

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S.No.214 of 1998

JUDGMENT:

This appeal is filed by the unsuccessful plaintiffs against the judgment and decree dated 17.09.1997 passed in O.S.No.183 of 1995 by the Subordinate Judge, Avanigadda, Krishna District.

The suit O.S.No.183 of 1995 was originally filed as O.S.No.123 of 1992 on the file of the Subordinate Judge, Machilipatnam. It is filed by one Sri Yenduri Srinivasa Rao and Yenduri Venkateswara Rao against the defendants for a declaration of the first plaintiff's title to the property and for an injunction restraining the defendants from interfering with the plaintiffs possession of the property. The claim of the first plaintiff is that he is the adopted son of Smt. Lakshmi Tayaramma and Yenduri Gopala Krishnaiah. According to the first plaintiff, after the death of Gopala Krishnaiah, he was adopted by Lakshmi Tayaramma in 1978. The defendants are the legal representatives of late Y. Gopala Krishnaiah and Tayaramma. The plaintiff claims title to the property both by virtue of the adoption and also by pleading adverse possession against the defendants.

The defendants 2 and 4 filed a written statement denying the entire case set up by the first plaintiff. Basing on the pleadings, the lower Court framed six issues:

1. Whether the 1st plaintiff is the adopted son of Smt. Lakshmi Tayaramma?
2. Whether the 2nd plaintiff is the cultivating tenant of the 1st plaintiff?
3. Whether the 1st plaintiff has title to the plaint schedule property?
4. Whether the 1st plaintiff is entitled for declaration?
5. Whether the plaintiffs are entitled to injunction?
6. To what relief?

Based on the pleadings and the issues, the parties went to trial. For the plaintiffs, PWs.1 to 6 were examined and Exs.A.1 to A.61 were marked. For the defendants, DWs.1 to 3 were examined and Sri Exs.B.1 to B.6 were marked. After the trial, the lower Court dismissed the suit. It is this judgment of the lower Court that is now assailed in the present appeal.

This Court has heard Sri P.R. Prasad, learned counsel for the appellants/plaintiffs and Sri S. Satyanarayana Prasad, learned senior counsel on behalf of Smt.C. Sindhu Kumari, learned counsel for 3rd respondent/3rd defendant.

As can be seen from the issues that are framed and based on the submissions of the learned counsel during the course of hearing, the two essential points which arise for determination are i) whether the first plaintiff has proved the adoption by Lakshmi Tayaramma and consequently his title; and ii) whether the first plaintiff has title to the property by virtue of adverse possession. These two points will take into their fold issues 1, 3 and 4 that are framed in the lower

Court. Both the learned counsel also concentrated on these two issues/points during their oral submissions.

The first and foremost point that was urged based on the first plaintiff's case that he is the adopted son of Gopala Krishnaiah and Lakshmi Tayaramma. As can be seen from the pleadings about which there is no serious dispute Sri Gopala Krishnaiah owned the suit schedule properties and other properties. He executed a Will in 1945 in which his wife Lakshmi Tayaramma was given a power to adopt children. According to the plaint, in February 1978, the first plaintiff was adopted by Lakshmi Tayaramma and she died within two months of the said adoption. Therefore, the first plaintiff claims title to the suit schedule property.

It is an admitted case that there is no formal deed of adoption and that the first plaintiff on whom the burden lies has to prove the adoption that he has pleaded. He stated that the 'ceremony of adoption' took place on 27.02.1978 in the presence of relatives (para-4 of the plaint). To prove the adoption, the first plaintiff filed Ex.A.1-lagna patrika and Ex.A.2- invitation card and also stated that pursuant to the said adoption, he took possession of the property and that the cist receipts which are filed clearly show that he is the adopted son of late Lakshmi Tayaramma. Therefore, it is his contention that even if there is no need of formal deed of adoption; a valid adoption was proved by establishing the factum of giving the child and taking the child through oral

evidence. He relied upon **S.V. Subbaiah Sarma v. K. Galib Saheb**¹ and argued that the oral evidence on record is enough to prove the adoption. He states that the evidence of PWs.2 to 6 apart from his oral evidence establishes the adoption.

