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S.A.No.859 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.02.2024

CORAM

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.859 of 2013

N.S.Nedunchezian @ Soubramanien

.. Appellant

Vs.

1.Kokilambal

2.Sivapragasam

3.Jayavelu

4.Thanigaivelu

5.Barani

.. Respondents

Prayer : This Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree, dated 29.11.2011 made in A.S.No.26 of 2008 on the file of the Principal Sub Judge at Pondicherry in reversing the judgment and decree, dated 02.04.2008 made in O.S.No.488 of 2004 on the file of the Principal District Munsif, Puducherry.

For Appellant : M/s.G.Sumitra

For Respondents : Mr.T.M.Naveen

JUDGMENT



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The present Second Appeal arises out of the judgment and decree of the Court of the learned Principal Subordinate Judge at Pondicherry in A.S.No.26 of 2008, dated 29.11.2011 in reversing the judgment and decree of the Court of the learned Principal District Munsif at Puducherry in O.S.No.488 of 2004, dated 02.04.2008.

2. For the sake of convenience, the parties will be referred to as their ranks in the suit.

3. O.S.No.488 of 2004 was presented for the purpose of recovery of possession. It is the case of the plaintiff that the property belonged to his great grandfather one Kailasa Subraya Mudaliar. The said Kailasa Subraya Mudaliar had purchased a property of which a portion thereof, is the suit schedule mentioned property, on 19.12.1887. The extent of purchase was 10 Ares or 18 Kuzhies and 11 veesams.

4. He further pleaded that the plaintiff's father one Ramasamy @ Saminatha Mudaliar had given the suit schedule mentioned property on lease to one Ramanujam. This Ramanujam is none else than the husband of



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the 1st defendant and the father of the defendants 2 to 5. The tenancy had been created through one Ora Palani @ Orakambu Palani. The reason being that Ramanujam was from the State of Tamil Nadu and not a resident of Pondicherry.

5. The plaintiff further pleaded that the monthly rent was Rs.2/-, for which, an advance of Rs.6/- had been paid. He further stated that as long as his father was alive, he was receiving the rent and thereafter, the rents were being paid to the plaintiff. It was paid till the death of Ramanujam on 02.02.1994 and subsequently, by the defendants till June 2000. In spite of several demands as the defendants did not pay the rent, he presented a suit for recovery of possession.

6. The 2nd defendant entered appearance and filed a detailed written statement. This statement was adopted by defendants 1 and 3 to 5. It is their specific contention that there was no landlord/tenant relationship between Ramanujam and Saminatha Mudaliar. He further pleaded that he had never been inducted into the vacant site by the said Saminatha Mudaliar. On the contrary, he pleaded that in the year 1962, the property was a vacant land



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and therefore, Ramanujam encroached upon the property and put up a superstructure, namely, a thatched hut.

7. It was further pleaded that Ramanujam himself had prescribed title to the property by adverse possession since he was in open, continuous, hostile and uninterrupted possession to the knowledge of the plaintiff. The defendant further pleaded that after the death of Ramanujam on 02.02.1994, they continued to be in such a possession as against the plaintiff. On these grounds, they sought for dismissal of the suit.

8. On the basis of these pleadings, the learned Trial Judge framed the following issues :

“ 1. Whether the plaintiff is entitled as relief of recovery of vacant possession of the land in respect of suit property as prayed for or not ?

2. Whether the plaintiff is entitled arrears of rent in respect of suit mentioned property or not ?

3. Whether the plaintiff is entitled mesne profits in respect of suit property or not ?

4. To what relief ?



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9. On the side of the plaintiff, the plaintiff examined himself as P.W.1 and marked Ex.A1 to Ex.A14. On the side of the defendants, D.W.1 was examined and Ex.B1 to Ex.B8 were marked.

10. After a detailed trial, the learned Trial Judge came to a conclusion that the defendants having pleaded adverse possession as against the plaintiff, they have tacitly admitted to his title and consequently, decreed the suit.

11. Aggrieved by the said decree, an appeal was preferred before the Lower Appellate Court, which was taken on file as A.S.No.26 of 2008. The learned Appellate Judge came to a conclusion that the plaintiff has not proved his title and therefore, dismissed the suit.

12. Against the said reversal finding, the present Second Appeal had been presented before this Court. On 20.08.2013, this Second Appeal was admitted on the following substantial questions of law :

“ (a) Whether the lower appellate Court



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was right in dismissing the suit holding that the appellant/plaintiff failed to prove his title, when the defendants/respondents admitted that they have perfected title to the suit property admitting the title of the appellant / plaintiff ?

(b) Whether the Courts below were right in deciding the suit without framing the issue regarding adverse possession pleaded by the defendants/respondents ?

