

HON'BLE SMT JUSTICE ANIS
SECOND APPEAL No.784 OF 2001

J U D G M E N T:

This Second Appeal is directed against the judgment and decree dated 10.04.2001, passed in A.S.No.12 of 1983, by the Senior Civil Judge, Adoni, whereby and whereunder the learned Senior Civil Judge has dismissed the appeal confirming the judgment dated 28.02.1983, passed in O.S.No.249 of 1981, by the Principal District Munsif, Adoni.

Originally, the first appellant herein is the plaintiff and respondent herein is the defendant in O.S.No.249 of 1981. The parties hereinafter will be referred to as they are arrayed before the trial Court for the sake of convenience.

The brief averments made in the plaint in O.S.No.249 of 1981 are that the plaintiff is the owner of the plaint schedule house having inherited from his father Late Abdul Kareem Sab. To the west of the main house No.83/14, there is a motor shed and plaintiff's father was attending to repair some motor, lorries, cars etc., there. The said motor shed was admeasured 1200 Sq. feet. During the life time of his father, there was a zinc shed in the varandah occupied and there was a store room attached to the shed. The shed had a gate and doors and the same was in occupation of the plaintiff's father. Municipality assessed the property and is collecting taxes for several years and assigned separate door numbers to the shed as Nos.83/2 and 83/3 in the 14th Ward of Adoni Municipality. Plaintiff is in possession of the suit schedule property and prior to his possession, his ancestors were in possession. The defendant Municipality objected about the existence of the shed and pointed out it to be an

encroachment. The Municipality all along treated the plaintiff schedule property as private property of the plaintiff and was collecting taxes over the same. Plaintiff's father executed a Will deed during his life time in the year 1967 in which he referred the plaintiff schedule property as his private property. According to the plaintiff he is in possession and enjoyment of the plaintiff schedule property continuously, uninterruptedly and perfected his title by adverse possession. On 15.11.1980 the defendant issued a notice stating that the said shed is an encroachment and thereafter also issued notices on 05.06.1981 and 20.06.1981 calling upon the plaintiff to demolish the structures. The plaintiff came to know that the plaintiff schedule property is demarcated as a public property in the survey records and plaintiff encroached the same and according to the plaintiff no survey was conducted in the 14th ward and no notice of survey was given to the plaintiff. Even if there is a survey, it is not binding on the plaintiff and is an *ex parte* survey. As the defendant Municipality tried to interfere with the plaintiff's peaceful possession of the plaintiff schedule property, plaintiff constrained to file the suit for declaration and for grant of permanent injunction.

The sole defendant Municipality filed a written statement and denied that the plaintiff is the absolute owner of the plaintiff schedule property having inherited from his father. The defendant also denied that the Adoni Municipality assessed the shed and imposed property tax and denied the allegation that plaintiff had perfected his title by way of adverse possession. According to the defendant, they have issued provisional and confirmatory notices on 15.11.1980, 05.06.1981 and 20.06.1981 respectively, when the town planning staff during the regular rounds in the town noticed unauthorized construction and encroachment by the plaintiff.

According to the defendant, the schedule property is a part and parcel of the public street and plaintiff encroached upon the same and constructed the shed. The defendant denied the allegation that no survey was conducted in 14th ward of Adoni and that no notice under Surveys and Boundaries Act was served on the plaintiff or the predecessors in title. According to the defendant, Adoni town as a whole was surveyed for the years 1942 and 1947. Notices under Survey and Boundaries Act will be served on those people, who were found to be encroached on the property. As the plaintiff or his predecessors in title have not encroached on the suit site during that period, no notices were issued to the plaintiff or his predecessor. It is only recently the plaintiff encroached on the public site and constructed the building under the reference. Even if there is a reference to the suit site in the Will deed, it does not *ipso facto* create any right to the plaintiff. Plaintiff's father did not have any right to bequeath the property, which does not belong to him and plaintiff cannot claim the same. Plaintiff is not entitled for declaration and injunction. No cause of action is accrued to the plaintiff to file the suit and finally prayed the Court to dismiss the suit.