In reply thereto, the learned counsel for the respondents/defendants argues that the entire theory of adoption is set up by the first plaintiff to grab the property of the deceased-Lakshmi Tayaramma and her husband. The learned counsel points out that the invitation card which is meant to invite people to a function does not contain any address or the name/details of place where the function is being held. He points out that even the lower Court noticed this important fact viz., the invitation card does not have any details whatsoever to prove the location of the function. In addition, the learned counsel also argues that the documentary evidence that is filed in this case is not enough to justify the finding of adoption. Ex.A.3 is a document that is relied upon by the first plaintiff to show that his father filed a guardian OP (GWOP No.106 of 1980) to protect the interest of the minor/first plaintiff during his minority. In that guardian OP itself, the respondents pleaded that there is no adoption at all at any point of time. In the light of that evidence, the Additional District Judge, Machilipatnam clearly held as follows in Ex.A.3-judgment dated 25.11.1981 in GWOP No.106 of 1980:

¹ 1997 (4) ALT 274

“I am however of the opinion that there is no necessity to give any finding regarding the truth and validity of the adoption in these proceedings since that is not the issue involved. The petitioner wants to confer upon him a legal status in order to represent the minor in the legal proceedings which may be initiation the future. I am therefore inclined to allow the petition only to the extent of appointing the petitioner as the guardian of the person, property if any of the minor. I may make it clear that this order does not confer the status of an adopted son on the minor Sri Srinivasa Rao. This order is made only to enable the petitioner to prosecute his legal remedies if any before legal forms. The rights of the second respondent’s wife accrued in the ‘B’ schedule or other properties of late Gopalakrishnaiah if any have to be established in appropriate civil proceedings. For those reasons, I am not inclined to refer to the evidence regarding the adoption.”

The learned counsel points out that in view of this finding, the first plaintiff’s case is not proved. The learned counsel for the respondents also points out that in the cross-examination of PW.2, he states that one Aachari prepared Ex.A.1-lagna patrika. But the said lagna patrika marked in Ex.A.3-judgment, dated 25.11.1981 in GWOP No.106 of 1980 as a document of Ex.A.22 shows that it is written by Tangiralla Punnaiah Hanumath Sastry. In addition, the learned counsel points out the following aspects from the cross-examination of PW.1:

“I studied up to Graduation. In my academic records, I am described as son of Subba Rao, but in the voters list. I am described as son of Gopala Krishnaiah. I tried to get my father’s name changed in the records, but it was not done as the authorities required order from the court. I did not obtain any decree declaring that I am adopted son of Gopala Krishnaiah. I applied

to the revenue authorities for getting the revenue records mutated in my name after I became major. I did not file those documents. I did not know whether a mutation was effected, though a mutation was affected, though applied 7 years ago.”

Similarly, he points out that even in the civil supplies card, his name is shown as the member of the elder brother's family only. The learned counsel argues that if an adoption actually took place in 1978, there would have been voluminous record to support the same. Even when the witness deposing in 1997, there is no documentary evidence filed to show that PW.1 is the adopted son of Gopala Krishnaiah and Tayaramma. Neither the voters list, nor the revenue records nor the college records are produced to show that the plaintiff's name was recorded as the son of Gopala Krishnaiah, after the alleged adoption.

