

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 02.02.2018
CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1390 of 1991

- 1.Nagappan (died)
- 2.Ellammal
- 3.Ellappan
- 4.Muthukrishnan

(Appellants 2 to 4 brought on record
as LR of the deceased 1st appellant
vide CMP.No.7743/96
dated 24.7.97 by EPJ) ... Appellants/Defendants

Vs.

- 1.Mayavan
- 2.Anjalai
- 3.Ramamurthi
- 4.Gangayi
- 5.Rajalingam
- 6.Venkatesan (Died)
- 7.Saraswathi
- 8.Sathyamurthi
- 9.Sathyavani
- 10.Sathya Kumar
- 11 Sathyakala

(RR7 to 11 brought on record as LRs of the deceased R6 vide
order of court dated 08.12.2016 made in CMP No.902 to 904 of
2010 in SA 1390 of 1991)

(R11 declared as major and her mother Sarawathy discharged from
the guardianship vide order of court dated 08.12.2016 made in
CMP 905/10 SA 1390/1991) ... Respondents/Plaintiffs

Prayer:

Second Appeal filed under Section 100 of C.P.C. against
the judgment and decree passed in A.S.No.11 of 1991 dated
29.4.91 on the file of the learned Subordinate Judge, Cuddalore
reversing the judgment and decree passed in O.S.No.328 of 1989
dated 5.10.90 on the file of the learned District Munsif,
Cuddalore.

For Appellants : Mr.S.Kingston Jerold
For Respondents: Ms.V.Srimathi for R1 to R3 and R6
R4 and R5 - Died

J U D G M E N T

The appellants 2 to 4 herein are the legal heirs of the first appellant viz., Nagappan, who is the sole defendant in O.S.No.328 of 1989 on the file of the learned District Munsif, Cuddalore. The defendant succeeded the case before the lower Court, however, lost the case before the lower Appellate Court. Hence, this second appeal.

2.The case of the plaintiffs is as follows: The suit schedule properties originally belonged to one Thangammal and his brother Jayakanthan. On 30.01.1957, on Subbaroyan Vahairs purchased the property from Thangammal Vahairs and they were in possession of the property. The said Subbaroyan and one Ranganathan are brothers. Thereafter the said Subbaroyan died leaving behind plaintiff nos.1 to 3 as his legal heirs and the said Ranganathan also died leaving behind plaintiff nos.4 to 6 as his legal heirs. Thereafter due to employment, the plaintiffs went to different places and taking advantage of the non-availability of the plaintiffs in the suit schedule property, the defendant encroached the property. Hence, on 19.03.1989 the plaintiffs caused a legal notice on the defendant and thereafter filed suit for declaration and mandatory injunction.

3.The case of the defendant is as follows: The defendant denied the sale deed dated 30.01.1957. According to the defendant, the property belonged to one Kannammal and he purchased the property from the said Kannammal in the year 1952 for a sale consideration of Rs.90. Thereafter, he is in continuous possession of the property and thereby acquired adverse possession and in order to defeat the rights of the defendant, the plaintiffs have filed the vexatious suit against the defendant.

4.After hearing both sides, the lower Court dismissed the suit and held in favour of the defendant. Aggrieved by the same, the plaintiffs filed appeal before the lower Appellate Court. The lower Appellate Court reversed the order passed by the lower Court and decreed the suit in favour of the plaintiffs, against which, the present second appeal is filed.

5. At the time of admission of the second appeal, this Court framed the following substantial questions of law:

"1. Whether the plea of adverse possession has to be rejected if title alone is proved without proving possession?

2. Has not the Appellant established title by adverse possession by proving possession for over the statutory period?

3. Whether the respondents have established title especially when the title of their vendors has not been proved?"

6. The learned counsel appearing for the appellants would submit that the first appellant purchased the property in the year 1952 orally for a valuable sale consideration from one Kannammal. He further submitted that in order to prove his title, the first appellant produced documents relating to invitation for ear borne function, school certificate, postal card and family card and after considering these documents and evidence of P.W.1, the lower Court dismissed the suit

and without considering the well written judgment of the lower Court, the lower Appellate Court reversed the findings and held in favour of the plaintiffs. Since the defendant established the adverse possession before the lower Court with the above said documents the lower Court dismissed the suit against the plaintiffs, however, the lower Appellate Court after erroneous consideration granted decree in favour of the plaintiffs which is not sustainable in law. Accordingly, he prayed for allowing the appeal.

7. The learned counsel appearing for the respondents would submit that the requirement of proving adverse possession has been elaborately discussed in the decision of the Hon'ble Apex Court reported in (2007) 6 Supreme Court Cases 59 (P.T. Munichikkanna Reddy and others Vs. Revamma and others).

8. Heard the arguments advanced on either side and perused the materials placed on record.

9. It is useful to extract hereunder the relevant portion of the decision of the Hon'ble Apex Court reported in (2007) 6 Supreme

Court Cases 59 (P.T. Munichikkanna Reddy and others Vs. Revamma and others):

"20. While dealing with the aspect of intention in the adverse possession law, it is important to understand its nuances from

varied angles.

21. Intention implies knowledge on the part of adverse possessor. The case of Saroop Singh v. Banto [(2005) 8 SCC 330] in that context held:

"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak.)

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. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

22. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in Karnataka Board of Wakf v. Government of India [(2004) 10 SCC 779] in the following terms: (SCC p.785, para 11)

"Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be 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"

23.It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner.