Basing on the pleadings, the trial Court framed four issues. To prove his case, the plaintiff got examined five witnesses and marked twenty documents on his behalf. On behalf of the defendant Municipality, DW.1 was examined. After considering the oral and documentary evidence, the trial Court held that there is no evidence to show that the suit shed was in existence at the time of street survey conducted by Survey Department for the years 1942 and 1947 and further plaintiff failed to prove that he perfected his title to the suit property by way of adverse

possession and dismissed the suit with costs.

Aggrieved by the judgment of the trial Court, the plaintiff filed A.S.No.12 of 1983 on the file of the Senior Civil Judge's Court, Adoni. On 10.04.2001, the said appeal was dismissed by the said Court confirming the judgment of the trial Court passed in O.S.No.249 of 1981 dated 28.02.1983 on the ground that the plaintiff failed to prove that himself and his father were enjoying the suit property to the knowledge of the real owner openly, peacefully and in hostile to the interest of the real owner for more than 12 years and held that plaintiff failed to prove that he perfected his title by way of adverse possession.

Aggrieved by the concurrent findings of both the Courts below, the plaintiff filed this second appeal. On 21.09.2001, this Court admitted the appeal on the following substantial questions of law:-

1. Whether lower appellate Court committed illegality in observing that there is no pleading that the appellant and his ancestors had perfected their title by adverse possession as against the Municipality when there is a specific pleading to the effect that the appellant and his ancestors had enjoyed the suit site openly, continuously, uninterruptedly against the Municipality?
2. Whether the appellate Court committed illegality in making observations without looking into the pleadings and thereby rejecting the case of the appellant?
3. Whether the appellate Court was correct in not acting upon the registered Will Ex.A20 executed by the father of the appellant on the ground that no Mohammedan can bequeath more than 1/3rd share of his properties?
4. Whether the appellate court was correct in rejecting the will as more than 1/3rd of the property

was bequeathed by the testator as that may be a ground for the other heirs to question it but that cannot be a ground to consider the same to establish the adverse possession?

Learned counsel appearing for the appellants argued that the first appellant is the owner of the plaint schedule property and he inherited the said property from his father and suit schedule property is consisting of a shed situated on the west road of the main house bearing No.83/14 and during the life time of his father, his father used to attend the repair work of motors, lorries, cars etc. After his death, the said shed was in occupation and enjoyment of the appellants. The defendant Municipality assessed the said shed and was collecting the taxes and it also assigned separate door numbers as 83/2 and 83/3. It is also argued that the first appellate Court without considering the pleadings held that there was no pleading that plaintiff and his ancestors perfected their title by way of adverse possession against the Municipality and thus erred in dismissing the appeal without going into the pleadings in the plaint. Thus, the first appellate Court committed illegality in making the observation and it needs interference, therefore, prayed the Court to remand the matter to the first appellate Court. It is also argued that against the judgment dated 09.03.1988 passed in A.S.No.12 of 1983, the defendant Municipality filed S.A.No.541 of 1989 and in that Second Appeal, the defendant has not pressed ground Nos.3 & 4 with respect to the alleged Will deed executed by his father being in violation of the Muslim Personal Law and finally prayed the Court to allow the second appeal.

On the other hand, learned counsel appearing for the respondent argued that the suit schedule property belongs to

Adoni Municipality and during the course of survey it was not noticed about the encroachment taken place between the years 1942 and 1947 and the plaintiff and his father encroached the land abutting their house on the west side without any manner of right. Further, the plaintiff in the plaint contended that the suit schedule property is a private property and his father bequeathed the same under a Will deed in the year 1967 and plaintiff must prove his title to the suit property and finally argued that the Municipality at no point of time assessed the suit schedule property for the purpose of tax and finally prayed the Court to dismiss the appeal.

Now, the point that arise for consideration in this appeal is whether the appellant proved that there is any substantial question of law involved in this appeal?

