



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 17TH DAY OF NOVEMBER 2021

BEFORE

THE HON'BLE Dr. JUSTICE H.B.PRABHAKARA SASTRY

R.E.A.No.1840 OF 2005

BETWEEN:

Chepudira Madaiah,
Son of late Muthanna,
Aged 45 years,
Residing at Nokya Village,
Virajpet Taluk,
Kodagu District.

.. Appellant

(By Sri T.A.Karumbaiah, Advocate)

AND:

1. Mallengada Chengappa,
Aged about 50 years,
2. Mallengada Saroja,
Aged 52 years,
3. Mallengada Muthanna,
Aged 75 years,

The 1st respondent is the
Son and 2nd respondent is
the daughter and 3rd respondent
is the widow of
Late Bopaiah.

4. Chepudira Ramakrishna,
Son of late Muthanna,
Major,
All the respondents are
Residing at Nokya Village,
Thithimathi Post,
Kodagu District.

.. Respondents

(By Sri Shravanth Arya Tandra, Advocate
For M/s.Poovayya & Co., for
Respondent Nos.1 to 3,
Respondent No.4- Served)

This Appeal is filed under Section 96 of Code of Civil Procedure, praying to call for the records, allow this appeal, set-aside the judgment and decree dated 30.09.2005 in O.S.No.77/1999 of the learned Civil Judge (Sr.Dn.) at Virajpet and dismiss the suit in the interest of justice.

This Appeal having been heard through Physical Hearing/Video Conferencing Hearing and reserved on 28.10.2021, coming on for pronouncement of Judgment this day, the Court delivered the following:

JUDGMENT

The present appellant was the defendant No.1 in O.S.No.77/1999, on the file of learned Civil Judge (Sr.Dn.), Virajpet, (hereinafter for brevity referred to as `trial Court'), which suit was instituted by the present respondent Nos.1, 2 and 3 for the relief of possession of the suit schedule properties, which are the two pieces of land measuring 2.25 acres and 0.50 cents. The present respondent No.4 was defendant No.2 in the

trial Court. After contest, the said suit came to be decreed. Challenging the same, the present appeal has been filed.

2. The summary of the case of the plaintiffs in the trial Court was that the plaintiff Nos.1 and 2 are the children of plaintiff No.3, who was the wife of one deceased Bopaiah. The said Bopaiah had died three years prior to filing of the suit. The defendants are the sons of one late Muthanna, who died six years prior to filing of the suit. The said Muthanna had filed a civil suit against Bopaiah in O.S.No.48/1983, in the Court of Addl.Munsiff, at Virajpet for possession of two bits of land measuring 35 cents and 10 cents, in Survey No.48/2 and Survey No.48/3 respectively and sought for possession of the said alleged encroached land. Bopaiah, as a defendant, contested the suit and alleged that he has not encroached any land of the plaintiff-Muthanna, on the other hand, the said Muthanna himself had encroached some portions of his lands. However, the said suit instituted by Muthanna came to be decreed on 22.02.1989, wherein it was held that the plaintiff-Muthanna was entitled for the possession of the land to an extent of 35 cents in Survey No.48/2 and 10 cents in Survey No.48/3. Bopaiah preferred a Regular Appeal in R.A.No.9/1991,

before the learned Senior Civil Judge, Virajpet. In the said appeal, at the instance of said Bopaiah, a Commissioner was appointed for survey of the lands. In the survey, it was found that said Bopaiah had encroached about 20 cents of land in Survey No.48/2 and 10 cents of land in Survey No.48/3 and Muthanna had encroached 2.25 acres of land in Survey No.48/9 and 50 cents in Survey No.48/11. The learned Civil Judge, Virajpet, where the appeal was pending, after considering these aspects, held that though the plaintiffs have encroached only 30 cents of land, but the defendants have encroached 2.25 acres of land. Observing that both parties were guilty of encroachment, wherein the defendants are guilty of encroaching a larger area and the balance of justice had to be held evenly, by its judgment dated 08.12.1994, allowed the appeal. In the meantime, the father of the plaintiffs Bopaiah and father of defendants Muthanna had died. As such, the present defendants filed a Regular Second Appeal No.486/1995 before this Court. The said appeal came to be allowed by this Court by its judgment dated 11.08.1998, however, it also observed that the defendants therein were entitled to file a suit in the competent Court of law to evict the plaintiffs from the

encroachment of the suit schedule properties and recover possession of the same. It is thereafter the legal representatives of the defendants in O.S.No.48/1983 have filed the present suit in O.S.No.77/1999 for recovery of the alleged encroached land.

