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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.12.2021
DELIVERED ON : 04.01.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.NO.156 OF 2010
M.P.1 OF 2010

Balaraman

...Appellant / Respondent /
Plaintiff

Vs

1.Vasudevan
2.Velou
3.Krishnapillai
4.Thirumalai
5.Sundarambal
6.Chandra

...Respondents / Appellants /
Defendants 2 to 7

Prayer : The Second Appeal is filed under Section 100 of C.P.C. against the Judgment and Decree dated 07.08.2009 passed in A.S.No.22 of 2007 on the file of the Principal District Court, Puducherry, reversing the Judgment and Decree dated 09.02.2007 passed in O.S.No.18 of 1999 on the file of the Principal Sub Court, Puducherry.

For Appellant : Mr.T.S.Baskaran

For Respondents : Mrs.R.Sripriya
for Mr.V.Raghavachari

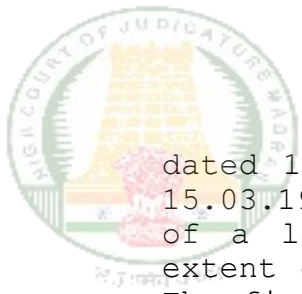
JUDGMENT

This second appeal is focused as against the judgment and decree dated 07.08.2009 passed in A.S.No.22 of 2007 by the learned Principal District Judge, Puducherry, reversing the judgment and decree dated 09.02.2007 passed in O.S.No.18 of 1999 by the learned Principal Subordinate Judge, Puducherry.

2. For the sake of convenience, hereinafter the parties are called as per their respective litigative status before the trial Court.

3. The laconic averments made in the plaint are as follows:

3.1. The plaintiff is the absolute owner of the suit schedule property by virtue of French Notorial Exchange deed



dated 16.06.1958 and subsequent registered partition deed dated 15.03.1972. The suit mentioned 'B' schedule property is a part of a larger extent of 'A' schedule property measuring to an extent of 17 Kuzhies and 1 Veesam being owned by the plaintiff. The first defendant is the father of the defendants 2 to 5, and they are the origins of Rengareddipalayam Village of Cuddalore Taluk. The first defendant was doing the work of milking in the village of Abishegapakkam including in the house of the plaintiff, apart from that he was rearing buffaloes and goats. The first defendant along with his family settled in Singirikoil, Cuddalore Taluk, which is situated near the village of Abishegapakkam. In the month of December, 1988, on the request of the first defendant, the plaintiff permitted him to use his cattle shed situated in the 'B' schedule property for a period of three months and thereafter, the first defendant made it use for residential purpose too without the knowledge and consent of the plaintiff and also constructed one hut near the cattle shed in 'B' schedule property and he is only a permissive occupier of the said property. The other defendants are also enjoying the said property along with the first defendant as his sons. The first defendant filed a suit in O.S.No.840 of 1997 before the Principal District Munsif, Pondicherry against the plaintiff's son for an injunction, not to evict him except under due process of law, as if the plaintiff's son had attempted to interfere with his possession and enjoyment over the suit property. The suit was decreed in his favour on 25.08.1998. In the said situation, the plaintiff has revoked the oral permission granted in favour of the first defendant by a notice dated 20.11.1988, which was acknowledged by the first defendant, who gave an evasive reply dated 27.11.1998 stating that they are in continuous and enjoyment of the suit property for the last 26 years and they have claimed adverse possession over the said property, which was denied by the plaintiff. Hence, the suit.

4. The averments found in the written statement are as follows:

4.1. The defendants contended that they are living in the suit property for the last 27 years i.e. from the year, 1972 to till date, without any interruption from anybody. They are residing in the suit property since 1972 with the knowledge and without permission from the plaintiff, by constructing a hut. The voter card, family ration card, and house tax for the Municipality stand in the name of the first defendant. As the plaintiff has admitted in the plaint the above fact, the first defendant is entitled for the property as adverse possession, since they administered the suit property as owner for the last 27 years without any interruption and continuous enjoyment and without permission from the owner of the property, for which the defendants made a counter claim as per Order VIII Rule 6(A) of



C.P.C. The defendants, therefore, prayed for the dismissal of the suit with costs.

5. In support of the plaintiff's case P.W.1 and P.W.2 were examined and Exs.A1 to A8 were marked. Similarly, on the side of the defendants D.W.1 was examined and nine documents were marked as Exs.B1 to B9. Apart from those documents, the authorisation letter sent by the Tahsildar was marked as Ex.X1.