P O I N T: Appellant is the plaintiff filed the suit for declaration and for grant of permanent injunction on the ground that his father late Abdul Kareem Sab was the owner of the house bearing No.83/14 and after his death, he inherited the said house. It is also specifically pleaded that one motor shed admeasuring 1200 Sq. feet situated to the west of the main house was constructed by his father and Municipality assessed the said property (mechanic shed) along with the main house and was collecting taxes for several years and also assigned separate door numbers to the shed as 83/2 and 83/3 in 14th ward and now the defendant is interfering with the title and possession over the said property. Hence, he filed the suit.

The defendant Adoni Municipality specifically pleaded that the shed is situated in the Municipal land and plaintiff is an unauthorized person encroached the said land and when the survey was conducted by the Municipality for the years 1942 to

1947 notices were served on the encroachers. As the plaintiff and his predecessors were not in possession of the said shed and not encroached on the property by that time, no notices were served under the Survey and Boundaries Act. Recently the plaintiff encroached upon the public land and erected the shed. It is also specifically pleaded that plaintiff's father had no right to bequeath the property belonging to the Municipality and plaintiff has no right and title over the said property. To prove the plaintiff's case, he examined four witnesses as PWs.2 to 5 and also got marked twenty documents as Exs.A1 to A20. Exs.A1 to A17 are the tax receipts for the door Nos.XVII-69, XIV-83, XIV-84 etc. If really the plaintiff is paying taxes to the shed, there is no documentary evidence produced by the plaintiff to show when the said shed was assessed for tax by the Adoni Municipality and when demand notice for payment of tax was issued. According to the plaintiff, this shed is situated on the west of his house bearing No.83/14 and he says that Adoni Municipality gave house numbers to the shed as 83/2 and 83/3. Even if plaintiff is in possession of the said shed, the documentary evidence Exs.A1 to A17 are silent that he paid tax to the shed bearing Nos.83/2 and 83/3 situated in 14th ward of Adoni Municipality. It is the general principle that the burden of proof lies on the plaintiff to prove that he perfected his title to the shed by way of adverse possession.

The concept of adverse possession contemplates an hostile possession i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Plaintiff must establish clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.

In the plaint, the plaintiff pleaded that his possession and enjoyment in respect of the suit schedule property was open, continuous, visible, hostile and uninterrupted to the view of the Municipality and to one and all without any let or hinderance from any one. He has perfected his right by adverse possession in addition to his having the document.

Plaintiff admittedly not pleaded that Municipality is the owner of the property. His claim is that he inherited the house and shed from his father through a Will deed. The learned counsel for the appellant argued that after remand by this Court in S.A.No.541 of 1989, the first appellate Court has not considered properly the evidence on record and held that plaintiff has not pleaded that the plaintiff perfected his title by way of adverse possession. A perusal of the contents of the plaint shows that plaintiff pleaded that he perfected his title by way of adverse possession. But the first appellate Court held that plaintiff failed to plead specifically a particular date from which his father and himself have been enjoying the suit property (shed) to the knowledge of the real owner i.e., Municipality knowingly and peacefully without having any interruption. A perusal of the findings of both the Courts below shows that they categorically held that plaintiff failed to prove that he perfected his title by way of adverse possession. Therefore, the contention of the learned counsel for appellants that matter has to be remanded to the first appellate Court does not arise. Even the documentary evidence produced by the plaintiff failed to prove that suit schedule property i.e., shed was assessed by the Municipality and house numbers were allotted as 83/2 and 83/3 in 14th ward of Adoni Municipality and plaintiff is paying tax to the Adoni Municipality. The plaintiff also failed to prove that he perfected his title by way of adverse possession. Further, plaintiff

has taken specific plea that suit schedule property is his ancestral property and the said property was devolved on him under a Will deed. If the plaintiff's contention is acceptable, he cannot claim that he perfected his title to the suit property by way of adverse possession. Both the Courts below after going through the evidence on record concurrently gave a finding to the effect that plaintiff is not entitled for declaration and permanent injunction. Thus, the concurrent findings of both the Courts below need no interference and appellant failed to prove that there is substantial question of law involved in this appeal and hence, the appeal is devoid of merits and is liable to be dismissed.

Accordingly, the second appeal is dismissed. No order as to costs.

Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

ANIS, J

Date: .07.2016
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