3. In response to the summons served upon them, the defendants appeared through their counsel and filed their written statement, wherein they admitted that Sri M.S.Bopaiah was the owner of the bane lands bearing Survey Nos.48/9 and 48/11, situated at Nokya Village and that the said Bopaiah died in November 1998, leaving behind the plaintiffs and one Sri M.B.Belliappa as his legal heirs. They further contended that their father Muthanna, was the absolute owner and in possession of the property bearing Survey No.48/2, measuring 1 acre and Survey No.48/3, measuring 7.30 acres. In the year 1980-81, the above said Bopaiah had unlawfully encroached a portion of the said property. It is in that regard, Muthanna had filed a suit in O.S.No.48/1983 for recovery of possession of the land. The defendants also contended that the Commissioner's report called for in R.A.No.9/1991 was not binding on them.

They specifically contended that their father Sri Muthanna has never encroached the suit property as alleged by the plaintiff.

The defendants further contended that from 1969 onwards, said Sri C.M.Muthanna has been in possession of the alleged encroached part of the land, which is the suit property, openly, peacefully and continuously with the knowledge and adverse to the interest of the said M.S.Bopaiah and the plaintiffs and perfected his title by adverse possession. After the death of said Muthanna, the defendants have been in exclusive possession and enjoyment of the said encroached area openly, peacefully and with the knowledge and adverse to the interest of the plaintiffs and thus have perfected their title by adverse possession. With this, they prayed for dismissal of the suit.

4. Based on the pleadings of the parties, the trial Court framed the following issues and additional issues :

1. *Whether the plaintiffs prove that the defendants have illegally encroached the suit schedule properties as contended in the plaint and they came to know about the alleged encroachment only on the basis of survey commission in a previous proceedings as alleged?*

2. *Whether the defendants prove that they have perfected their title to the suit schedule property by way of adverse possession as contended in their written statement?*
3. *Whether the plaintiffs are entitled for possession of the suit property?*
4. *What order and decree?*

Additional Issues :

1. *Whether the suit is bad for non-joinder of proper and necessary party as contended?*
2. *Whether the valuation made and Court fee paid is proper?*
5. In support of their case, plaintiff No.1 got himself examined as PW-1 and got marked documents from Exs.P-1 to P-8. The 1st defendant got himself examined as DW-1 and one Sri A.Achachaiah as DW-2 and got marked documents from Exs.D-1 to D-4.

After recording the evidence and hearing both side, the trial Court while answering issues Nos.1, 3 and additional Issue No.2 in the affirmative and issue No.2, additional issue Nos.1 and 3 in the negative, proceeded to pass the impugned judgment and decree dated 30.09.2005. Challenging which,

the defendant No.1 in the trial Court has preferred the present appeal.

6. In response to the notice served upon them, the respondents are being appearing through their counsel.

7. Records from the trial Court are called for and the same are placed before the Court.

8. For the sake of convenience, the parties would be referred to as per their rank before the trial Court.

9. Heard the arguments of learned counsel from both side and perused the materials placed before this Court, including the impugned judgment and the trial Court record.