(c) Whether the lower appellate Court was right in holding that the appellant/plaintiff is not entitled to the relief when the defendants/respondents did not prove adverse possession ? ”

13. I Heard M/s.G.Sumitra, learned counsel appearing for the appellant and Mr.T.M.Naveen, learned counsel appearing for the respondents.

14. M/s.G.Sumitra brought to my notice that the 2nd respondent/ Sivapragasam had expired. Mr.T.M.Naveen is also in agreement to the same and he pointed out that there are other legal representatives other than the 1st respondent/Kokilambal and therefore, they must be impleaded. A perusal of the cause title would show that Sivapragasam, who is the 2nd respondent in the appeal has left behind his mother, wife and two daughters. His mother is already on record as the 1st respondent. As the estate is substantially



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represented by the mother and she had already been on record, she is recognized as the legal representative of the deceased Sivapragasam.

15. In other words, Kokilambal would represent herself and the estate of Sivapragasam. With this house keeping having been done, I move on to the merits of the appeal.

16. Since the substantial questions of law are introduced, they are taken up together and are answered.

17. The plaintiff claims the property by virtue of a sale deed, dated 19.12.1887. The original sale deed has been filed before the Court as Ex.A1. It is a registered document stating that Kailasa Subraya Mudaliar had purchased 10 Ares of property situated at Oulgaret Commune in Thattanchavady Revenue Village. The total extent of purchase is 18 Kuzhies and 11 veesams. The suit schedule mentioned property is a portion thereof, which is only 4 Kuzhies. The boundaries for the said properties are as follows :



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“ Boundaries : To the west of plaintiff's remaining portion of property in R.S.No.165/18, to the south of VOC street, to the north of the plaintiff's land given on lease to Veerasiman and to the east of the land of Pavadai Gounder and Deivanayaga Gounder. ”

18. It is the case of the plaintiff that since the defendants did not pay the rents after the death of Ramanujam, he issued a notice under Ex.A11, dated 03.08.2002. It was immediately responded by the defendants on 30.08.2002 and in particular, the following stand was taken :

“ My client states after the death of the said Ramanujam, they, as his legal heirs continued to have such adverse, hostile, open and unequivocal, continued and uninterrupted possession to the knowledge of the said Saminatha Mudaliar and your client till date. Therefore, even if your client claims are to be found to be the owner of the said property, they have prescribed title by adverse possession of the said property. ”



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19. The plea of adverse possession is a double edged sword. Incase, the defendants are able to prove adverse possession, then, the plaintiff will lose his right to recover the property through the process of Court. However, if the defendants fail to prove adverse possession, the very defence taken by them would cut their throat as this defence :

(1) presupposes the title of the plaintiff to the property.

(2) the plea of adverse possession having failed, the plaintiff could be entitled to recover the same.

20. As to what are the contents of adverse possession had been gone into in the judgment of a Constitution Bench of the Supreme Court in ***M.Siddiq (Ram Janmabhumi Temple – 5J) v. Suresh Das*** reported in ***2020 (1) SCC 1***. I would rely upon two portions of the said judgment in order to come to a conclusion of this issue. They are :

“ **1148.** In *P.Lakshmi Reddy v. L.Lakshmi Reddy*, 1957 SCR 195 : AIR 1957 SC 314, Jagannadhadas, J. speaking for a Three-Judge Bench of this Court dwelt on the “classical requirement” of Adverse Possession : (AIR pp.317-18, Para 4)

'4. Now, the ordinary classical



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requirement of the Adverse Possession is that it should be Nec vi nec clam nec precario. (See Secy. of State for India in Council v. Debendra Lal Khan, 1933 SCC Online PC 65 : (1933-34) 61 IA 78], IA at p. 82.) The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.'

The Court cited the following extract from U.N.Mitra's Tagore Law Lectures on the Law of Limitation and Prescription : (AIR p.319, Para 7)

'7. ... An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him (sic), who was in possession. (Angell, Sections 390 & 398). It is the intention to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a Cause of action which constitutes Adverse Possession.'[U.N.Mitra, Tagore Law Lectures on the Law of Limitation and Prescription, 6th Edn., Vol. I, Lecture VI at p. 159.]

This Court held : (AIR p.319, Para 7)

'7. ... Consonant with this principle, the commencement of Adverse Possession, in favour of a person implies that the person is in actual possession, at the time, with a notorious hostile claim of exclusive Title, to repel which, the True Owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person



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wanting to acquire Title by Adverse Possession his Adverse Possession cannot commence until he obtains actual possession with the requisite animus.'

1149. In Karnataka Board of Wakf v. Union of India, 2004 (10) SCC 779, S.Rajendra Babu, J. speaking for a Two-Judge Bench held that : (SCC p. 785, Para 11)

'11. ... 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. Plea of Adverse Possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims Adverse Possession should show : (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed.'

