

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 16.04.2019
PRONOUNCED ON : 03.06.2019
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S.A.No.415 of 2007
and
M.P.Nos.1 and 2 of 2007

Kaliaperumal

...Appellant/Defendant

Vs.

Lakshmi

....Respondent/Plaintiff

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.85 of 2005 on the file of the First Additional Sub Court, Cuddalore, dated 03.11.2006 reversing the judgment and decree passed in O.S.No.188 of 2004 on the file of the Additional District Munsif, Cuddalore dated 30.09.2005.

For Appellant : Mr.C.T.Mohan
For Respondents : No representation / No appearance.
Set exparte vide order
dated 16.04.2019.

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 03.11.2006 passed in A.S.No.85 of 2005 on the file of the First Additional Subordinate Court, Cuddalore, reversing the judgment and decree dated 30.09.2005 passed in O.S.No.188 of 2004 on the file of the Additional District Munsif Court, Cuddalore.

2. The second appeal has been admitted on the following substantial questions of law.

"1. Has not the first appellate court erred in granting the decree for adverse possession when Section 116 of the Evidence Act, estops the tenant from claiming adverse possession?

2. Has not the first appellate court erred in granting the decree for adverse possession more particularly when the respondent / tenant has not proved the ingredients of adverse possession?"

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

5. Suffice to state that the plaintiff has laid the suit against the defendant for the reliefs of declaration and permanent injunction.

6. Though the plaintiff claims that she had acquired the title to the suit property by way of the registered settlement deed dated 13.07.1998 said to have been executed by her mother Saroja in her favour, the plaintiff has not pleaded or established as to how her mother had acquired title to the suit property as such. On the other hand, as could be seen from the plaintiff's case, the suit property belonged to Balkhis Bivi and that the plaintiff's father Shanmuga Chettiar was inducted as a tenant in the suit property by Balkhis Bivi and that Shanmuga Chettiar had been residing in the suit property and also engaging in the business in a portion of the suit property and paying the rent and according to the plaintiff, the rent was paid to Balkhis Bivi as long as she was alive and after her death, nobody claimed the rent for the suit property either from Shanmuga Chettiar and after his demise from the plaintiff's mother Saroja and hence according to the plaintiff, her father and mother had enjoyed the suit property, as their own, by asserting the title to the same for several years without paying any rent and accordingly dealt with the suit property as their own, particularly it is pleaded that her mother had mortgaged the suit property and also settled the suit property in her favour and in such view of the matter, it is put forth by the plaintiff that she and her predecessors in interest had been in the possession and enjoyment of the suit property for more than 30 years in their own right without interruption and thereby prescribed title to the suit property by way of the adverse possession and on the other hand, the defendant, without any entitlement to the suit property, attempted to interfere with her possession and enjoyment of the same and hence, according to the plaintiff, she has been necessitated to lay the suit against the defendant for appropriate reliefs.

7. Per contra the defendant would claim that he has acquired the title to the suit property by way of the purchase of the same from the legal representatives of Balkhis Bivi by way of the registered sale deed dated 28.07.1998 and thereby entitled to the suit property and contended that the plaintiff is not entitled to the suit property in any manner and not entitled to

seek title to the suit property by way of the adverse possession and disputed the claim of the plaintiff that she and her predecessors in interest had been enjoying the suit property for several years on their own by asserting title to the same and dealing with the suit property one way or the other and accordingly prayed for the dismissal of the plaintiff's suit.

8. In the light of the abovesaid factors, it is evident that the plaintiff is endeavouring to seek the claim of title to the suit property only on the plea of adverse possession and in such view of the matter, it is seen that it is only the plaintiff who has to establish that she has prescribed title to the suit property as put forth by her in the plaint.

