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S.A.No.806 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.12.2023

CORAM :

THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN

S.A.No.806 of 2007

and M.P.No.2 of 2007

1.D.Thanikachalam, rep.by
Power Agent S.Ganapathy
2.A.Ukkaramoorthy.

...Appellants

Vs.

1.M.Kannaiya Padayachi (died),
2.Jayalakshi Ammal,
3.K.Rajapadayachi,
4.K.Chinnathambi Padayachi,
5.Maniammal,
6.Chinnaponnu.
(R2 to R6 are impleaded as legal heirs of deceased R1
vide Court order dated 16.12.2019
in C.M.P.Nos.13287 to 13289 of 2016 by VPNJ)

...Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 30.03.2007 made in A.S.No.89 of 2006 on the file of the Principal Subordinate Court, Cuddalore, reversing the judgment and decree dated 31.10.2006 made in O.S.No.498 of 2003 on the file of the Additional District Munsif Court, Cuddalore.



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For Appellant : Mr.S.T.Bharath Gowtham

For Respondents 2 to 6 : Mr. Kovin Bharathan
for Mr.D.Ravichandran.

J U D G M E N T

This second appeal has been filed at the instance of the defendants. The appellants are the defendants and the respondents 2 to 6 are the legal heirs of the plaintiff/deceased R1. For the sake of convenience, the parties will be referred to according to their litigative status as before the Trial Court.

The brief facts which give rise to this second appeal are as follows:

2. According to the plaintiff, the suit property was his ancestral property. He mortgaged the suit property to one Ms.Mani Ammal vide registered mortgage deed dated 11.02.1981. Subsequently, the mortgage was discharged. Further, he leased out the suit property to one Mr.Samidurai Padayachi under a registered lease deed dated 31.07.1982. The plaintiff had been enjoying his continuous possession over the suit property and also was exercising his right over the suit property. Thus, the sum and substance of



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the plaintiff's case was that he perfected his title by way of adverse possession. Hence, he came forward with the suit for the relief of declaration and permanent injunction against the defendants.

3. The said suit was resisted by the defendants by contending that the plaintiff executed a settlement deed dated 06.04.1938 in favour of the plaintiff's sister one Mrs.Vellachi Ammal, and that the defendants purchased the suit property from the plaintiff's sister by way of two sale deeds both dated 05.11.2003. Therefore, by virtue of the said sale deeds, they became the absolute owners of the property. Hence, they prayed to dismiss the suit.

Evidence and documents:

4. Before the Trial Court, on behalf of the plaintiff, the plaintiff himself was examined as P.W.1 and two more witnesses viz., Mr.Murugan and Mr.Dhamodharan were examined as P.W.2 and P.W.3, and 34 documents were marked as Exs.A1 to A34. On behalf of the defendants, the second defendant himself was examined as D.W.1 and two more witnesses



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viz., Mr.Arul and Mr.Balu were examined as D.W.2 and D.W.3, respectively, and 8 documents were marked as Exs.B1 to B8.

Finding of the Courts below:

5. The Trial Court, after going through the oral and documentary evidence, ultimately found that the plaintiff had not established his possessory title and dismissed the suit. However, when the plaintiff approached the First Appellate Court by filing an appeal, the First Appellate Court, by relying upon Exs.A1 and A2 viz., the deed of discharge of mortgage executed in favour of the said Ms.Mani Ammal and the lease deed executed in favour of the said Mr.Samidurai Padayachi, under Section 91 of the Indian Evidence Act, 1872, presumed that the plaintiff had been in possession of the property for more than 30 years, declared that the plaintiff has established his possessory title, and thereby, reversed the judgment and decree of the Trial Court and decreed the suit as prayed for. Aggrieved by the same, the defendants are before this Court by way of this second appeal.

Substantial questions of law:



6. At the time of admission of this second appeal, this Court has formulated the following substantial questions of law:

“1. When the plaintiff having not sought for setting aside the Settlement Deed dated 06.04.1938, and in such circumstance, whether the plaintiff is entitled to a Decree for Declaration?

2. When the settlee being the sister and admittedly living with the plaintiff, and no positive evidence to hold the property adverse to that sister, still is the learned Subordinate Judge right in reversing the decree of the Trial Court?

