

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 23.11.2016

PRONOUNCED ON: 29.11.2016

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.502 of 1995

Chockalingam

.. Appellant/Plaintiff

v

1.Namadev (died)

2.Anjalai

3.Mangalakshmi

4.Vaidhyanathan

5.Dhanalakshmi

6.Marimuthu

7.Sundari

..Respondents/D1 and LR
of D1

(R3 to R7 are brought on record as
LRs of the deceased R1 vide order of
Court dated 05.09.2003 made in
CMP.No.10604/95)

Prayer:- This Second Appeal has been filed under Section 100 of C.P.C., against the finding given in the judgment dated 22.08.1994 in A.S.No.292 of 1993 on the file of the District Judge, of South Arcot Vallalar Cuddalore reversing the judgment and decree dt 20.09.1993 in O.S.No.636 of 1990 on the file of the Additional District Munsif, Cuddalore.

For Appellant : Mr.R.Sunil Kumar

For R.1 : Died

For R.2 : Ms.P.V.Rajeswari

For RR.3,5 & 7 : No Appearance

For RR4 & 6 : Dismissed on 13.07.2009

JUDGMENT

The plaintiff is the appellant before this Court. The suit was filed for declaration to declare the plaintiff's title to the plaint "A" schedule property and recovery of possession of the suit properties from the defendants or in alternate, for partition and separate possession of the plaintiffs 1/3rd share in "B" schedule property and for future mesne profits. The trial Court after examining the parties and analyzing 7 exhibits on behalf of the plaintiff and 31 exhibits on behalf of the defendants held that the plaintiff is entitled for the alternate relief seeking 1/3rd share in the "B" schedule property.

2.However, on appeal, the First Appellate Court reversed the finding of the trial Court holding that the defendants were allowed to be in possession for over and above the statutory period therefore, the defendants have prescribed the title to the suit properties by way of adverse possession. Aggrieved by this, the present Second Appeal has been preferred by the plaintiff.

3.At the time of admission of this Second Appeal, this Court has formulated the following substantial questions of law:-

"Whether the learned District Judge did not err in casting the burden of proof of possession within a period of 12 years by the plaintiff, when especially in a suit based on title, which is admitted, the plaintiff could not be non-suited unless the defendants proved their title by adverse possession and ouster for over the statutory period"

4.The short point involved in this case is, both the Courts below have held that the undivided portion shown in "B" schedule property of the suit was a joint family property and it belongs to Mr.Gopal, Mr.Rathinam and Mr.Deivanayagam. The Courts below have also held that one of the co-sharer of the property i.e, Mr.Gopal has sold his 1/3rd property to his wife Mrs.Thayarammal in the year 1943 vide Ex.A.1, the property conveyed under Ex.A.1 has been later purchased by Mr.Vadivel Padayachi in the year 1951 and subsequently, Mr.Vadivel Padayachi settled the property to one Mr.Dandapani vide Ex.A.3 dated 07.01.1966. The said Mr.Dandapani had sold the property in two parts through Exs.A.4 & A.5 to Mr.Chockalingam who is the plaintiff/appellant herein in the year 1989-1990. While being so, having accepted that the plaintiff has traced his title over the suit property from one of the co-sharer, on the ground that the plaintiff has failed to prove the possession, the suit has been dismissed by the First Appellate Court reversing the finding of the trial Court.

5.It is well settled in law that merely by pointing out that particular individual in his possession of a property for a long time, he cannot plead that he acquired the prescribed title over it by way of adverse possession without proof of the ouster and hostile to the knowledge of the original owner. This condition gets more stringent when such a plea of adverse possession is sought against the co-owner.

6.In this case, it is an admitted fact that the "B" schedule property was jointly held by three brothers and one of the brother by name Mr.Gopal has alienated his undivided 1/3rd

share over the property which is described as "A" schedule property in this suit. The First Appellate Court failed to consider the admission of the defendants that Mr.Dandapani who is the vendor of the plaintiff was provided with alternate site during the family partition held in the year 1966 since then, they are in possession of the suit property. This assertion of the defendants not been proved in the manner known to law and was denied by Mr.Dandapani himself while examining him as D.W.2.

7.The First Appellate Court should have held that possession of one co-owner is for himself and on behalf of the other co-owners. Therefore, no adverse inference could be drawn. Furthermore, unfortunately, the First Appellate Court has shifted the burden of possession on the title holder which is unknown in law of evidence. A person who claims adverse possession is bound to prove that there must be a hostile open possession, denial and repudiation of the rights of the other co-owners. In the absence of definite evidence to his effect, the First Appellate Court ought not to have reversed the finding of the trial Court.

8.In this connection, attention has been invited to an earliest decision in the case of Hardit Singh & Ors. V. Gurmukh Singh & Ors. [AIR 1918 PC 1] wherein it has been held as under :

"If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more , must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members. If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. The evidence of actual user is not sufficient to establish abandonment or exclusion."