21. These two paragraphs show that in order to claim adverse possession, a person must show :

- (a) the date from which he came into such possession.
- (b) What was the nature of his possession.
- (c) Whether the factum of possession was known to the other party.
- (d) How long the possession had continued.



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(e) that the possession was open and undisturbed.

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22. The Constitution Bench approved the following paragraph in the judgment of the Karnataka High Court in **Pilla Akkayamma v. Channapa** case reported in **ILR 2015 Kar 3841**. It is extracted below :

“27. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person, who does not acknowledge others' rights but denies them. Possession implies dominion and control and the consciousness in the mind of the person having dominion over an object that he has it and can exercise it. Mere possession of the land would not ripen into possessory title. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. Occupation only implies bare use of the land without any right to retain it. In order to constitute adverse possession, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. To prove title to the land by adverse possession, it is not sufficient to show that some acts of possession have been done. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. In other words, the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation.

* * *

30. In a suit falling under Article 65 of the Limitation Act, plaintiff must establish his title to



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the property. He need not prove that he was in possession within 12 years. If he fails to prove his title, the suits fails, and the question of adverse possession does not arise in such a case. When the plaintiff has established his title to a land, the burden of proving that he has lost that title by reason of the adverse possession of the defendant lies upon the defendant. If the defendant fails to prove that he has been in adverse possession for more than 12 years, the plaintiff is entitled to succeed simply on the strength of his title. A person alleging that he has become owner of immovable property by adverse possession must establish that he was in possession of the property peaceably, openly and in assertion of a title hostile to the real owner. Stricter proof is required to establish acquisition of title by adverse possession for the statutory period. ”

23. I have to test the case which is before me, on the basis of the law that has been laid down in the aforesaid judgments. The plaintiff having pleaded he is the owner of the property and substantiated the same by filing Ex.A1 and the defendant having taken the plea of adverse possession, the burden now lies on the defendants to prove how their possession is adverse to that of the plaintiff.

24. The factum that the defendant is in possession of the property is admitted, if not, a suit for recovery of possession need not be filed. As to the



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character under which the defendants were in possession, unfortunately, for the defendants, they themselves had produced Ex.B3. A perusal of the application made for supply of water connection by Kokilambal would show that on 10.12.1998, connection was given and Kokilambal had received the said connection as a tenant of the property.

25. In other words, it was the categorical case of the defendants that they were tenants of the property as later as on 10.12.1998. The LTI (Left Thumb Impression) of Kokilambal/1st defendant, is affixed at the bottom of the said form. This would show that the plea of adverse possession has been set up for the purpose of the case.

26. It is pertinent to point out that this record had not been produced by the plaintiff but had been produced by D.W.1, in order to substantiate the character of possession. This water connection is for the suit schedule mentioned property. There is no explanation from the defendants as to how having applied for water connection as a tenant, can they turn around and plead that they have perfected title by adverse possession and my answer is No.



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27. I would have still probed into the title of the plaintiff and would not have rested my case only on the plea of adverse possession had the defendants set up title in favour of a third party. It is here that the plea of Mr.T.M.Naveen becomes relevant. Mr.T.M.Naveen would strongly urge that the plaintiff ought to have filed a suit for declaration of title and for recovery of possession rather than a simpliciter suit for recovery of possession. This argument would have appealed to me if the defendants set up a plea of title in themselves or in a third party.

28. This issue is no longer *res integra* and has been settled by a judgment of the Supreme Court in ***Anathula Sudhakar v. P.Buchi Reddy (Dead) By LRs and Others*** case reported in ***(2008) 4 SCC 594***. In Paragraph No.13 and 14 of the said judgment, the Supreme Court was pleased to hold that where a cloud over title is created then the plaintiff cannot file a suit for mere recovery of possession but would have to sue for declaration and recovery of possession. The Supreme Court defined what is the meaning of 'cloud over title'. It was held as follows :

“ 14. We may, however, clarify that a



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prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title of the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injuntion may be sufficient. ... ”

29. A reading of this judgment would show that where the defendant merely denies the title of the plaintiff, it does not amount to creating a cloud over the title. The defendant must either set up a title in himself or in a third party in order to create a confusion on the title of the plaintiff. In this case, the defendant has not set up a title in himself or any third party but has taken a stand that he has perfected title to the property by adverse possession.

30. As seen from above, the plea of adverse possession implies that he



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admits to the title of the plaintiff. Once the title of the plaintiff is admitted then there is no necessity to push the plaintiff to seek for a declaration only in order to satisfy the ego of the defendants. The position of law being clear, I am not inclined to hold that the suit should fail on account of the fact that the plaintiff has not sought for declaration of title. Even otherwise, the settled position of law as per *NSS Society v. Alexander* case reported in *AIR 1968 SC 1165* is that, in a suit for bare recovery of possession, plaintiff should stand or fall on his pleadings. The defendants will certainly be entitled to succeed in such a suit incase if he proves that he has better title to the property than that of the plaintiff.