9. Even as per the admitted case of the plaintiff, the suit property belonged to Balkhis Bivi and that her father Shanmuga Chettiar was only inducted as a tenant in the suit property and paying the rent. The only case projected by the plaintiff is that after the demise of Balkhis Bivi, nobody came forward to collect the rent from Shanmuga Chettiar and his legal representatives at any point of time and accordingly it is pleaded that Shanmuga Chettiar and his legal representatives had been enjoying the suit property on their own by asserting the title to the same and in such view of the matter, it is put forth by the plaintiff that her mother had settled the suit property in her favour, thereby, the plaintiff has acquired the title to the suit property. As rightly found by the trial court, when the abovesaid claim of the adverse title to the suit property put forth by the plaintiff is being seriously challenged by the defendant, it is for the plaintiff to establish the same by acceptable and convincing evidence. As determined by the trial court, the party who is pleading the title to the property in dispute by way of the adverse possession, should project necessary recitals in the plaint as to on what basis, he or she claims title to the property in dispute by way of the adverse possession, in particular, the plaintiff should come forward with the specific case as to from which date she and her predecessors in interest had been asserting the title to the suit property as their own for entitling them to claim title to the suit property by way of the adverse possession. As abovenoted, the plaintiff has only pleaded that her father Shannuga Cheittiar was inducted as a tenant in the suit property by Balkhis Bivi and that he had been paying the rent to Balkhis Bivi in respect of the suit property. The only plea that has been projected is that, after the demise of Balkhis Bivi, no one came forward to collect the rent from Shanmuga Chettiar and his legal representatives and accordingly, it is put forth that Shanmuga Chettiar and his legal representatives had been dealing with the suit property as their own and thereby prescribed title to the same by way of the

adverse possession. At the foremost, the plaintiff should have come forward in a clear manner as to when Balkhis Bivi had died. With reference to the same, there is no plea in the plaint. Furthermore, the plaintiff should have come forward as to when from her father had started asserting title to the suit property as his own and with reference to the same, there is no clear pleas in the plaint, other than merely stating that she and her predecessors in interest had been enjoying the suit property as their own for more than 30 years and that she had prescribed title to the suit property by way of the adverse possession. As rightly found by the trial court, such a plea is not sufficient or adequate for sustaining the plea of adverse possession. The plaintiff should have averred in the plaint clearly as to from which point of time she and her predecessors in interest had put forth adverse title to the suit property against the true owner there of, if not the specific date, atleast, the plaintiff should have come forward as to from which year onwards she and her predecessors in interest had been asserting the adverse title to the suit property as against the true owner by way of the adverse title. When the plaintiff is endeavouring to snatch the property belonging to another, in such view of the matter, the person who is pleading the adverse possession cannot claim any equities in his favour for sustaining his abovesaid title to the property in dispute. In such view of the matter, as rightly found and determined by the trial court, necessary pleas constituting the plea of adverse possession having not been set out in the plaint by the plaintiff, on that ground alone, it is found that the plaintiff suit should fail.

10. The induction of the plaintiff's father in the suit property is only by way of the tenancy arrangement. In such view of the matter, when the plaintiff's father had been inducted as a tenant in the suit property, to claim that the tenant, thereafter, had repudiated the claim of title of the landlord or the owner, should establish clearly from what period of time he had been asserting such title against the true owner and also should have come forward with the clear case in what manner he has proceeded to repudiate or challenge the true owner's title to the suit property and furthermore, should establish that he had asserted his adverse title to the suit property openly, continuously and uninterruptedly to the knowledge of one and all, particularly, to the knowledge of the true owner. On the other hand, it is seen that absolutely there is no acceptable and reliable material projected on the part of the plaintiff that she and her predecessors in interest had been asserting the title to the suit property openly, continuously and uninterruptedly to the knowledge of the true owner. On the mere footing that the original owner had not claimed the rent from them, that by itself, would not raise the presumption of

adverse possession in favour of the plaintiff and her predecessors in interest. As found by the trial court, the owner would be deemed to be in the possession of the property so long as there is no encroachment into the same. Non use of the property by the owner even for a long time, that by itself, would not affect its title. However, if the property is found to be in the possession and enjoyment of the third party other than the true owner, in such circumstances, for the person in the possession of the property, to assert the adverse title against the true owner, it is seen that such a person should establish his claim of adverse title to the suit property by establishing that his possession had been peaceful, open and continuous in publicity and to the knowledge of one and all, particularly, against the true owner and the exercise of hostile ownership should be beyond the statutory period. The mere possession, howsoever long, by itself, would not be sufficient for sustaining the plea of adverse possession against the true owner. Accordingly, it is found that the plaintiff having come forward with the plea of adverse possession, should plead and also establish as to from what date / point of time she and her predecessors in interest had asserted hostile title to the suit property against the true owner, in what manner they had been asserting the said title and how long such adverse possession had been exercised by them and that such adverse possession had been open and uninterrupted and to the knowledge of the true owner, in specific and without establishing the abovesaid factors by placing acceptable and convincing evidence, on the mere possession of the property in dispute even assuming the same to be over a considerable period of time that by itself, would not entitle the said party to claim title to the suit property in dispute by way of the adverse possession, as such person, has no equities in his favour since by way of setting up the adverse title, he is endeavouring to defeat the rights of the true owner of the property and in such view of the matter, it is for such person to clearly plead and establish all the facts necessary to establish his claim of adverse title to the property in dispute.

