

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 30.08.2019

Judgment Pronounced on : 01.11.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1007 of 2005

1.Chenrayan
2.Ellamma
3.Muniappan
4.Perumal
5.Krishnan
6.Chinnarasi
7.Muniappan
8.Munusamy

...Appellants/Defendants 1 to 8

Vs.

1.Kaveri (Died)
2.Jadasi
3.Deivani
4.Shakthivel
5.Jyothi
6.Nagaraj

..Respondents/Plaintiffs 1 & 2

(Respondents 3 to 6 brought on record as legal representatives of the deceased R1 viz., Kaveri Vide Order of Court dated 25.06.2019 made in CMP.Nos.16840 to 16842 of 2018 in S.A.No.1007/2005)

Prayer :- Second Appeal filed under Section 100 of CPC., against the judgment and decree in A.S.No.4 of 2004 on the file of the Subordinate Judge, Hosur, dated 27.12.2004 in reversing the judgment and decree in OS.No.4/1997 on the file of the District Munsif cum Judicial Magistrate Court, Denkanikottai dated 14.08.2003.

For Appellants : Mr.V.Raghavachari

For Respondents : Mr.J.Hariharan

for Mr.V.Nicholas [RR3 to R6]

R2 - Served [No appearance]

JUDGMENT

The defendants 1 to 8 in a suit for declaration and recovery of possession are the appellants herein. The suit was dismissed by the trial Court, but came to be decreed by the First Appellate Court.

2.1 The suit property is described as a piece of agricultural land comprised in S.No.296/4. It is stated to have a total extent of 95 cents. The sizeable part of the facts that forms the foundation for the cause of action for the suit is admitted. The admitted part of the pleadings are:

- The suit property and others originally were held by certain Periya Mottaiyan as ancestral properties. Periya Mottaiyan had four sons, namely, Muniappan (the 3rd plaintiff), Govindan (who died at the time when the suit was laid), Chenrayan, the 1st defendant and Lakshmanan, the 9th defendant (Lakshmanan died when the case was pending trial).
- The 3rd plaintiff had divided from the joint family, and had obtained the suit property towards his share in the ancestral property. The property was originally part of Royakottai Estate Village, which was later abolished vide Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1948. In the settlement proceedings that took place under the enactment, patta was granted to the suit property in favour of the 3rd plaintiff. He was in possession of the property.

2.2 The controversy commenced thereafter. According to the 3rd plaintiff, as he was advancing in age, he entrusted the responsibility of cultivating the suit property with his brothers, or their heirs, who are arrayed in the suit as defendants 1 to 9. As indicated earlier, the defendants 1 and 9 are his brothers. The defendants 2 to 5 are the heirs of his brother Govindan, and the defendants 6 to 8 are the wife and children of the 1st defendant.

2.3 The plaintiffs 1 and 2 are the daughters of the 3rd plaintiff. On 07.10.1996, the 3rd plaintiff had executed the settlement deed marked as Ext.A2 in favour of his two daughters. The plaintiffs would now claim that as the third plaintiff had no male support to help him in his agricultural activities, the defendants are put in possession of the property as permissive occupants, to cultivate his land. As the defendants did not evince any interest to deliver possession of the suit property, the plaintiffs were constrained to issue a suit notice Ext.A4 dated 06.10.1996 to which reply (Ext.A5 dated 15.10.1996) was issued. Hence, the suit.

3. The written statement which was substantially the reproduction of the reply notice, it is alleged:

- a) That about 15 years prior to the institution of the suit, the 3rd plaintiff had sold his share of the property to his three brothers, namely, defendants 1, 9 and Govindan, for a consideration of Rs.900/-.

b) The three brothers thereafter, divided the lands equally. While so, under Ext.B7 dated 14.12.1992, 9th defendant sold 27 cents out of his share in the suit property to the 2nd defendant, the widow of Govindan, and, the 6th defendant, wife of 1st defendant had executed a settlement deed dated 27.09.1996 in favour of her two sons, namely defendants 7 and 8 as concerning another portion of the suit property.

c) To say the 3rd plaintiff did not have any male heir to support his agricultural activities is wrong as 3rd plaintiff had six sons-in-law to support him.

d) At any rate, the defendants have perfected title by long continuous adverse possession.

4.1 The dispute went to trial. The trial Court has framed as many as six issues. But, no issue was framed as concerning the defendants plea of adverse possession. For the plaintiffs, the 1st plaintiff was examined as PW1. One Rajan was examined as PW2. For the defendants, 1st defendant was examined as DW1 and one Raman, an independent witness, was examined as DW2.

4.2 On the issue of title, the trial Court decided against the plaintiffs on the following reasons:

a) Oral evidence in this case indicated that the 3rd plaintiff had sons-in-law to support him in his cultivation, and therefore, the allegation in the plaint that he had no male support for his agricultural activity is false.

b) Ext.A2 under which the plaintiffs 1 and 2 claim title is not a document of settlement, but is only a Will.