9.In the case of Mohaideen Abdul Kadir & Ors. V. Mohammad Mahaideen Umma & Ors. reported in ILR [1970] 2 Mad. 636 a Division bench of this Court has held as follows:-

"..no hard and fast rule can be laid down. But the following relevant factors may be taken into consideration :

(i) exclusive possession and perception of profits for well over the period prescribed by the law of limitation ;

(ii) dealings by the party in possession treating the properties as exclusively belonging to him;

(iii) the means of the excluded co-sharer of knowing that his title has been denied by the co-owner in possession. There may be cases, where, owing to long lapse of time, it may not be possible for the co-owner in possession to adduce evidence as to when the ouster commenced and how it was brought home to the knowledge of the excluded co-owner. In such a case the law will presume ouster as an explanation of the long peaceful possession of the co-owner in possession. In order to maintain the person in such possession the law presumes a lawful origin of the possession. Therefore, no hard and fast rule can be laid down from which it can be inferred that any co-sharer has ousted his co-sharer. That will depend upon facts of each case. Simply long possession is not a factor to oust a co-sharer but something more positive is required to be done. There must be a hostile open possession denial and repudiation of the rights of other co-owners and this denial or repudiation must be brought home to the co-owners. Simply because a co-sharer gave notice claiming partition of the suit properties and possession and did not pursue the matter further, that will not be sufficient to show that the co-sharer has lost his/her right. In the present case, it is only when 'B' schedule property was being sold by two brothers then alone the plaintiff woke up to realise that the step sons were not interested to give her share in the property and she rushed to file the suit. Therefore, by no stretch of imagination it can be inferred in the present case that the plaintiff had lost her right to claim partition and share in the property.

10. In the case of Nirmal Chandra Das and Ors. V. Mohitosh Das & Ors. reported in AIR 1936 Calcutta 106, a Division Bench of the Kolkatta High Court has observed as follows:-

"....that in order to succeed on the ground of ouster, the person setting up ouster is bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of 12 years. Their Lordships further observed that there can be no adverse possession by one co-sharer as against others until there is an ouster or exclusion; and the possession of a co-sharer becomes adverse to the other co-sharer from the moment there is ouster. Therefore, what is ouster and what is adverse to the interest of the claimant depends upon each case. In this case, a plea was raised that certain properties were usufructuary mortgage. But that was not in a manner to show that these properties are adverse to the interest of the plaintiff. It was only when 'B' schedule properties were sought to be sold and it came to the knowledge of the plaintiff that her step sons were not interested in partition of the property and giving her share, she filed the suit in the year 1979. Therefore, for the first time in 1979 she came to know that adverse possession is being sought to be established and her interest in 'B' schedule properties is sought to be sold by her step sons. But in any case, just because she gave a notice and she did not pursue the same, on that basis no adverse inference can be drawn and she cannot be ousted on that count by way of adverse possession."

11. Admittedly, except a thatched hut rest of the suit properties are vacant and it is also borne on record that in the remaining undivided portion of the suit property, the defendants have their building and paying tax for it. Therefore, the evidence pertaining to payment of tax should not be construed that it is not meant for the "A" schedule property alone. Furthermore, one co-sharer paying the tax/revenue liabilities will not amount to ouster and hostile enjoyment of the property. Accordingly, the substantial questions of law are answered in favour of the appellant. Therefore, the judgment of the First Appellate Court is liable to be set aside.

12.In the result, the Second Appeal is allowed and the judgment and decree passed by the First Appellate Court is set aside and the decree and judgment passed by the trial Court is restored. There shall be no order as to costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

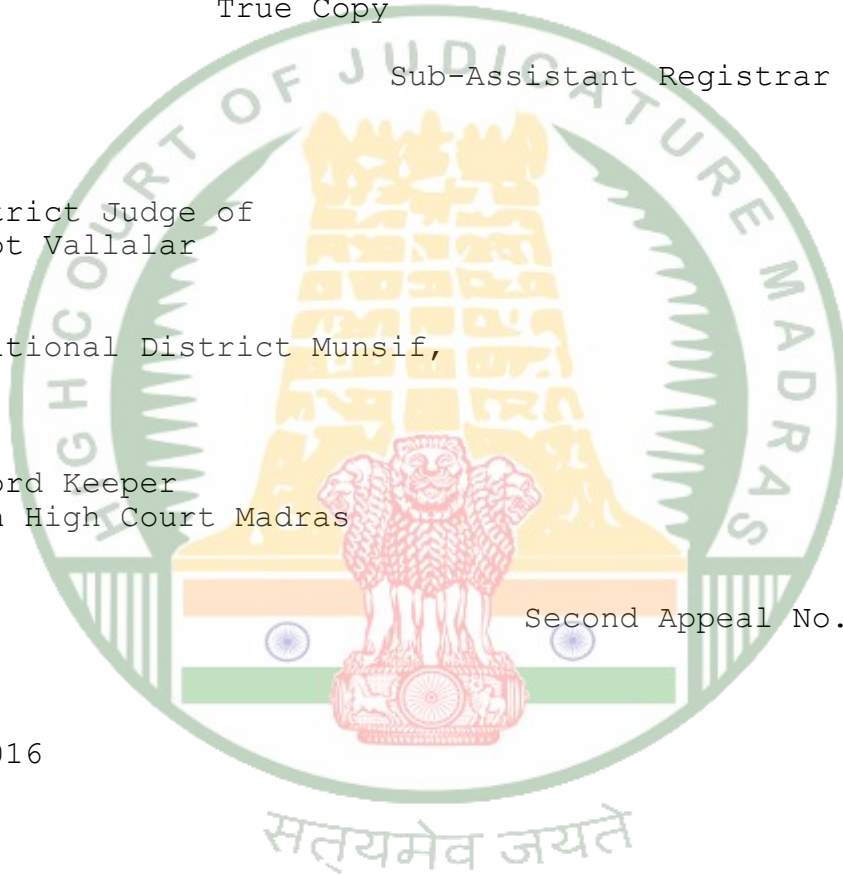
1.The District Judge of
South Arcot Vallalar
Cuddalore

2.The Additional District Munsif,
Cuddalore.

3.The Record Keeper
VR Section High Court Madras

Second Appeal No.502 of 1995

aa27/12/2016



WEB COPY