11. Insofar as this case is concerned, as rightly found and determined by the trial court, considering the evidence adduced by the plaintiff examined as P.W.1 in this matter, it is seen that she has completely pleaded ignorance as to in what aspects her father had been enjoying the suit property and accordingly, she is unable to state as to the particulars of the true owner and the collection of the rent by the true owner from her father, upto what point of time her father had been paying the rent and what was the rent tendered and when her father had stopped the payment of rent and from what point of time the true owner had failed to exercise her claim of title to the suit property and also admitted that she and her predecessors in

interest had not endeavoured to contact the legal heirs of the true owner for tendering the rent and according to the plaintiff, she is not aware of the legal heirs of the true owner and admitted that her father was inducted into the property only as a tenant . In such view of the matter, it is found that when the plaintiff is unable to establish in what capacity her father had been enjoying the suit property, particularly, when her father had been inducted only as a tenant in the suit property and as abovenoted, the mere failure on the part of the true owner to collect the rent, would not raise the presumption of adverse possession on the part of the person in possession, in such view of the matter, it is evident that the plaintiff is endeavouring to claim the adverse title to the suit property only based upon the mortgage deed said to have been executed in favour of her husband by her mother and the settlement deed said to have been executed in her favour by her mother marked as Exs.A1 and A2. Exs.A1 and A2 are found to be dated 11.12.1996 and 13.07.1998. Within a few days from Ex.A2 settlement deed, it is found that the suit has come to be laid by the plaintiff i.e., the plaint has come to be presented on 10.09.1998, i.e., immediately before the expiry of 2 months from the date of execution of Ex.A2 settlement deed. Furthermore, on a perusal of Exs.A1 and A2, nothing has been whispered in the said documents as to how the plaintiff's mother Saroja had claimed title to the suit property and there is no recital in the said document that the plaintiff's mother had acquired title to the suit property by way of the adverse possession and on that footing, she had executed the abovesaid documents by asserting title to the suit property. In such view of the matter, when the plaintiff has pleaded complete ignorance as to how her predecessors in interest had been enjoying the suit property, particularly, the plaintiff is unable to place acceptable and convincing materials that her predecessors in interest had exercised the acts of ownership in respect of the suit property repudiating or challenging the title of the true owner and on the other hand, the documents projected by the plaintiff are only found to be evidencing the enjoyment of the suit property by her predecessors in interest and when both the parties agree that it is only the plaintiff's predecessors in interest who had been in the possession and enjoyment of the suit property and as abovenoted when the plaintiff's father had been inducted into the suit property only as a tenant and accordingly the suit property is found to be continuing in the possession of the plaintiff's father and his legal representatives one way or the other, in such view of the matter, the documents of possession projected by the plaintiff, by themselves, would not be sufficient to hold safely that those documents had been issued in recognition of the hostile title of the plaintiff's predecessors in interest and in such view of the matter, the said documents would not serve any purpose, as such, for

claiming the adverse title to the suit property as put forth by the plaintiff. In fact, it is found that as rightly determined by the trial court, the receipt for the deposit of amount mentioned in Ex.A37 produced by the plaintiff is found to be made on behalf of Balkhis Bivi and furthermore, from Ex.B4 tax receipt, which is dated 31.08.1998 when it is found that the tax receipt had been levied only in the name of Balkhis Bivi prior to the institution of the suit, in such view of the matter, the documents of possession projected by the plaintiff, as rightly determined by the trial court, cannot be the basis for sustaining the plea of adverse possession / title put forth by the plaintiff.

12. As abovenoted, from Exs.A1 and A2 ipso facto particularly when the abovesaid documents are found to be created amongst the close relatives one way or the other, in such view of the matter, the abovesaid documents cannot be the basis for accepting the plea of adverse possession put forth by the plaintiff.

13. Though the plaintiff has examined P.Ws.2 to 5 in support of her case, as found and determined by the trial court, their evidence is found to be not pointing to the adverse possession of the plaintiff and her predecessors in interest in respect of the suit property and P.Ws.2 to 5 would only state that the suit property has been in the possession and enjoyment of the plaintiff and her predecessors in interest. However, as abovenoted, the mere possession howsoever long, by itself, would not be sufficient for upholding the assertive title projected by the plaintiff in respect of the suit property. In addition to that P.Ws.2 to 5 have pleaded complete ignorance about the antecedent title of the suit property. In such view of the matter, no reliance could be placed upon the evidence of P.Ws.2 to 5 to uphold the plaintiff's case.