3. When title and adverse possession cannot go together, is the learned Subordinate Judge right in decreeing on the basis of adverse possession?”

Submissions on both sides:

7. The learned counsel for the appellants/defendants would vehemently submit that the very claim of the plaintiff is based on the mortgage deed and the lease deed. The mortgage deed was executed in favour of Mani Ammal and the said Ms.Mani Ammal was none other than the daughter of the plaintiff. Further, the lease deed was executed in favour



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of the said Mr.Samidurai Padayachi, who was also a close relative of the plaintiff. It is his further submission that when the plaintiff came forward with the suit for declaration based upon the possessory title, it is the duty of the plaintiff to plead from when onwards the defendants' possession became adverse and it is also the duty of the plaintiff to prove his possessory title whereas the plaintiff had not at all established all these things. However, based on a wrong finding, the First Appellate Court granted decree for declaration. Hence, they prayed to allow the second appeal.

8. Per contra, the learned counsel for the respondents 2 to 6/legal heirs of the plaintiff, would contend that though the defendants relied upon the settlement deed of the year 1938, they were not in a position to submit the original and that the plaintiff established his continuous and uninterrupted possession over the suit property. Hence, they prayed to confirm the judgment and decree of the First Appellate Court.

9. This Court has given its anxious consideration to the submissions of both sides.



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Analysis of the submissions:

10. The sum and substance of the plaintiff's case is that he perfected his title by way of adverse possession. It is a settled principle of law that the possessory title and the title cannot go together and in this case, the plaintiff, in his pleadings, categorically stated that the suit property is his ancestral property. In the same breath, he pleaded an adverse possession not only against the defendants, but also against all the persons. However, while perusing the plaint, this Court could not find as to from when onwards his possession became adverse.

11. However, it is the contention of the learned counsel for the appellants/defendants that by virtue of the mortgage deed/Ex.A1 and the lease deed/Ex.A2, the plaintiff's possession cannot be construed as an adverse possession. But, the plaintiff came forward with the suit against the defendants, who set up the title over the suit property based upon the settlement deed, which had been executed by the plaintiff in favour of his sister under Ex.B1. But, the plaintiff did not disclose as to how the



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possession became adverse against the defendants or against his predecessors-in-title.

12. The learned counsel for the appellants/defendants would invite the attention of this Court that the said Ms.Mani Ammal, to whom the plaintiff was stated to have executed the mortgage deed/Ex.A1, was none other than the daughter of the plaintiff. Therefore, simply because the plaintiff had executed the mortgage deed in favour of his daughter, it cannot be construed that the plaintiff was the owner of the suit property.

13. If the plaintiff disputed the execution of the settlement deed dated 06.04.1938, he ought to have moved a suit to avoid the same. Here, in respect of execution of settlement, no pleading is available in the plaint. As such, this Court has to accept the execution of settlement deed dated 06.04.1938. If that being the case, the defendant, being the subsequent purchaser, are entitled to have right over the property.

14. Therefore, at this juncture, this Court deems it appropriate to



rely upon the judgment of the Hon'ble Supreme Court in ***Government of Kerala and another vs. Joseph and others [Civil Appeal No.3142 of 2010***

(decided on 09.08.2023)] in which, at para 21, it has been held as under:

"Before proceeding to do so, it is essential to take note of the law governing such a claim. After a perusal and consideration of various judgements rendered by this Court, the following principles can be observed :

21.1 Possession must be open, clear, continuous and hostile to the claim or possession of the other party; all three classic requirements must coexist- nec vi, i.e., adequate in continuity; nec clam, i.e., adequate in publicity; and nec precario, i.e., adverse to a competitor, in denial of title and knowledge;

(a) In Radhamoni Debi v. Collector of Khulna [1900 SCC Online PC 4], the Privy Council held that-

"The possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor."

(b) Further, the Council Maharaja Sri Chandra Nandi v. Baijnath Jugal Kishore [AIR 1935 PC 36] observed-

"It is sufficient that the possession should be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening."



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(c) *A Bench of three judges of this Court in Parsinni v. Sukhi [1993 (4) SCC 375] held that*

“Party claiming adverse possession must prove that his possession must be ‘nec vi, nec clam, nec precario’ i.e. 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.”

(d) *In Karnataka Board of Wakf v. Govt. of India (two Judges' Bench) [2004 (10) SCC 779], it was held:-*

“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.”

