

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**Reserved on :02.12.2016
Pronounced on :22.12.2016**

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.672 of 2007

1.Selvaraj

2.Jagan

3.Ananth

..Appellants

/vs/

1.Kannan(died)

2.Santhanam

3.Selvam

4.Chinnappan

5.Baskar

6.Chinnadurai

(RR2 to 6 brought on record as
Lrs of the deceased sole respondent
vide order of Court dated 20.03.2014
made in M.P.No.1 to 3 of 2013 in
S.A.No.672 of 2007).

..Respondents

Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 20.06.2006 and made in A.S.No.53 of 2000 on the file of the District Court, Tiruvannamalai, reversing the judgment and decree dated 25.01.2000 in O.S.No.269 of 1991 on the file of the District Munsif Court, Polur.

For Appellants :Mr.R.Subramanian for
Mr.T.R.Rajaraman
For Respondents :Mr.P.Sivamani for R3 to R6
R2-No appearance
R1- died

JUDGMENT

Suit in O.S.No.269 of 1991 filed for declaration and injunction, later, amended for possession was allowed by the trial Court but, the first appellate Court has rejected the claim of the plaintiffs in respect of item Nos.6 and 7, on the ground of adverse possession accrued by the defendant. Aggrieved by the findings of the first appellate Court disallowing the claim on item Nos.6 and 7, the present Second Appeal is preferred by the appellants/plaintiffs.

2. For the sake of convenience in this Second Appeal the parties are described as per their rank and status shown in plaint.

3. The relevant points leading to this appeal are under:-

The suit properties 7 in numbers are the properties of one Kulandaisamy. On 15.03.1990, he settled those properties in favour of his minor grandchildren, who are the plaintiffs 2 and 3. Under the settlement, the first plaintiff was appointed as the guardian of the minors. After the death of Kulandaisamy, his other son and daughter attempted to interfere with the peaceful possession of the plaintiffs. Hence, the suit.

4. The defendant in his written statement contend that the suit property is not the absolute property of Kulandaisamy. It was purchased by joint exertion of joint family property. The said Kulandaisamy has no right to settle the property in favour of the plaintiffs 2 and 3. Even prior to the suit, the properties shown as item Nos. 6 and 7 in the suit schedule are in possession of the defendant. They are house property, but it was wrongly described as vacant land.

5. The trial Court has framed the following issues:

1) Whether the settlement deed dated 15/03/1990 is duly executed and acted upon ?

2) Whether the suit properties are purchased with the joint exertion of the defendant in the joint family is true ?

3) Whether the suit is properly valued ?

4) Whether there is no cause of action for the suit ?

5) To what relief the plaintiffs are entitled ?

6. In the course of trial, on behalf of the plaintiffs, three witnesses were examined as P.W.1 to P.W.3 and 14 documents were marked as Ex.A1 to A14 and the on behalf of the defendant, two witnesses were examined as D.W.1 and D.W.2 and 13 documents were marked as Exs.B1 to B13. The trial Court, after considering the oral and documentary evidence, held that the properties are self-acquired properties of Kulandaisamy. His settlement deed in favour of plaintiffs 2 and 3 is duly proved. Though the defendant had proved the possession in respect of item Nos.6 and 7 of the suit schedule property and he is residing in one of the property, the defendant's possession cannot be considered as lawful possession. So, the plaintiffs are entitled for the relief sought.

7. Aggrieved by the findings of the trial Court, the defendant had preferred A.S.No.53 of 2000 in respect of item Nos.6 and 7 only. The first appellate Court has formulated the following points for determination:-

- 1) Whether the defendant had perfected his title by adverse possession in respect of item Nos.6 and 7 of the suit schedule ?*
- 2) Whether the settlement deed Ex A-7 is valid in respect of item Nos.6 and 7 of the suit schedule ?*
- 3) What relief the appellant is entitled to?*

8. After re-appreciating the facts and evidence, the first appellate Court held that, the defendant has prescribed his title in item Nos.6 and 7 long before Ex A-7. Therefore, Kuladaisamy has no right to settle those properties. The plaintiffs are not entitled for the relief of possession and mandatory injunction for removing the super structure and delivery of vacant possession in respect of item Nos.6 and 7.

9. The plaintiffs being aggrieved by the judgment of the first appellate Court has preferred this second appeal by raising the following Substantial Question of law for consideration:-

"1)Is the learned District Judge right in granting title to defendant by adverse possession, when there is no pleading to that effect ?

2)When the defendant was in possession only as sharer in the suit property, along with other undivided properties from 1972, can his possession be construed as adverse to plaintiffs and his father?"