31. Yet again, the plea that the father of the defendants had occupied a vacant land in the property shows that he has not set up a title in himself nor he has better title than the plaintiff, which has been demonstrated under Ex.A1 in order to defeat this case.

32. Mr.T.M.Naveen would invite my attention to two documents, namely, Ex.B6 and Ex.B7 in order to plea that these documents would point out that he has been in open and continuous possession for over a statutory



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period.

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33. Let me now turn my attention to these documents. Ex.B6 is a certificate said to have been given by a committee of village Panchayathars on 02.02.1993. Even as per this document, it merely states that Ramanujam had been in possession of the property from the year 1962. First, I very much doubt the capacity of a local panchayat, constituted privately to issue such a certificate. How this committee came to be formed, whether it has a statutory backing, are matters which remain unexplained. Further more, a team of three persons have, no right to my knowledge under law, to go around the State of Puducherry to give certificates as to who are in possession of the property and from when.

34. Further more, this document had not been marked through any of the so called certificate issuers but has been marked through D.W.1, who could not have personal knowledge of the certificate. Therefore, Ex.B6 does not deserve any consideration and it has to be rejected.

35. Now, I turn my attention to Ex.B7, which as pointed out by



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Mr.T.M.Naveen, is a registered document. The title of the document is

“வாரிசு உறுதி மொழி பத்திரம்” which is loosely translated into declaration of legal heirship. I have carefully gone through this record. As to who are these two gentlemen to give the certificate is also not disclosed, as in the case of Ex.B6. This document seems to state a case, which goes even beyond the best case stated by the defendants. According to the defendants, Ramanujam has been in possession of the property from the year 1962. However, in Ex.B7, it is stated that Ramanujam has been in occupation of property for more than 50 years. The said certificate has been given on 04.03.1993. Going back 50 years means that Ramanujam could have been in possession of the property atleast from 03.03.1943. It is not even the case of the defendants that they have been in possession of the property from the year 1943 but it is their case that Ramanujam came into possession of the property only in the year 1962. The persons who have sworn to the affidavit under Ex.B7 seem to have been more loyal than the King and therefore, the Ex.B7 does not deserve a moment's consideration.

36. Insofar as Ex.B4 and Ex.B5 are concerned, they are all the payment of electricity charges and it does not take the case of the plaintiff



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anywhere. According to Mr.T.M.Naveen, Ex.B1 is a marriage certificate of Ramanujam and this has been produced to demonstrate that he had been in possession of the occupational property since his marriage took place in the suit schedule mentioned property.

37. I have gone through Ex.B1 and it does not state the address as pleaded by the defendants. Ex.B2 merely states that Ramanujam of Shanmugapuram had given birth to a son. This does not move the case of the defendant forward, as a birth of a son does not mean, it is the commencement of adverse possession.

38. None of the records of the defendants point out any continuous, hostile, adverse and uninterrupted possession to the knowledge of the plaintiff, I am constrained to reject their case.

39. Now turning to the judgment of the Lower Appellate Court, it had lost sight of the fact that the plea that had been set up by the defendants to defeat the case of the plaintiff is one of adverse possession. I have already extracted the law settled by the Constitution Bench of the Supreme Court



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that the plea of adverse possession implies admission to the title of the plaintiff. Under such circumstances, the failure of the learned 1st Appellate Judge to refer to the position of law that prevails on the defendants to set up a plea of adverse possession renders the judgment perverse.

40. Consequently, I am satisfied that the plaintiff has proved his title to the property under Ex.A1 and the defendants have failed to prove adverse possession over the property. All the substantial questions of law framed are answered in favour of the appellant and against the respondents.

41. The judgment of the Lower Appellate Court deserves to be interfered with. Accordingly :

(1). The Second Appeal is allowed.

(2) The judgment and decree of the learned Principal Subordinate Judge, Pondicherry in A.S.No.26 of 2008, dated 29.11.2011 is set aside.

(3) The judgment and decree of the learned Principal District Munsif at Puducherry in O.S.No.488 of 2004, dated 02.04.2008 is restored.

(4) Time for eviction – 3 months.



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42. The plaintiff will be entitled to a decree of vacant possession of the property on payment of the Court fee under Section 25 of the Puducherry Court Fees and Suits Valuation Act.

43. The Registry of the High Court shall prepare a decree only after the plaintiff pays the additional Court fee, that is, necessary for the purpose of this case.

44. The litigation having been pending for a long time, I am not inclined to impose any costs.

28.02.2024

Index:Yes/No

Speaking Order :Yes/No

Neutral Citation:Yes/No

mkn2

To

1.The Principal Sub Judge,
Pondicherry

2.The Principal District Munsif,
Puducherry



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V. LAKSHMINARAYANAN, J.

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