This case was relied on in the case of M. Venkatesh v. Bangalore Development Authority (three-Judge Bench) [2015 (17) SCC 1], Ravinder Kaur Grewal v. Manjit Kaur (three-Judge Bench) [2019 (8) SCC 729].

(e) *This Court in a recent case of M Siddiq (D) through LRs v. Mahant Suresh Das & Ors. 14 (five-Judge Bench) [2020 (1) SCC 1] reiterated this principle as under - “748. A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous - possession which meets the requirement of*



being 'nec vi nec claim and nec precario'. To substantiate a plea of adverse possession, the character of the possession must be adequate in continuity and in the public because the possession has to be to the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence."

21.2 The person claiming adverse possession must show clear and cogent evidence substantiate such claim;

This Court in Thakur Kishan Singh v. Arvind Kumar¹⁵ (two-Judge Bench) [1994 (6) SCC 591] held that- "5. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession..."

Reference may also be made to M. Siddiq (supra).

21.3 Mere possession over a property for a long period of time does not grant the right of adverse possession on its own; (a) In Gaya Prasad Dikshit v. Dr. Nirmal Chander and Anr. (two-Judge Bench) [1984 (2) SCC 286], this court observed-

"1... It is not merely unauthorized possession on termination of his licence that enables the licensee to claim title by adverse possession but there must be some overt act



on the part of the licensee to show that he is claiming adverse title. It is possible that the licensor may not file an action for the purpose of recovering possession of the premises from the licensee after terminating his licence but that by itself cannot enable the licensee to claim title by adverse possession. There must be some overt act on the part of the licensee indicating assertion of hostile title. Mere continuance of unauthorised possession even for a period of more than 12 years is not enough.”

Reference may also be made to Arvind Kumar (supra); Mallikarjunaiah v. Nanjaiah (two-Judge Bench) [(2019) 15 SCC 756]; Uttam Chand (supra).

21.4 Such clear and continuous possession must be accompanied by animus possidendi - the intention to possess or in other words, the intention to dispossess the rightful owner; in Karnataka Board of Wakf (supra) it was observed-

“...Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature...”

(a) The case of Annakili v. A. Vedanayagam (two-Judge Bench) [(2007) 14 SCC 308] also shed light on this principle as under -

“24. Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must



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continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well-settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession...

(b) In Des Raj and Others v. Bhagat Ram (two-Judge Bench) [(2007) 9 SCC 641] this Court observed -

“21. In a case of this nature, where long and continuous possession of the plaintiff-respondent stands admitted, the only question which arose for consideration by the courts below was as to whether the plaintiff had been in possession of the properties in hostile declaration of his title vis-à-vis his coowners and they were in know thereof.”

(c) This court in L.N. Aswathama v. P. Prakash (two Judge Bench) [(2009) 13 SCC 229] had observed that permissive possession or possession in the absence of Animus possidendi would not constitute the claim of adverse possession.

(d) It was also held in the case of Chatti Konati Rao v. Palle Venkata Subba Rao (two-Judge Bench) [(2010) 14 SCC 316] -



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“15. Animus possidendi as is well known is a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until the possessor holds the property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and that possession was open and undisturbed...”

(Emphasis supplied).

Referring to the above judgement Subha Rao (supra), this Court has reiterated the cardinality of the presence of Animus possidendi in a case concerning adverse possession in Brijesh Kumar & Anr. v. Shardabai (dead) by LRs. (two Judge Bench) [(2019) 9 SCC 369].

21.5 Such a plea is available not only as a defence when title is questioned, but is also available as a claim to a person who has perfected his title; The prior position of law as set out in Gurudwara Sahab v. Gram Panchayat Village Sirthala (two-Judge Bench) [(2014) 1 SCC 669] was that the plea of adverse possession can be used only as a shield by the defendant and not as a sword by the plaintiff. However, the position was changed later by the decision of this Hon'ble Court in the case of Ravinder Kaur (supra) had held that -

“...Title or interest is acquired it can be used as a



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sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession...”

The position in Ravinder Kaur (supra) was followed in Narasamma & Ors. v. A. Krishnappa (Dead) Through LR. (three-Judge Bench) [(2001) 2 SCC 498].