Next, the learned counsel for the appellants points out that as PW.1 was a minor by 1978 he will not have personal knowledge of the adoption, but according to the learned counsel, the evidence of PW.2 is important to prove the adoption. PW.2 states he was personally present and gave PW.1 in adoption. The learned counsel argues that PW.1 was given adoption by this witness (PW.2) and so the evidence of witness is credible in proving the adoption. In reply thereto, the learned counsel for the respondents clearly points out that as per the cross-examination of PW.2, neither the teachers nor the immediate relatives by name Ganga Raju, Sri

Hari etc. (brother of mother-Lakshmi Tayaramma etc.) were invited to the function. He also points out that the cross-examination on 01.04.1997 of PW.1 reveals the following:

“I have not produced any evidence to show that the adoption took place in my house. I cannot remember the names and relationship of the persons attended that function, so also the names of philosophical guru and his reciples attended the ceremony. Except the ceremonies stated in my chief examination, I cannot say the other details of adoption. No other ritual was observed.”

In addition, this witness also admits in the cross examination as follows:

“I have purchased the property on behalf of PW.1. Those documents would describe PW.1 as the adopted son of Gopalakrishnaiah. In the voters list also, PW.1 is described as my son, so also in the ration card. In addition, he admits that PW.1 was married after Upanayanam and in the said invitation card also, PW.1 is described as the son.”

The learned counsel for the respondents argued very strongly that apart from the absence of a deed of adoption, these important admissions cut at the very root of the first plaintiff's case and that the adoption is not proved.

This Court after a review of the evidence both oral and documentary notices that a) Exs.A.1 & A.2 do not by themselves prove that the adoption took place. b) in the absence of a formal deed of adoption, contemporaneous documents would have been useful to throw light on the fact that the adoption had took place and that the first plaintiff was actually adopted. No records or college records/school records were produced to support the version that PW.1 was

actually adopted and his adopted father's name was entered therein.

The clear and categorical admissions of the witnesses which have a bearing on this are as follows:

PW.1 admits in his evidence that the academic record describes him as the son of Subba Rao. He also admits that he applied for mutation of his name but the same is not produced. In the civil supplies card, his name is shown as member of the elder brother's family. The admission of PW.2 is that even after the adoption, he purchased the properties and that the said title deed shows PW.1 as his son. In the voters list, ration card, PW.1 is shown as the son of PW.2. Even after the upanayanam, an invitation card was printed for the marriage of PW.1 and this also shows that he is the son of PW.2 only.

There is a huge gap from 1946 (death of Gopalakrishnaiah) till the pleaded adoption in 1978. No explanation is forthcoming for this three decade delay for the so called adoption. This Court also notices that Tayaramma's brother Sesha Gangaraju was shown as the 2nd respondent in the said guardian OP and he vehemently opposed the adoption. Neither Gangaraju nor the other brother Hari were invited for the adoption. The invitation card does not disclose the venue of the adoption. On a cumulative reading of these factors, this Court is of the opinion that the adoption is not proved and the oral evidence introduced does not inspire any

confidence. There are no relatives at the function. Even after the so-called adoption, the sale deeds, voters list, educational records and even the wedding invitation of PW.1 do not disclose the fact that he was adopted. Therefore, for all the above reasons, this Court holds that PW.1 could not prove this adoption of Tayaramma. This coupled with the fact that within two months of the said adoption she died leads this Court to the conclusion that the adoption was set up to claim the property.

The next question that arises for consideration is whether the first plaintiff has proved the acquisition of title to the property by 'adverse possession'. The pleadings in the plaint are that the first plaintiff is in possession of the property since 1978 and adversely to the legal representatives of late Y. Gopala Krishnaiah and his wife Lakshmi Tayaraamma in their own rights. *Noc-vic, noc-clam and noc-pre cario* they acquired by rights for adverse possession. This is pleaded in para-8 of the plaint. Again in para-12, it is repeated. The defendants strongly denied the plea of adverse possession. The learned counsel for the plaintiffs argues that his client's possession is proved by the voluminous record that he has filed and also from the admissions made by the witnesses in their oral evidence. The first plaintiff, according to the learned counsel, filed the passbook and cist receipts paid over a period of time to show his possession of the property. The learned counsel also argues that DW.1 also

