been living nearby, used to visit the brothers house frequently. The defendants 1 and 2 also applied for mining license in one of the suit properties and notice was issued to the sisters by the competent authority/District Collector and the plaintiff and the 4th defendant also filed their objections. Whereas, the mining license was issued to the defendants 1 and 2 by rejecting the objections raised by the sisters. The brothers have been carrying on mining operation in the disputed portion. It is not denied that a portion of the land was acquired by the Government and the compensation was also paid only to the defendants 1 and 2 and not to others till date. Between 1971 to 1993 neither of the sisters raised any claim in this regard.

18.Thus, considering the relationship between the parties and the distance at which they live and the conduct of the respective husbands of two of the sisters in having purchased the property from the brother-in-law and in standing as attesor in the partition deed between the sons and mother and in standing as guarantor in the mortgage deed created by the brothers, and having regard to the

conduct of the sisters in not participating in the enjoyment of the property or in the income and in not making any claim in the income or for share in the property for more than the statutory period, the same would amount to exclusive implied assertion of their right over the suit property by the brothers and denial of sisters right in the suit property. The conduct of the sisters in not making any claim for more than the statutory period either for any share or income in the property would amount to passive acceptance on the right of the defendants. The acts above referred to if coupled with the exclusive possession of the defendants 1 and 2, vide defendant's side documents are sufficient enough to constitute an act of ouster. In the judgments reported in (i)AIR 1957 SC 314 - P.Lakshmi Reddy v. L.Lakshmi Reddy; (ii)2007 9 SCC 641 - Des Raj and others v. Bhagar Ram (dead) by LRs and others; (iii)2013 (4) CTC 586 Division Bench - The Chairman & Managing Trustee, Krishnaswamy Educational Trust, Chennai-34 v. C.V.Rajeswari Ammal (Deceased), C.V.Sivaraman and others and (iv)2012 (5) LW 194 Division Bench - Mrs.Thangam Nair (deceased) and another V. Kamalachi Ammal and others the Hon'ble Supreme Court and our High Court have categorically laid down the circumstances under which the exclusive possession of one co-heir can be recognised as adverse possession and amounting to ouster of other co-heir.

19.The Division Bench of our High Court in the judgment reported in 2012 (5) LW 194 - Division Bench - Mrs.Thangam Nair (deceased) and another V. Kamalachi Ammal and others has laid down the essential requirements for the perfection of title by adverse possession viz., date of entry into possession, nature of possession, exercise of act of ownership undisturbed continuously to the knowledge of the owner of the property, and the present case satisfies all the tests for the period prescribed under Article 65 of the Limitation Act.

20.Similar view is expressed by the Division Bench in para 52 of the other judgment, to the effect that a person who claim adverse possession should show (1)on what date he came into possession (2) what was the nature of his possession (3)whether his possession was known to the Opposite party (4)how long his possession continued and (5)his possession was open and undisturbed (Karnataka Board of Wakf v. Government of India) 2004 (10) SCC 779. The Division Bench has in para 58 having found the plaintiff's possession to be open and undisturbed to the knowledge of the opposite party by obtaining electricity connection in his name and having observed that all the five conditions laid down above got satisfied, decided that the plaintiff has prescribed title by adverse possession and accordingly disposed of the case.

21.The Supreme Court has in the judgment reported in AIR 1957 SC 314 (cited supra) in para 7 extracted the lecture reported in Mitra's Tagore Law Lectures on limitation. For better understanding the same is reproduced herein :

An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him who was in possession. It is the intention to claim adversely accompanied by such an invasion of the rights of the opposite party gives him a cause of action which constitutes adverse possession."

22.The Hon'ble Supreme Court in the judgment reported in 2007 (9) SCC 641 - Des Raj and others V. Bhagat Ram and others held that the claim of the hostile title in the suit land was thus known to the opposite party. Applying the principle laid down by the Hon'ble Supreme Court and our High Court regarding the test to be satisfied to claim adverse possession and mode of proving the same, this court has no hesitation to say that the defendants have well established their claim for adverse possession for more than the period prescribed under the Act.

23.As rightly argued by the learned counsel for the appellant, the trial court after having detailed discussion and appreciation of entire evidence rendered well considered findings by accepting the plea of ouster raised by the defendants and the reversal of the same by the lower appellate Court is contrary to the legal principles and the same warrants interference by this court. The substantial questions of law are accordingly answered in favour of the appellants.

24.In the result, the Second Appeal is allowed by setting aside the judgment and decree of the lower appellate court and by restoring the judgment and decree of the trial court. No costs.

Sd/-
Asst.Registrar (CS III)

/true copy/

सत्यमेव जयते
Sub Asst. Registrar

To

- 1.The I Additional District Judge-cum-Chief Judicial Magistrate,
Coimbatore
- 2.The III Additional District Munsif, Coimbatore.
- 3.The Section officer, VR Section, High Court, Madras
- +1 cc to M/S.A.S.Kailasam & Associates sr.16009
- +1 cc to M/S.T.R.Rajaraman Advocate sr.16084

SA.No.1588 of 1998

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