The points that arise for my consideration are,

1. *Whether the plaintiff in the trial Court has proved that defendants had encroached the suit schedule properties?*

2. *Whether the defendants have perfected their title over the suit schedule properties by adverse possession?*

3. *Whether the judgment and decree under appeal deserves any interference at the hands of this Court?*

10. The main point of argument of learned counsel for the appellant/defendant No.1 was that the suit was hopelessly barred by law of limitation. Learned counsel submitted that the defendants have specifically taken a contention that from the year 1969, their father deceased Muthanna was in possession of the suit schedule property and was cultivating it by growing banana, coffee and other commercial crops. Further, the plaintiff No.1 who was examined as PW-1, in his cross-examination, has stated that when there was division of property between himself and his elder sister in the year 1986, he got the survey of the land made in the month of December. It was at that time, he came to know that defendants have encroached their property. With this, learned counsel submitted that from the said date, within a period of twelve years, the suit has not been filed. As such, the suit is hopelessly barred by limitation. Learned counsel further submitted that the defendants have proved the perfection of their title over the suit schedule property by adverse possession, which fact, the trial Court failed to notice.

11. Learned counsel for the respondents in his argument submitted that in RSA.No.486/1995, this Court has given liberty to the present plaintiffs to take appropriate legal action for recovery of the encroached land, which is the suit schedule property. The said appeal came to be disposed of in the year 1998, as such, without any further delay, in the very next year i.e., in 1999, the present suit has been filed, thus, the same is within limitation.

Learned counsel for the respondents further submitted that since the present plaintiffs have already delivered the possession of that piece of land which was said to be encroached by their father Bopaiah, in favour of the defendants, as a reciprocity, the defendants, who have encroached larger portion of the land, are also required to deliver the possession to the plaintiffs.

12. It is not in dispute that the father of the defendants Sri Muthanna had filed a suit in O.S.No.48/1983 against Bopaiah, the ancestor of the plaintiffs seeking recovery of the possession of some portion of the land. Admittedly, the judgment and decree passed in O.S.No.48/1983, dated 22.02.1989, held that Bopaiah had encroached in all 45 cents

of land in Survey No.48/2 and Survey No.48/3 both put together and directed Bopaiah to deliver possession of the said 45 cents of land. It is also not in dispute that by challenging the said judgment and decree, the defendant in the said suit, Sri Bopaiah filed R.A.No.9/1991, in the Court of Senior Civil Judge at Virajpete. It is also not in dispute that, at the instance of said Bopaiah, Commissioner for survey of land was appointed for surveying the properties of the plaintiff and defendant. The said Commissioner's report revealed that the alleged encroachment by Bopaiah in the lands of Muthanna was only to an extent of 20 cents and 10 cents in Survey No.48/2 and Survey No.48/3 respectively, whereas, the said Muthanna had encroached the land to an extent of 2.25 acres in Survey No.48/9 and 50 cents in Survey No.48/11. The said Commissioner's report was not challenged by the respondents in the said R.A.No.9/1991. It is accepting the said Commissioner's report, the said appeal R.A.No.9/1991 came to be dismissed.

The children of Muthanna challenged the said judgment and decree passed in R.A.No.9/1991, before this Court in R.S.A.No.486/1995. This fact is also not in dispute. This Court

by its judgment dated 11.08.1998, set aside the judgment and decree passed in R.A.No.9/1991 and restored the judgment and decree passed in O.S.No.48/1983. However, as could be seen from the certified copy of the said judgment passed by this Court in RSA.No.486/1995, which is at Ex.P-6, this Court in the very same judgment confined the encroached extent to only 30 cents in Survey No.48/2 and 10 cents in Survey No.48/3 in accordance with the report of the Assistant Director of Land Records. It also observed in the same judgment that, it was upon the defendants in the said O.S.No.48/1983 to recover any encroached portion said to have been encroached by the plaintiff (Muthanna) by way of separate proceedings.

13. In that background, the argument of learned counsel for the appellant that in view of the fact that judgment and decree passed in R.A.No.9/1991 since has been set aside, the Commissioner's report also stands quashed, is not acceptable. On the other hand, this Court in its judgment passed in RSA.No.486/1995, has relied upon the report of the Assistant Director of Land Records, who was appointed as Commissioner and accepting his finding regarding the encroachment, has set aside the judgment and decree passed in R.A.No.9/1991, since

the respondents' father (plaintiffs in O.S.No.48/1983) had also encroached upon some portion of the land of the defendants. Therefore, when this Court in RSA.No.486/1995 has considered and accepted the Commissioner's report, the argument of learned counsel for the appellant that by setting aside of the judgment passed in R.A.No.9/1991, the Commissioner's report also get set aside, is not acceptable.