admitted that the first plaintiff was in possession to the property from 1980. The learned counsel also argues that the cist receipts that are filed to show that the first plaintiff is adopted son of Y. Gopala Krishnaiah. The learned counsel for the appellants/plaintiffs argues that his client has discharged the burden of proving that his client has been in possession and enjoyment of the property. Therefore, the learned counsel argues that his case is proved. He relied upon the judgment of a learned single judge of this Court reported in ***K. Rajeshwar Reddy and others v. N. Laxmikantam***² and also relied upon the judgment of the Hon'ble Supreme Court of India reported in ***L. N. Aswathama v. P. Prakash***³ and argues that the case of adverse possession has been sufficiently proved and on the strength of the same, his client is entitled to maintain the suit for a declaration and for an injunction. The possession of property over the statutory period has been established in this case, as per him.

In reply thereto, the learned counsel for the respondents argues that a person claiming adverse possession has no equities in his favour and that his conduct should be very carefully viewed. He also argues that mere possession over the long period is not enough to show the acquisition of title by adverse possession. The possession should be coupled with the hostile animus or the intention to possess the property with a view to claim ownership of the same. The

² 2002 (3) ALD 731

³ (2009) 13 SCC 229

learned counsel also argues that the pleas taken by the first plaintiff in this case are not mutually inconsistent and are 'destructive' of each other. He also argues that the case law cited in **L. N. Aswathama** (3 supra) also supports his plea.

This Court on an examination of the pleadings and legal issues raised finds that the lower court rightly noticed this issue about the mutually inconsistent pleas. The first plaintiff has claimed title to the property by virtue of his adoption and also by virtue of his possession adverse to the reversioners (Paras-8 and 12 of the plaint). This is a plea that is mutually destructive. By claiming title on the basis of the adoption the first plaintiff has stated that Tayaramma is the owner of the property and that by virtue of the valid adoption, he has succeeded to the estate. The plaintiff's next argument is that by virtue of the open hostile possession with animus over the statutory period, his title is established vis-à-vis the defendants. The plaintiff cannot take both the stands. He can either plead about the title of Tayaramma and his subsequent acquisition of the said title by virtue of the adoption in February, 1978 or he can plead that by virtue of the open hostile possession alone the title of the reversioners of Gopalakrishnaiah is now defeated. His pleading is thus inconsistent. Even in the judgment relied upon by the learned counsel for the appellants in **L. N. Aswathama** (3 supra), the Hon'ble Supreme Court has squarely held that the plea based on title and adverse possession are mutually

inconsistent and later does not begin until the first is given up. Inherent in a plea of adverse possession is an acknowledgement that the opposite party had title but the same was lost due to open; hostile possession. In **Karnataka Board of Wakf v. Government of India**⁴, the Hon'ble Supreme Court held in para-12 as under:

"12. Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See: **S M Karim v. Bibi Sakinal** MANU/SC/0236/1964 : [1964]6SCR780). In **P Periasami v. P Periatthambi** MANU/SC/0821/1995 : (1995)6SCC523 this Court ruled that - "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** MANU/SC/1039/1996 : (1996)1SCC639 that is similar to the case in hand, this Court held:

"As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under 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 53A, 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."

It is important to note as mentioned earlier that by pleading that Tayaramma had title and by virtue of the adoption of February, 1978 the first plaintiff has come into possession of the property as the owner of the property he cannot again say that title was left in the reversioners but the same was extinguished due to the plaintiffs open hostile

⁴ (2004) 10 SCC 779

possession. These pleadings are thus mutually destructive. The first plaintiff can only rely upon the title he acquired through Tayaramma or the title he acquired by adverse possession. This Court therefore holds that the first plaintiff cannot succeed on the plea of adverse possession in view of his case that he has acquired title in 1978 through the adoption.