4.3 On appeal to the Sub Court, Hosur, by the plaintiffs, the First Appellate Court reversed the decree of the trial court. Its line of reasoning are that: The defendants have claimed their right on an oral sale, which law does not recognise, and pleaded adverse possession as an adjunct to their claim of title over the property, which law does not permit. Given the circumstance, the revenue records such as land-tax receipts or patta are inadequate to resist plaintiffs' claim of possession based on their title. Turning to the finding of the trial Court that Ext.A-2 is only a Will and not a settlement, the first Appellate Court held that the same has little bearing on the maintainability of the suit, since, the executant of the said document, namely the 3rd plaintiff himself was in the party array, and as he died during the pendency of the suit, plaintiffs 1 and 2 became his heirs to prosecute the suit.

4.4 Aggrieved by the decree of the first appellate court, the defendants have preferred this Second Appeal.

5. This appeal was admitted on the following substantial questions of law:

a) *Whether the lower appellate Court is right in reversing the order of the trial Court without disclosing the area of error?*

b) *When the plaintiffs have failed to establish permissive occupation of defendants, and on their own admission admits the possession of the defendants, whether the non institution of the suit for over 12 years would not confer automatic title in the appellants?*

c) *Whether the lower appellate Court is right in not applying the provisions of Section 27 of Limitation to dismiss the suit?*

d) *Whether the finding of the lower appellate Court is not against the well settled principles of law reported in 1993 (2) MLJ 598?*

The Arguments

6. The learned counsel for the appellants argued that the entire allegation of the plaintiffs was premised on their allegation that they are the title holders of the property and that the defendants/appellants herein are their permissive occupants. In other words, they characterise the defendants' possession as permissive possession, and if the probability which the evidence on record suggests, outweigh the possibility of they holding possession as permissive owners, then the cause for the action fails. Elaborating the point, the learned counsel submitted that the 3rd defendant has six daughters, and has sons-in-law to take care of agricultural activity. P.W.2, an independent witness for the plaintiff, has deposed that one of his sons-in-law has agricultural lands adjacent to the suit property. This implies that there are male relatives available for him in his agricultural activity, if only the plaintiffs' version could be trusted and hence his theory about non availability of male support for his agricultural activity was baseless. It could be now derived that defendants' (admitted) possession of the suit property cannot have foundation in permissive possession. Arguing further, the learned counsel submitted:

- The plaint does not specify the date on which the 3rd plaintiff inducted the defendants as permissive occupants.

- The revenue records such as Ext.B-2, Ext.B3 UDR pattas and Ext.B4 series kist receipts, and Ext.B-6 patta are in favour of the defendants. P.W.1 states that the documents were removed by defendants, but this has no foundation in any specific facts.
- Under Ext.B-7, dated 14-12-1992, the 9th defendant had sold 27 cents in the suit property to his sister-in-law, the 2nd defendant herein (widow of Govindan, who was dead when the suit was laid). This sale was about five years before the suit was laid.
- The suit cannot be maintained as Ext.A-2, gift deed under which the first and second plaintiffs claim title was executed by their father, the 3rd plaintiff on 07-10-1996, whereas Ext.A-4 suit notice was issued a prior to that, on 06-10-1996.
- The suit is barred by limitation, as the defendants have been in occupation of the land at least from about 1985, since Ext.B-2 and Ext.B3, pattas were issued in the names of Govindan and Chinnarasi on 13-01-1985. And, the suit was laid only on 07.01.1997 more than 12 years since the date of issuance of the patta. Reliance was placed on *Baby Ammal Vs. Rajan Ansari* [1997-2-L.W.453], *Devasironmani and another Vs. Rajathangam.T and another* [1997-3-L.W.761]; *Muthy Velu and another Vs. G.Kannammal and 4 others* [2001-2-L.W.400]; *Muthaih Pillai.V.(died) Vs. Vedambal* [1998-L.W.606]; *Sevigounder Vs. Ramaswamy & another* [2010(3) CTC 276]; *N.S.Spance Vs. D.S.Kanagarajan and T.A.* [2005(1) CTC 494] and *Muthukaruppan Samban and Ors. Vs. Muthu Samban* [(1914) 27 MLJ 497].

7. Countering the aforesaid argument, the learned counsel for the respondents submitted:

- The defendants/appellants have admitted the original title of the 3rd plaintiff. And, they plead an oral sale, though they have chosen not to provide the details of the said oral sale in their pleadings. And, their claim of possession is founded on this oral sale. Given the factual setting, the contention that they had perfected title by adverse possession is not available to them. And, for adverse possession, there must be a specific pleading, and here, the allegation in the written statement falls short of the legal requirement.
- Regarding Ext-B3 patta, the proceedings by which patta came to be transferred is not produced. At any rate, patta is not a document of title, nor can it dis-entitle the title

holder of his right to claim possession based on his original title.

- Turning to Ext.B-7 sale deed in favour of the 2nd defendant, it was executed among the defendants, and there is no evidence to indicate that the plaintiffs knew about it at any time before.