6. The trial Court after going through the evidence adduced by both sides and after hearing the arguments advanced on either side had decreed the suit as prayed for with cost and the counter claim of the defendants was dismissed. Aggrieved over the said judgment and decree, the defendants have preferred an appeal in A.S.No.22 of 2007 on the file of the Principal District Court, Puducherry.

7. During the pendency of the appeal, the defendants have filed an application in I.A.No.8 of 2008 under Order 41 Rule 27 of C.P.C., praying to receive additional evidence. The learned Principal District Judge, Puducherry had disposed of the said application simultaneously along with Appeal Suit.

8. The learned Principal District Judge after allowing the said application, had received two documents, viz., (i) Welfare Endowment Certificate dated 09.07.1986 issued by Peerless General Finance & Investment Company Ltd. in favour of M.Sundarambal (ii) Post Card dated 27.02.1987 addressed to M.Sundarambal by R.Govindarajan, Field Officer and marked the same through D.W.1 as Exs.B10 and B11, respectively and resultantly he allowed the appeal and set aside the judgment and decree rendered by the trial Court. Feeling aggrieved over the same, the plaintiff has preferred this second appeal.

9. At the time of admission, this Court had formulated the following Substantial Questions of Law:

(i) Whether the First Appellate Court is right in allowing the claim of adverse possession of the respondents merely because of the possession of the respondents in the suit property when the possession of the respondents is not adverse to the true owner but only a permissive occupier?

(ii) Has not the First Appellate Court erred in holding that, since the respondent was not dispossessed in 1997, by the continuous possession of the suit property the respondents had prescribed title by prescription which is opposed to the settled principles of law that, "Unless the person possessing the land has a requisite animus, the period of



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prescription does not commence and the possession must be open and undisturbed one" reported in 2004 (10) SCC 779 and 2006 (3) LW 6?

(iii) Has not the First Appellate Court erred in allowing the claim of adverse possession only on the basis of Ex.B10, Ex.B11, which are the correspondence to the respondents which does not satisfy the requirements of animus possessendi?

(iv) Has not the First Appellate Court overlooked the categorical admission of DW1 that, she did not know that the plaintiff was the owner, thereby disentitling her to the claim of adverse possession?

10. Heard the learned counsel appearing on either side and perused the materials available on record.

11. Mr.T.S.Baskaran, learned counsel for the appellant would contend that after purchasing the property in the year, 1972, the suit schedule property becomes the absolute property of the plaintiff, only in the month of December, 1988, the first defendant approached the plaintiff and sought permission from him to use the plaintiff's cattle shed, which is situated in the 'B' schedule property for a period of three months. Thereafter, the first defendant without the knowledge of the plaintiff slowly made use of the cattle shed for his residential purpose. The first defendant has also constructed a hut near the cattle shed and resided in 'B' schedule property. Therefore, the said sequence of events shows that the defendants are the permissive occupier to the suit 'B' schedule property and due to the same, they cannot claim the adverse possession.

12. It is the further submission made by the learned counsel for the appellant that the trial Court has correctly held that the defendants have not proved their possession by producing the relevant document to the prescribed period, and accordingly the claim made by the defendants cannot be entertained. On the other hand, the First Appellate Court on the strength of Exs.B10 and B11, which are the documents received during the pendency of the appeal before the First Appellate Court, came to the wrong conclusion that the defendants are in possession of the suit property for the statutory period of 12 years prior to the institution of the suit and it was open and continuous and hence, in all probabilities, the defendants acquired prescribed title over the suit property by way of adverse possession. Since the evidence given by D.W.1 narrates the fact that in the year, 1997 alone she came to know the real owner of the property, being the reason that the suit has been filed in the year, 1999, it cannot be said that the defendants have acquired prescriptive title over the suit property. Accordingly, the First Appellate



Court committed an error and thereby the findings arrived at by the trial Court has to be restored.

13. Per contra, the learned counsel appearing for the respondents/defendants would contend that before the Courts below, the plaintiff took a stand that the defendants are the permissive occupier. Therefore, it is for the plaintiff to establish that the permissive possession as alleged, otherwise in the event of failure to establish the same, it is unnecessary for the defendants to establish adverse possession.