14. The argument of the learned counsel for the appellant is that the suit is hopelessly barred by limitation and that the defendants have proved that they have perfected their title over the suit schedule property by adverse possession. As submitted by the learned counsel for the appellant, no doubt, PW-1 in his cross-examination at one particular place has stated that in the year 1986, at the time of division of the property between himself and his elder sister, they got the survey of the land done and at that time, they came to know about encroachment of a portion of their property by the defendants. Banking upon the said statement of PW-1 made in his cross-examination, learned counsel for the appellant vehemently submitted that the period of limitation starts

running from the year 1986, as such, the Original Suit filed in the year 1999 is hopelessly barred by the law of limitation.

15. According to Article 65 of the Schedule to the Limitation Act, 1963, the period of limitation for a suit for the relief of possession of an immovable property or any interest thereunder based on title is twelve years from the date when the possession of the defendant become adverse to the plaintiff. The important point to be noticed is the time from which the period begins to run is not from the date of his alleged possession of the plaintiff's property by the defendant, but, the time begins to run when the possession of the defendant become adverse to the plaintiff. Therefore, Article 65 of the Limitation Act presupposes that the limitation starts only if the defendants prove the factum of adverse possession affirmatively from a particular time. "*Animus possidendi*" is one of the ingredients of adverse possession and unless the person possessing the property has the requisite hostile animus, the period of prescription does not commence. The physical fact of exclusion, possession and *animus possidendi* to hold as owner, in exclusion to the actual owner, are the most important factors to prove the adverse possession.

16. Merely because PW-1 has stated in his cross-examination that in the year 1986, they came to know about the encroachment of a portion of their property by the defendants, by itself it cannot be construed that, to the knowledge of the plaintiff, the possession of the defendant had become adverse to them. Furthermore, as stated by none else than the defendants through DW-1 in their cross-examination, though they claim to be in possession of the property belonging to the plaintiff, even on the date of the cross-examination of DW-1, he was not aware as to in how much of the area of the plaintiff's property, the defendants were said to be in actual possession.

Similarly, DW-2, apart from being a relative of the defendants, was also not aware of the survey number of the land which is in dispute between the parties to the litigation. As such, the evidence of DW-2, who himself is not aware of the particulars of the property which is said to be under alleged adverse possession of the defendant, cannot inspire any confidence to believe his evidence.

Further, as observed above, DW-1 also does not know the extent of the land in which they claim adverse possession.

As such, when the defendants themselves are not clear and aware as to when their alleged possession has turned hostile to the plaintiff, it cannot be held that, merely because PW-1 has stated that in the year 1986, they came to know about the encroachment of a portion of their property by the defendant itself is the date from which the possession of the defendant had become adverse to the plaintiff. On the other hand, the plaintiffs in their plaint have stated that they came to know about the exact encroachment in their property made by the defendants only after the Commissioner surveyed the land as per the orders of the first Appellate Court in R.A.No.9/1991 on 19.02.1994 and the cause of action has arisen to them when the defendants did not vacate the encroached land in spite of the request made by the plaintiffs. Thus, it is clear that, it is only after the plaintiff making a demand to the defendants to vacate the land and when the defendants refused to vacate the land and showed that they are not ready and willing to vacate the land, but, claimed their title by adverse possession over the property, the plaintiffs got cause of action to sue the defendants. As such, the suit filed by the plaintiffs in the trial court cannot be said to

be barred by limitation. Therefore, the argument of the learned counsel for the appellant that the suit was hopelessly barred by the law of limitation is not acceptable.