Discussion & Decision:

8. In the suit for recovery of possession of a piece of immovable property based on title, the plaintiffs start with an advantage: The defendants have conceded 3rd plaintiff's title candidly. Jurisprudentially, he who has ownership over a property, has the right to have its possession. This right of the owner is absolute, which though a rudimentary principle, is yet reiterated only to provide a convenient premise to the ongoing discussion.

9. Now, having admitted 3rd plaintiff's title, unless they plead and prove a legal basis for justifying their possession in law, the defendants cannot succeed in resisting the suit. Few circumstances where law recognises possession without ownership are, the possession of a lessee, a usufructuary or a possessory mortgagee, a licensee, subject to the terms of licence, or possession of a holder of a written agreement of sale of an immovable property in part performance of the contract of sale in terms of Sec.53-A of the Transfer of Property Act. The defendants opted for none from the list to defend their possession. They chose to plead title in themselves. And, this title they trace it to the purchase of the suit property by the brothers of the 3rd plaintiff in an oral sale upon paying a consideration of Rs.900/-. Obvious are its consequence: That their pleading on title recoils back heavily on them to spoil their defense. Here, they said to plead adverse possession. And, the entire efforts of the defendants'/appellants' counsel are spent to sustain it.

10. The law on prescription of title by adverse possession is too old, and too well firmed up in our jurisprudence, that it does not require an elaborate statement. 'Adverse possession', as the very expression explains, is holding possession adverse to the interest of the one in who the ownership to the property is vested. What is significant here is not the possession, but the animus or intent, hostile to the interest of the title holder of the property (with which possession is held). It is not the duration of the possession, or its continuity that matters to law to divest title of the true owner, but the animus or the hostile intent of the one who enters upon the property of another. This possession must be open enough to caution the true owner of the hostile intent of the non-owner to possess an immovable property. Hence, mere long and continuous possession of an immovable for

over twelve years does not convert possession into prescriptive title, unless a *hostile animus* to hold possession in open defiance of the title of the true owner characterises the same. See *Ravinder Kaur Grewal & Others Vs Manjit Kaur & Others* [2019 (4) CTC 936 (SC)] *L.N. Aswathama & another Vs P. Prakash* [(2009) 13 SCC 229] and *Nanje Gowda alias Gowda (dead) by Lrs., & another Vs Ramegowda* [(2018) 1 SCC 574], to refer a few in the endless list of authorities on the topic.

11. Turning to the pleadings of the defendants, the relevant portion in the written statement reads: "*..even if here is any defect in their title to the suit property, they have perfected the same by way of adverse possession.*" The reliance of the defendants has always been on the oral sale, which is their primary line of defense, and as they were uncertain about the quality of this defense, they bring in a secondary line of defense in adverse possession as a contingent strategy. But the plea of adverse possession is a stand alone concept and it cannot be fitted with a plea of ownership. They are inconsistent, and though they can be pleaded, yet the party pleading alternate and inconsistent plea has to elect one, and cannot press both the plea simultaneously. Here, the attempt of the defendants is not even to introduce an alternate and inconsistent plea, but to plea adverse possession only as a contingent plea. The character of pleading in the written statement creates a situation that only if the Court finds the title founded on the oral sale defective, then the court ought to consider the plea of adverse possession. The election, the court may have to take for the defendants. And, where is the requisite animus in the entire exercise of the defendants to demonstrate that they had hostile intent to hold possession from the time they entered possession, open to the knowledge of the 3rd plaintiff? Have they entered possession of the suit property with the knowledge that it still belonged to the 3rd plaintiff, and with a hostile intent to hold the property adverse to the title of the 3rd plaintiff? The answers to both necessarily have to be negative. The structure of the defense that the defendants have provided creates an impossibility of establishing it. This Court finds that plea of adverse possession has not been established by the defendants/appellants.

12. The other pieces of arguments of the defendants' counsel will now arrange themselves easily:

- The mutation of revenue records, with no indication that 3rd plaintiff knew about it has zero consequence to upset title of the 3rd plaintiff. So was Ext.B-7 sale deed that 9th defendant had executed in favour of the 2nd defendant.
- Whether Ext.A-2 is a Will or a settlement, or how it was executed are immaterial, as the 3rd plaintiff himself was in the party array.

- The fact that 3rd plaintiff had sons-in-law to provide the former necessary support for his agricultural activity is too remote a cause to supply justification to the manner in which defendants have pleaded adverse possession.

13. In conclusion, this Court finds no merit in the appeal and consequently all the substantial questions are decided against the appellants. The appeal is dismissed and the judgment and decree in A.S.No.4 of 2004 on the file of the Subordinate Judge, Hosur, dated 27.12.2004, is hereby confirmed. No costs.

Sd/-

Assistant Registrar (C.O.)

/True Copy/

Sub Assitant Registrar

To:

- 1.The Subordinate Judge, Hosur
- 2.The District Munsif cum Judicial Magistrate, Denkanikottai.

Copy to : The Section Officer, V.R.Section,
High Court of Madras, Chennai.

+1cc to Mr.Nicholas, Advocate Sr.No.90585

+1cc to Mr.V.Raghavachari, Advocate Sr.No.90813

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