10. The learned counsel for the appellants submitted that, without pleading and evidence, the first appellate Court has erroneously held that the defendants have perfected their title over the property. which is admittedly stood in the name of Kulandaisamy the father of the first plaintiff/first appellant and the defendant/first respondent. Being a joint family property, the possession of defendant cannot be adverse to the interest of the other co-sharer whatever be the length of his possession. In the absence of pleading and proof of ouster, the first appellate Court ought not to have allowed the first appeal.

11. In support of his submission, he relied upon a judgment of the Hon'ble Supreme Court in ***Bangalore Development***

Authority v. N.Jayamma, dated 10th March 2016, wherein at para 15, it is observed as:

"15. Coming then to the question whether the plaintiffs-respondents could claim adverse possession, we need to hardly mention the well known and oft quoted maxim nec vi, nec clam, nec precario meaning thereby that adverse possession is proved only when possession is peaceful, open, continuous and hostile. The essentials of adverse possession were succinctly summed-up by this Court in Karnataka Board of Wakf v. Govt. of India (2004) 10 SCC 779 in the following words:

11. In the eye of the law, an owner be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is,

peaceful, open and continuous. The possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (Secc S.M.Karim v. Bibi Sakina (Air 1964 SC 1254), Parsinni v. Sukhi (1993) 4 SCC 375 and D.N. Venkatarayappa v. State of Karanataka (1997) 7 SCC 567). Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors tht are tobe accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c)whether the factum of possession was known to the other party, (d)how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse

possession.[Mahesh Chand Sharma (Dr.)v. Raj Kumari Sharma (1996) 8 SCC 128)."

12. The learned counsel appearing for the appellants also relied upon the judgment of the Hon'ble Supreme Court in ***Nandkishore Lalbhai Mehta v. New Era Fabrics Pvt. Ltd and Ors. reported in 2015-II-MCC-6***, wherein, at para 15, it is observed as:

"15. The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constituion Bench of this Court in Bhagwati Prasad v. Chandramaul:

"10..... If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the tile of both parties to the suit are touched, though indirectly or even obscurely, in

the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

13. Per contra, the learned counsel for the respondents submitted that, in the plaint schedule, the description of the properties in item Nos 6 and 7 was not properly described. It was originally alleged by the plaintiffs that those properties are vacant land. Later, they

amended the plaint alleging that the defendant has trespassed into the property and put up a hut. Even such allegation was not specific, but vague without furnishing the date and time of such trespass. Since 1972 the defendant is in possession of the suit items 6 and 7 and he has clearly established through documentary evidences, such as house tax receipts and Electricity consumption card. Therefore, the appellate court has rightly held that the defendant is in peaceful possession of 6th and 7th items of property with the knowledge of the plaintiffs. Therefore, there is no ground to interfere with the findings of the lower appellate Court.

14. To claim adverse possession, the first requisit is "admitting the ownership on others". The second requisit is "animus". In this case, the defendant has pleaded in his written statement that the suit property though stands in the name of his father Kulandaisamy, it is the joint family property, which was purchased out of joint exertion of the family member. The defendant being the eldest son of Kuladaisamy, has contributed in purchasing the suit property. Claiming himself as co-owner, the defendant has lost the right to plead adverse possession. In fact, it was not his pleading at all. It is the first appellate Court which

has gone beyond the pleadings and granted relief, which the defendant is not legally entitled to.

15. The occupation of the defendant is only a permissive occupation and there is no pleading or proof to show that the defendant has expressed his animus of possession in exclusion of the co-owners. Unless the person possessing the land has the requisite animus, the period for prescription does not commence.

16. As put by the Hon'ble Supreme Court, the lower appellate court has breached the Fundamental Rules of Civil Procedure by granting a relief; which was never pleaded, has not been the subject matter of issues nor implicitly seen from the facts and cause of action alleged.

17. Therefore, this Court holds that the judgment of the first appellate Court is against the settled principles of law regarding adverse possession and it is liable to be set aside.

18. In the result, ***the Second Appeal is allowed.*** The

judgment and decree of the first appellate Court in A.s.No.53 of 2000 dated 20.06.2006 is set aside and the judgment and decree of the trial Court in O.S.No.269 of 1991 dated 25.01.2000 is restored. No order as to costs.

22.12.2016

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Index:Yes/No

Internet:Yes/No

To

The District Court, Tiruvannamalai.

The District Munsif Court, Polur, Tiruvannamalai District.

Dr.G.Jayachandran, J.

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Judgement made in
S.A.No.672 of 2007

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