14. In this regard, the learned counsel for the defendants had referred the judgment of this Court reported in MANU/TN/3855/2017, wherein, in the case of Lakshminarayana Padayachi vs. Subramaniam and Others, this Court has held as follows:

"... when it is found that it is only the defendant, who had been in possession and enjoyment of the suit property for a long period of time as above narrated and when the permissive occupation or otherwise of the suit property by the defendant as pleaded is not established by the plaintiff, as rightly argued by the counsel appearing for the defendant, it is only for the plaintiff to establish that permissive possession of the defendant is within 12 years prior to the filing of the suit and in the event of the failure of the plaintiff to establish the same, it is unnecessary for the defendant to establish adverse possession for the statutory period and on the other hand, it is for the plaintiff to prove his possession within 12 years and in this connection, the decision reported in 2010-1-L.W.439 (Deivanai Ammal (Died) & others Vs. Periasamy @ Sambagounder & others) is relied upon and the decision reported in 2012 (3) MWN (Civil) 536 (Pappannan and 4 others Vs. Kolandasamy) is also relied upon for the contention that the burden of proof shifts on the plaintiff to prove the plea of permissive possession and on the failure of the plaintiff to establish the same, the plaintiff cannot be allowed to pick holes in the case of the defendant and thereby succeed in his case without establishing his title to the suit property as pleaded by him."

15. Further he referred the judgment of this Court reported in MANU/TN/3748/2009 in the case of Deivanai Ammal and Others vs. Periasamy and Others, wherein, this Court has held as follows:

"26. The Full Bench of this Court in The official Receiver of East Godavari at Rajamundry reported in 1940 (2) MLJ 190 was deciding a reference by a single Judge and the reference was



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whether, in a case where the plaintiff sets up a case of permissive possession and fails to prove it, the burden then lies upon the plaintiff to prove that he was in possession within 12 years of suit, or whether the onus is upon the defendant to prove adverse possession for a period of 12 years".

The Hon'ble Sir Alfred Henry Lionel Leach, Chief Justice, has held that

in my opinion, the plaintiff, who is suing for possession of property in the occupation of another cannot rest his case on title alone. He must show that he has exercised the rights of ownership by being in possession within 12 years of suit.

27. It is well settled law that a person, who claims title to the property by adverse possession must definitely allege and prove how and when adverse possession commences, but such onus will not be called for when the plaintiff sets up a case of permissive possession or in other words, the burden is upon the plaintiff to prove that the defendant was in permissive possession within 12 years of filing of the suit."

16. Now on considering the said submissions with the relevant records it is not in dispute that the plaintiff herein has set up his case as defendants are the permissive occupier to the suit schedule property. In respect of the date on which, the permission was granted to the defendants, while at the time the plaintiff gave evidence as P.W.1, he stated in his proof affidavit as, in the year, 1988, the first defendant had approached him and requested to grant permission to use his cattle shed, which was situated in the suit 'B' schedule property for a period of three months or in the alternative till he finds a separate place to shelter his cattle. After giving evidence as above, in order to substantiate the said evidence, he has not produced any relevant document to show that he has given permission to the defendant. However, being the reason that the permission asked by the first defendant is oral, we cannot expect the written document from the plaintiff in respect of the permission granted to the first defendant. Even assuming that the plaintiff has not proved the permissive possession, being the reason that the present suit has been filed in the year, 1999 that too within 11 years from the date of alleged permissive possession, this Court cannot hold that it is not necessary for the defendants to establish the adverse possession



for the statutory period. Therefore, the decision rendered by the defendants' counsel is not having any virtual elements to the facts of the present case. Accordingly, I am of the view that in the present situation, the defendants have to establish that they are in the suit schedule property for more than a statutory period.

17. To prove the possession before the trial Court, on the side of the defendants, nine documents were marked as Exs.B1 to B9. Among which, the earliest document is Ex.B1, which is the Voter Card dated 01.01.1998. The trial Court after analysing those exhibits came to the conclusion that the defendants had proved their possession from the year 1998 and in the said situation, being the reason that the suit has been filed in the year 1999, it can be held that the defendants had proved their possession for more than the statutory period. In respect of the said decision, the Lower Appellate Court though approved the said findings rendered by the trial Court by believing the documents viz., Exs.B10 and B11, came to the conclusion that the defendants are in the possession of the suit schedule property from 09.07.1986. Accordingly, the findings rendered by the First Appellate Court is fully relied on the evidence let in by the defendant/D.W.1 as well as on the strength of Exs.B10 and B11.