24.In *Narne Rama Murthy v. Ravula Somasundaram* ((2005) 6 SCC 614), this Court held:

"However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter." (emphasis supplied)

25.The test is, as has been held in the case of *R. v. Oxfordshire County Council* (1999) 3 WLR 160: (All ER p.393-e)

"... *Bright v. Walker* (1834) 1 CM&R 211, 219, 'openly and in the manner that a person rightfully entitled would have used it. . .' The presumption arises, as

Fry J. said of prescription generally in Dalton v. Angus & Co. (1881) 6 App Cas 740, App Cas at 773, from acquiescence."

26.The case concerned (at All ER p.388e) interpretation of Section 22(1) of the Commons Registration Act, 1965. Section 22(1) defined "town or village green" as including:

land on which the inhabitants of any locality have indulged in lawful sports and pastimes as of right for not less than 20 years.

27.It was observed that the inhabitants' use of the land for sports and pastimes did not constitute the use "as of right". The belief that they had the right to do so was found to be lacking. The House held that they did not have to have a personal belief in their right to use the land. The Court observed: (All ER p.395e-f)

"... [the words 'as of right'] import the absence of any of the three characteristics of compulsion, secrecy, or licence - 'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements...."

28.Later in Beresford, R (on the application of) v. City of Sunderland (2003) 3 WLR 1306, same test was referred to.

29.Thus the test of nec vi, nec clam, nec precario i.e., "not by force, nor stealth, nor the licence of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession.

30.In Karnataka Wakf Board the law was stated, thus: (SCC p.785, para 11)

"11.In the eye of law, an owner would 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 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 must be adequate in continuity, in publicity and in extent to show that their 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. (See : S.M. Karim v. Bibi Sakina AIR 1964 SC 1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D.N.Venkatarayappa v. State of Karnataka (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 that are to be 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 true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

2. Inquiry into the particulars of Adverse Possession

31. Inquiry into the starting point of adverse possession i.e. dates as to when the paper owner got dispossessed is an important aspect to be considered. In the instant case the starting point of adverse possession and other facts such as the manner in which the possession operationalised, nature of possession: whether open, continuous, uninterrupted or hostile possession, have not been disclosed. An observation has been made in this regard in S.M. Karim v. Bibi Sakina (AIR 1964 SC 1254): (AIR p.1256, para 5)

"Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for 'several 12 years' or that the plaintiff had acquired 'an absolute title' was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea." (emphasis supplied)

32. Also mention as to the real owner of the property must be specifically made in an adverse possession claim.

33. In Karnataka Wakf Board, it is stated: (SCC pp.785-86, para 12)

"12.A plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In P. Periasami v. P. Periathambi (1995) 6 SCC 523 this Court ruled that: (SCC p.527, para 5)

'Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property.'

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar (1996) 1 SCC 639 that is similar to the case in hand, this Court held: (SCC oo.640-41, para 4)

'4.As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec

clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant'."

(emphasis supplied)

3. New Paradigm to Limitation Act

34. The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has undergone complete change insofar as the onus is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. The ingredients of adverse possession have succinctly been stated by this Court in *S.M. Karim v. Bibi Sakina* (AIR 1964 SC 1254) in the following terms:

"Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found"

(See also *M. Durai v. Muthu*.)

35. The aforementioned principle has been reiterated by this Court in *Saroop Singh v. Banto* stating:

"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See *Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak*)

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. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

36. In Mohammadbhai Kasambhai Sheikh v. Abdulla Kasambhai Sheikh (2004) 13 SCC 385, this Court held:

"But as has been held in Mahomedally Tyebally v. Safiabai the heirs of Mohammedans (which the parties before us are) succeed to the estate in specific shares as tenants-in-common and a suit by an heir for his/her share was governed, as regards immovable property, by Article 144 of the Limitation Act, 1908. Article 144 of the Limitation Act, 1908 has been materially re-enacted as Article 65 of the Limitation Act, 1963 and provides that the suit for possession of immovable property or any interest therein based on title must be filed within a period of 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. Therefore, unless the defendant raises the defence of adverse possession to a claim for a share by an heir to ancestral property, he cannot also raise an issue relating to the limitation of the plaintiff's claim."

37. The question has been considered at some length recently in T. Anjanappa and Others v. Somalingappa [(2006) 7 SCC 570], wherein it was opined :

"21. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable."

(See also Des Raj and Ors. v. Bhagat Ram;

Govindammal v. R.Perumal Chettiar)

10.The Hon'ble Apex Court has elaborately discussed the requirement for proving adverse possession. However, the appellant did not produce any of the requirement as elaborated in the decision of the Hon'ble Apex Court except self serving documents which were marked before lower Court.

11.On the other hand the respondents/ plaintiffs marked the title deed which was purchased in the very same suit schedule property from one Thangammal vahairs for the valuable consideration. When the title deed is marked by the respondents/ plaintiffs, no document was marked by the defendant either with regard to the title or for proving adverse possession except the documents relating to invitation for ear borne function, postal card and family card.

12.In the absence of any document with regard to the title or for proving adverse possession, I do not find any error in the order passed by the lower Appellate Court. Accordingly, the substantial questions of law are answered against the appellants and the second appeal is dismissed.

13.In the result, the second appeal is dismissed. The judgment and decree passed in A.S.No.11 of 1991, dated 29.04.1991 on the file of the learned Subordinate Judge, Cuddalore, is confirmed. No costs.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Judge, Cuddalore.

2.The District Munsif, Cuddalore.

+1 cc to Mr.S.K.Rakhunathan Advocate sr 7749

S.A.No.1390 of 1991

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