Even otherwise, the documents filed which are the tax receipts merely show that cist is being paid. The learned counsel for the respondents also rightly pointed out that it is mentioned in all the tax receipts filed for the tax paid over the years that the first plaintiff is the 'son of Sri Gopalakrishnaiah'. The learned counsel points out that in tax receipts owners name is generally recorded and it appears in certain cases the owners name will be followed by the father's name. But in all receipts that are filed PW.1's name is clearly mentioned followed by the recital that he is the adopted son of Gopala Krishnaiah. Thus is an unusual form of recording. In addition, even as per the judgment cited by the learned counsel for the respondents, possession should be 'renowned and hostile'. In ***Karnataka Board of Wakfs*** case (4 supra), the Hon'ble Supreme Court has clearly held as para-11 as under:

"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 Sakinal*** MANU/SC/0236/1964 : [1964] 6 SCR 780, ***Parsinni v. Sukhi*** MANU/SC/0575/1993 : (1993) 4 SCC 375 and ***D N Venkatarayappa v. State of Karnataka*** MANU/SC/0766/1997 : AIR 1997 SC 2930).

Physical fact of exclusive possession and the *animus* posited 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.

(Dr. Mahesh Chand Sharma v. Raj Kumari Sharma MANU/SC/0231/1996 : AIR 1996 SC 869)."

In this case, the evidence of witnesses does not show that despite objections by the defendants/reversioners the first plaintiff continued to enjoy the property with hostile animus. The possession will only become 'hostile' when it is known to the opposite parties and the actions of the party show he is asserting title to the property despite objection. Even Article 65 of the Limitation Act says limitation will begin where the possession is 'adverse'. This has to be pleaded and proved. ***Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak***⁵ is relevant here as also ***Saroop Singh v. Banto***⁶.

⁵ AIR 2004 SC 1893

⁶ (2005) 8 SCC 330

In this case, there is no such pleading or proof of the actual 'date' of the hostile animus or of the possession turning 'hostile'.

For all the above reasons, this Court holds that the first plaintiff did not prove the necessary ingredients to uphold the case of adverse possession. Neither the pleading nor the evidence satisfies the tests laid down over a period of time by the highest courts of the land to prove adverse possession.

The learned counsel for the appellants also cited a judgment reported in *Nair Service Society Ltd. v. K.C. Alexander*⁷ and made an alternative submission that when the facts disclose no title to either party, presumption of title would arise from the possession of the property. However, a careful reading of the judgment of the Hon'ble Supreme Court shows that there is a presumption, possession follows title, but the Hon'ble Supreme Court said this presumption hardly arise when the facts are known. In the case on hand, the plaintiff has come to this Court with a specific case of title based upon the adoption. Therefore, he cannot state that he is now entitled to a decree on the ground of his possession of the property and a presumption that 'title follows possession'. In a suit of this nature, the law is very clear that the burden was on the first plaintiff to plead and prove his title to the property. Since it is the suit for a declaration of title and for a permanent injunction, the heavy onus that is cast upon the

⁷ AIR 1968 SC 1165

first plaintiff has not been discharged. This Court therefore holds that the first plaintiff has failed to prove his title to the property.

This Court therefore holds that the first plaintiff did not prove that he is the adopted son of Lakshmi Tayaramma and that he has title to the plaint schedule property. Consequently, the first plaintiff is not titled to a declaration or a permanent injunction as prayed for. This Court concludes that the findings of the lower Court on issues 1, 3, 4, 2 and 5 are in order. This Court also concurs with the finding that the failure to add all reversioners including the brother's wife is fatal to the case. This issue is not included in the appeal that is filed as can be seen from the grounds of appeal. This finding is thus final.

For all the above reasons, this Court holds that the first plaintiff is not entitled to any relief. The appeal is bereft of merits and the same is therefore dismissed. The judgment and decree dated 17.09.1997 passed in O.S.No.183 of 1995 by the Subordinate Judge, Avanigadda, Krishna District, are confirmed. In the circumstances of the case, there shall be no order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 07.06.2018
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