18. In this regard, the learned counsel for the appellant would contend that the defendant in her cross examination has stated before the trial Court as, only during the time when she was re-rooting her hut, the plaintiff came and made objection for re-rooting. It is the further evidence given by D.W.1 that she does not know the owner of the land, wherein she was resided. He would further contend that in respect of the date, on which she re-rooted her hut, she gave evidence before the trial Court on 29.08.2006 as, she re-rooted her hut before nine (9) years. Hence, approximately in the year, 1997 she knows the owner of the suit schedule property. That is why the first defendant has filed a suit in O.S.No.840 of 1997 before the Principal District Munsif, Pondicherry seeking permanent injunction not to obstruct the possession and enjoyment under due process of law.

19. Exs.B3 and B4 are the Judgment and Decree of the said suit. The above documents are also construed that the plaintiff has obstructed the continuous enjoyment of the defendants during the year, 1997. Therefore, the said situation reveals the fact that though the suit schedule property is in the possession of the defendants as alleged by him, being the reason that she knows the owner of the land in the year, 1997, it can be construed that her possession became hostile only in the year, 1997. In the said circumstances, the present suit has been filed



in the year, 1999. Hence, it cannot be said that the defendants have proved their case. At this juncture, it is useful and necessary to see the judgment of the Hon'ble Apex Court in the case of T.Anjanappa and Others vs. Somalingappa and another reported in (2006) 7 SCC 570, wherein, the Hon'ble Apex court has held as follows:

"Adverse possession means a hostile possession which is expressly or impliedly in denial of title of the true owner. Under Article 65 of the Limitation Act, burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

20. Further in the judgment reported in (2007) 6 SCC 59 in the case of P.T.Munichikkanna Raddy and Others vs. Revamma and Others, the Hon'ble Apex Court has held as follows:

"8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.

2. Specific Positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

9. It is interesting to see the development of adverse possession law in the backdrop of the status of Right to Property in the 21st Century. The aspect of stronger Property Rights Regime in general, coupled with efficient legal regimes furthering the Rule of



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Law argument, has redefined the thresholds in adverse possession law not just in India but also by the Strasbourg Court. Growth of Human Rights jurisprudence in recent times has also palpably affected the developments in this regard.

19. Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence."

21. Now applying the principles set out in the above referred judgment with the present case, though the possession of the suit property by the defendants is open and known to the plaintiff, the said possession is not hostile to constitute an adverse possession. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor or on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. Enquiry 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.

22. Accordingly, it is found that when there is no material placed on record by the respondent that her possession is hostile in nature, the essential ingredient, namely, adverse intention being completely absent in respect of the claim of the respondent and when it is found that the respondent has not pleaded in specific nor established as to from which particular date, her possession had become adverse to the plaintiff in respect of the disputed property, the determination of the Courts below upholding the claim of the respondents in respect of the disputed land by way of adverse possession, as such, cannot be accepted.



23. On the other hand in order to prove his title, the plaintiff has produced the French Notorial Exchange Deed dated 16.06.1958 stands in his name as Ex.A1 and further he has produced the partition deed dated 15.03.1972 vide Ex.A2. The said documents will prove that the plaintiff is the absolute owner to the suit schedule property and thereby he is entitled to a relief of declaration and recovery of possession.

24. In conclusion, the Judgment and Decree dated 07.08.2009 passed in A.S.No.22 of 2007 on the file of the Principal District Court, Puducherry, reversing the Judgment and Decree dated 09.02.2007 passed in O.S.No.18 of 1999, on the file of the Principal Subordinate Court, Puducherry is set aside and resultantly, the suit laid by the appellant in O.S.No.18 of 1999 is decreed and the counter claim filed by the defendants was dismissed.

25. Accordingly, the Second Appeal is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(I)

// True Copy //

Sub Assistant Registrar

rsi

To

1.The Principal District Judge,
Puducherry.

2.The Principal Subordinate Judge,
Puducherry.

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The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to M/s.T.S.Baskaran, Advocate Sr.No.435
+1cc to M/s.V.Ragavachari, Advocate Sr.No.217

S.A.No.156 of 2010

VSN-II (CO)
RVM(24/06/2022)