14. The main crux of the plaintiff's case is that after the demise of Balkhis Bivi, no one came forward to collect the rent from her father and accordingly her father had commenced to enjoy the suit property as his own. By way of the same, it is put forth that as if Balkhis Bivi had died issueless. On the other hand, the materials had been placed on record to point out that the property belonging to Balkhis Bivi situated adjacent to the suit property had been dealt with by the legal heirs of Balkhis Bivi by conveying the same to the tenant in occupation of the same and the same could be evidenced from the sale deed dated 17.06.1993 marked as Ex.B5. Therefore, it is found that legal representatives of Balkhis Bivi have been exercising the right of title in respect of the properties belonging to Balkhis Bivi and Ex.B5 being found to be in respect of the property adjacent to the suit property accordingly, as rightly

put forth by the defendant's counsel, the plaintiff on coming to know of the exercise of the ownership by the legal heirs of Balkhis Bivi to the properties belonging to Balkhis Bivi one way or the other, apprehending that they may disturb her possession in respect of the suit property, it is found that the plaintiff had endeavoured to create Exs.A1 and A2 with a view to lay a false claim of title to the suit property one way or the other and the abovesaid factors put forth by the defendant's counsel cannot be easily brushed aside and accordingly it is seen that the same had also been considered by the trial court in the right perspective in the nature of preponderance of probabilities and on that basis also disbelieved the genuineness of the plaintiff's case.

15. In the light of the abovesaid factors, when the plaintiff has miserably failed to establish her claim of adverse title to the suit property by her and predecessors in interest, as above found, the declinement of the relief sought for by the plaintiff on the basis of adverse title by the trial court, cannot be faulted with and it is found that the trial court has rightly analysed the materials placed on record in the proper perspective both factualwise as well as legalwise and rightly determined that the plaintiff has miserably failed to establish her claim of adverse title to the suit property and accordingly rightly non suited the plaintiff. On the other hand, the first appellate court, without appreciating the materials placed on record in the correct perspective and also the principles of law governing the issues involved between the parties, merely on the footing that the suit property has been in the possession and enjoyment of the plaintiff and her predecessors in interest, on that premise, erroneously proceeded to uphold the plea of adverse title projected by the plaintiff and in such view of the matter, in my considered opinion, for the reasons aforesaid, the judgment and decree of the first appellate court cannot be legally sustained and liable to be set aside.

16. In addition to that, considering the fact that the plaintiff has levied the suit seeking the relief of declaration to the suit property mainly on the plea of adverse possession, it is found that on that score alone, the plaintiff's suit is legally unsustainable in the light of the decision of the Apex Court in Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another, reported in (2014) 1 SCC 669. In the said decision, the Apex Court has held that the declaration of ownership of land, on the basis of the adverse possession, cannot be sought by the plaintiff, but, the claim of ownership by adverse possession can be made by way of defence when arrayed as defendant in the proceedings against him and on that determination, upheld the declinement of the decree to the plaintiff by way of adverse possession in the said case by the

Trial Court and thus, it is found that when the plaintiff has come forward with the present suit claiming the relief of declaration to the suit property on the basis of adverse possession and when on that basis, the plaintiff is not entitled to maintain the suit for the relief of declaration as outlined by the Apex Court in the abovesaid decision, it is seen that on the abovesaid factor alone, the plaintiff's suit is liable to be dismissed.

17. Furthermore, the abovesaid decision of the Apex Court has been subsequently, followed by the Apex Court in the decision in Dharampal (dead) through L.Rs. Vs. Punjab Wakf Board and others, reported in (2018) 11 SCC 449 and in the abovesaid decision also, the Apex Court has held that the declaration of ownership to the suit property sought by the plaintiff on the basis of the plea of adverse possession is not permissible and for coming to the said conclusion, the Apex Court has relied upon its decision in Gurdwara Sahib's case (cited supra). The above position of law has also been followed by me in the decision in S.K.Komarasamy Gounder vs. Soundari and others, reported in (2018) 2 MLJ 580, by holding that the plea of declaration of title to the suit property on the basis of the adverse possession, cannot be taken by the plaintiff as the abovesaid plea could be only used as a shield and not as a sword and accordingly, in the light of the abovesaid principles of law outlined by the Apex Court and in the other decision, it is found that the relief claimed by the plaintiff in the present case seeking the relief of declaration on the basis of the adverse possession is found to be legally not maintainable and on that score alone, the plaintiff's suit has to fail. On the abovesaid reasonings also when it is found that the plaintiff, as a suitor, is not entitled to seek the relief of declaration of title to the suit property on the plea of adverse title and the said plea could be availed of by the plaintiff only as a shield and not as a sword in the light of the principles of law outlined by the Apex Court in the abovesaid decisions, in such view of the matter, on the abovesaid point of law also, it has to be held that the plaintiff's suit is not legally sustainable and liable to be rejected.