21.6 Mere passing of an ejectment order does not cause brake in possession neither causes his dispossession; In Balkrishna v. Satyaprakash²⁴ (two-Judge Bench) this Court held :

“...Mere passing of an order of ejectment against a person claiming to be in adverse possession neither causes his dispossession nor discontinuation of his possession which alone breaks the continuity of possession.”

21.7 When the land subject of proceedings wherein adverse possession has been claimed, belongs to the Government, the Court is duty-bound to act with greater seriousness, effectiveness, care and circumspection as it may lead to Destruction of a right/title of the State to immovable property. In State of Rajasthan v. Harphool Singh (two-Judge Bench) [(2000) 5 SCC 652] it was held :

“12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the



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State to immovable property and conferring upon a third-party encroacher title where he had none.” Further, in Mandal Revenue Officer v. Goundla Venkaiah (two-Judge Bench) [(2010) 2 SCC 461] it was stated :

“...It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the court is duty-bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give an upper hand to the encroachers, unauthorised occupants or land grabbers.”

21.8 A plea of adverse possession must be pleaded with proper particulars, such as, when the possession became adverse. The court is not to travel beyond pleading to give any relief, in other words, the plea must stand on its own two feet. This Court has held this in the case of V. Rajeshwari v. T.C. Saravanabava (two-Judge Bench) [(2004) 1 SCC 551] :

“...A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal...”

It has also been held in the case of State of Uttrakhand v. Mandir Sri Laxman Sidh Maharaj (two-Judge Bench) [(2017) 9 SCC 579] :

“...The courts below also should have seen that courts can grant only that relief which is claimed by the



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plaintiff in the plaint and such relief can be granted only on the pleadings but not beyond it. In other words, courts cannot travel beyond the pleadings for granting any relief...”

Mandir Sri Laxman Sidh Maharaj (supra) was relied on in Dharampal (Dead) v. Punjab Wakf Board (two-Judge Bench) [(2018) 11 SCC 449] on the same principle.

21.9 Claim of independent title and adverse possession at the same time amount to contradictory pleas. The case of Annasaheb Bapusaheb Patil v. Balwant (two-Judge Bench) [(1995) 2 SCC 543] elaborated this principle as :

“15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.”

This principle was upheld in the case of Mohan Lal v. Mirza Abdul Gaffar (two-Judge Bench) (1996) 1 SCC 639] -



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“4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period of his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the 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.”

The Court in Uttam Chand (supra) has reiterated this principle of adverse possession.

21.10 Burden of proof rests on the person claiming adverse possession. This Court, in P.T. Munichikkanna Reddy v. Revamma (two-Judge Bench) [(2007) 6 SCC 59], it held that initially the burden lied on the landowner to prove his title and title. Thereafter it shifts on the other party to prove title by adverse possession. It was observed:—

“34. The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show



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within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change insofar as the onus is concerned : once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession....”

The Court reiterated this principle in the case of Janata Dal Party v. Indian National Congress (two-Judge Bench) [(2014) 16 SCC 731] :

“...the entire burden of proving that the possession is adverse to that of the plaintiffs, is on the defendant...”

21.11 The State cannot claim the land of its citizens by way of adverse possession as it is a welfare State. [State of Haryana v. Mukesh Kumar³⁴ (two-Judge Bench)] [(2011) 10 SCC 404].”

The above judgment has inextenso discussed as to how the adverse possession has to be proved. But, in our case, the above proposition has not been followed by the plaintiff to prove his adverse possession.

15. Thus, this Court is of the firm opinion that though the plaintiff had not at all pleaded in respect of the adverse possession, the First Appellate Court on the wrong notion based upon Exs.A1 and A2, and



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illegally applied the presumption under Section 91 of the Indian Evidence Act, 1872, decreed the suit, which, as per the above discussion, is perverse and liable to be interfered with. Further, the plaintiff had not taken any steps to set aside the settlement deed dated 06.04.1938. Thus, the substantial questions of law are answered in favour of the appellants.

16. In the result, this Second Appeal is allowed and the judgment and decree of the First Appellate Court is set aside and as a consequence, decree of dismissal passed by the Trial Court is restored. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

01.12.2023.

Internet : Yes/No

Index: Yes/No

Speaking order/Non-speaking order

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To

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



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C.KUMARAPPAN,J

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