17. As held by the Hon'ble Apex Court in ***Dagadabai (Dead) by Legal Representatives -vs- Abbas alias Gulab Rustum Pinjari***, reported in **(2017) 13 SCC 705**, the person raising plea of adverse possession must necessarily first admit the ownership of true owner of relevant property to the knowledge of that owner. In the instant case, the defendants in their written statement have admitted the ownership of the plaintiffs over the suit schedule property.

Apart from the defendants raising the plea of adverse possession and admitting the ownership of the true owner of relevant property to the knowledge of the said owner, they should also prove that their possession is an actual, open, exclusive, hostile and continued over statutory period by wrongful dispossession of rightful owner. Thus, *animus possidendi* is essential. Therefore, mere possession cannot be deemed to be adverse possession merely on the basis of denial of another's title over property for that would be

violative of basic rights of actual owner. Until the defendants' possession becomes adverse to that of the real owner, the defendants continue in permissive possession of the property. Only if the defendants' possession becomes adverse to the interest of the real owner and the real owner fails to file the suit for possession within twelve years, as prescribed under Article 65 of the Limitation Act, from the point of time the possession by the defendants becomes adverse to the plaintiffs, the real owner loses his title over the property. Every possession is not an adverse possession. The defendants will not acquire adverse possession by simply remaining in permissive possession for howsoever long it may be.

18. The Hon'ble Apex Court in ***Uttam Chand (Dead) through Legal Representatives -vs- Nathu Ram (Dead) through Legal Representatives and others***, reported in **(2020) 11 SCC 263**, was pleased to observe that, 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 adverse possession requires all the three classic requirements to co-exist at the same time, namely, *nec vi* i.e.

adequate in continuity, *nee clam* i.e. adequate in publicity and *nec precario* i.e. adverse to a competitor, in denial of title and his knowledge. 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 considered.

19. In the instant case, as observed above, even though the plaintiffs can be taken as coming to know about the possession of a portion of their property by the defendants as long back as in the year 1986, as analysed above, the alleged possession of the portion of their property by the defendant had by then not become adverse to the plaintiff. As has come out in the pleadings of the parties and also through their evidence, an undisputed fact is that the lands of both Bopaiah and Muthanna were surveyed and it was revealed by the report of the Commissioner that there is encroachment of the property by each one of them to some extent. Accordingly, the plaintiffs in the present suit were asked to deliver the possession of 30 cents in Survey No.48/2 and 10 cents in Survey No.48/3 in accordance with the Assistant Director of Land Records report as held by this Court in RSA.No.486/1995 in its judgment dated 11.08.1998. It is by virtue of the said

Commissioner's report, which has been considered and accepted by the Court, the plaintiffs in the instant case, came to know the exact extent of their land under the possession of the defendants by instituting the present suit and it is the defendants through their written statement have taken up the plea of adverse possession. Thus, except taking such a plea, the defendants have not placed any material to show from when their possession of the portion of the plaintiffs' property has become their possession adverse and hostile to the title of the plaintiffs. Merely because they produced two RTC at Ex.D-1 and D-2, it cannot be inferred that their possession of the property was adverse and hostile to the title of the original owner and the same was to the knowledge of the true owner.

20. It is considering the evidence placed before it in its proper perspective since the trial Court has arrived at a finding holding that the defendants have failed to prove their alleged perfection of title over the suit schedule property by adverse possession, I do not find any perversity, illegality or irregularity in the said finding warranting any interference at the hands of this Court. As such, the finding given by the trial Court does not warrant any interference at the hands of this Court and

decree passed by the trial Court directing the defendants therein to hand over possession of the suit schedule property to the plaintiffs requires to be confirmed.

21. Accordingly, I proceed to pass the following order:

ORDER

The Regular First Appeal is ***dismissed***. The judgment and decree passed by the learned Civil Judge (Sr.Dn.) Virajpet, in O.S.No.77/1999, dated 30.09.2005, stands confirmed.

Registry to transmit a copy of this judgment along with records to the concerned trial Court without delay.

**Sd/-
JUDGE**

bk/