18. As abovenoted, according to the defendant, he has acquired the title to the suit property by way of the sale deed dated 28.07.1998 marked as Ex.B3 from the legal heirs of Balkhis Bivi. Considering the materials projected by the defendant, in toto, particularly, the settlement deed dated 11.04.1956 marked as Ex.B6 as well as the oral evidence of the son of Balkhis Bivi, namely, Abdul Bazeeth, examined as D.W.2 plus the marriage extract of Balkhis Bivi and her husband Mohamed Ibrahim Sahib marked as Ex.B8 and the birth extract marked as Ex.B9 coupled with the identity card of D.W.2 marked

as Ex.B7 and the french birth extract marked as Ex.B9, which had been analysed in detail by the trial court, it is found that Balkhis Bivi had not died issueless and on the other hand left behind the legal heirs and accordingly the legal heirs are found to have dealt with the properties belonged to her one way or the other and accordingly it is seen that the defendant had purchased the suit property from the legal heirs of Balkhis Bivi. As determined by the trial court, the plaintiff has not challenged that Abdul Sameeth and Abdul Bazeeth are not the sons of Balkhis Bivi but she would only plead ignorance about the same. Furthermore, to establish the genuineness of Ex.B3 sale deed, the defendant had also endeavoured to examine the attesor and the scribe of the document and in addition to that, the other executant of Ex.B3 sale deed Mumtaz Begam, the grand daughter of Balkhis Bivi had been examined as D.W.5, accordingly, it is found that the defendant had placed convincing and reliable materials to establish that the legal heirs of Balkhis Bivi had conveyed the suit property in his favour and that it is he who has the valid title to the suit property and the same had been rightly analysed and determined by the trial court and I do not find any reason to interfere with the same, being centered on the appreciation of the factual matrix.

19. The counsel for the defendant, in support of his various contentions, placed reliance upon the following decisions reported in

1. 2014(4) CTC 471 (Union of India and others vs. Vasavi Co-op Housing Society Ltd., and others).
2. 2007-2-L.W. 114 (Duraismi @ R.Natarajan vs. M.Vellingiri & others).
3. AIR 2000 Supreme Court 1485 (Roop Singh (dead) through L.Rs., vs. Ram Singh (dead) through L.Rs).

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

20. In the light of the abovesaid factors, the plaintiff having miserably failed to establish her claim of adverse title to the suit property and also the plaintiff being not entitled to maintain the suit for seeking the relief of declaration of title to the suit property on the plea of adverse title and on the other hand, when it is found that as determined by the trial court, it is only the defendant who had acquired the valid title to the suit property, in all, it is found that the judgment and decree of the first appellate court upholding the plaintiff's suit cannot be sustained in the eyes of law and accordingly they are set aside and for the reasons aforesaid, the substantial questions of law formulated in this second appeal are

accordingly answered in favour of the defendant and against the plaintiff.

21. For the reasons aforesaid, the judgment and decree dated 03.11.2006 passed in A.S.No.85 of 2005 on the file of the First Additional Subordinate Court, Cuddalore, are set aside and the judgment and decree dated 30.09.2005 passed in O.S.No.188 of 2004 on the file of the Additional District Munsif Court, Cuddalore, are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petitions are also closed.

Memorandum of Costs

Stamp for Vakalatnama	...10 .00
Do.used for the Memo	..3750.00
Do.for do. of the Lower Court	.. 103.00
Do. for enclosure Batt	.. 30.00
Advocate's Fee on Rupees (FC Not filed)	..
Translation and Printing /Typing charges..	Nil

	3893.00

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

bga

Copy to

1. First Additional Subordinate Court, Cuddalore
2. Additional District Munsif Court, Cuddalore.
3. The Section Officer, V.R.Section,
High Court, Madras

+1 cc to Mr.C.T.Mohan Advocate sr44516

S.A.No.415 of 2007

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