

Bench: A Ramamurthi

K. Raju vs Arul Mary, A.V. Ayub George Rajan (Died), Edward, Unnis, Kennedy, Bethalis, Victoria, Elizabeth, William, Rani And Selvi on 30/9/2002

JUDGMENT

1. The plaintiff in the suit is the appellant.

2. The case in brief is as follows:- The plaintiff filed a suit for declaration that he is the owner of the suit property and a consequential relief of permanent injunction. The suit property originally belonged to one Arokiasamy, father of the 1st defendant. The said Arokiasamy purchased the same under a registered sale deed dated 20th February 1952 for a sum of Rs.700/=. He was in possession and enjoyment of the property and divided the same into two portions and on the western portion, he had put up a house and resided there and on the eastern side, he had put up a foundation. Subsequently, Arokiasamy sold the suit property to the plaintiff under a registered document dated 19.02.1982 for a consideration of Rs.6,000/= and he was placed in possession of the property. The two sons of Arokiasamy had also attested the sale deed. The property was also sold for discharging the previous mortgage over the property. The property was also assessed in the name of the plaintiff after purchase and he has been paying the taxes. The 1st defendant is the daughter of Arokiasamy and the 2nd defendant is her husband. Arokiasamy had permitted his daughter and the 1st defendant had resided in the house in the western portion of the property. The plaintiff after purchase, wanted to put up superstructure; but the defendants questioned the right. Hence, the suit.

The 1st defendant filed a written statement and denied that his father purchased the property under a sale deed dated 20th February 1952. The marriage between defendants 1 and 2 is a love marriage and it took place on 27.09.1951. The 2nd defendant was employed in Military and at the time of discharge, he got substantial money. Out of this money only, they approached the father of the 1st defendant to purchase the property; but the father had purchased the property nominally in his name. When questioned, her father had entrusted the document and she was permitted to put up construction in the property. Her father had no right, title and interest in the property and he was only a name lender. Subsequently, she had filed a plan before the Dindigul Municipality and put up construction in the property and she was paying the taxes. She had also extended the construction and for violation, proceedings were taken against her and she had also paid the penalty. Her father moved the authorities to transfer the assessment in 1975, but it was dismissed. The sale deed in favour of the plaintiff is not valid and it is not binding on her. The 1st defendant and her husband are in possession and enjoyment of the property for more than 30 years adverse to the knowledge of the plaintiff.

The 1st defendant also filed additional written statement raising a plea that they are in possession and enjoyment of the property for more than 35 years and they have also prescribed the title by adverse possession.

The trial court framed 3 issues and on behalf of the plaintiff, P.Ws.1 to 4 were examined and Exs.A-1 to A-19 were marked and on the side of the defendants, D.Ws.1 to 5 were examined and Exs.B-1 to B-79 were marked. The trial court decreed the suit in favour of the plaintiff and aggrieved against this, the defendants preferred A.S. No. 41 of 1989 on the file of District Court, Dindigul and also filed Exs.B-80 to B-88 and the learned Judge after hearing the parties, allowed the appeal, set aside the judgment and decree of the trial court and dismissed the suit. Aggrieved against this, the plaintiff has come forward with the present second appeal.

3. At the time of admission of the second appeal, this Court framed the following substantial question of law for consideration:

Whether the first appellate court was correct in reversing the judgment of the trial court on the ground of adverse possession ?

4. Heard the learned counsel for the parties.

5. The plaintiff filed the suit for declaration and permanent injunction relating to the property alleging that the property originally belonged to one Arokiasamy, father of the 1st defendant. Ex.A-2 dated 20th February 1952 is the sale deed in the name of Arokiasamy. The plaintiff purchased the property from the said Arokiasamy under Ex.A-1 dated 19.02.1982 for a sum of Rs.6000/= and he is in possession and enjoyment of the same. The 1st defendant was permitted to occupy the house by her father Arokiasamy and before sale, Arokiasamy himself sent a notice under Ex.B-66 dated 03.11.1977 to the 1st defendant and she sent a reply under Ex.B-68.

6. Per contra, the defendants contended that the property was not purchased by Arokiasamy, but it was purchased only out of the funds of the 2nd defendant. The sale deed was taken nominally in the name of Arokiasamy. On coming to know of this, the 1st defendant enquired with her father and thereupon, he entrusted the original sale deed and permitted her to put up construction in the property. Accordingly, she had submitted plan to the Municipality and got approval and put up construction and the assessment was also made in her name and she has paid the property tax.

7. The trial court decreed the suit in favour of the plaintiff, whereas the lower appellate court reversed the finding and dismissed the suit on the ground that the defendants have prescribed title to the property by adverse possession. In fact, both the courts below gave a concurrent finding that the property was purchased only by Arokiasamy and it was not purchased nominally out of the funds of the 2nd defendant in the name of Arokiasamy. The learned counsel for the appellant / plaintiff contended that the lower appellate court failed to see that Ex.A-3 clinches the issue that the vendor of the appellant mortgaged the suit property in 1970 and the assessments stood in the name of P.W.2. The appellate court ought to have seen that there is no animus on the part of the respondents to prescribe title to the property. In this case, the respondents set up a case of benami originally and later by way of additional written statement raised the plea of adverse possession. The appellate court also erred in allowing the documents to be marked at the appellate stage and no opportunity was given to the appellant to cross examine the defendants with reference to the new documents.

8. The appellant had positively established that his vendor has got title to the property. Under Ex.A-3, the vendor had mortgaged the property to a third party for a sum of Rs.1000/= on 09.02.1970. Subsequently, the mortgage was redeemed under Ex.A-4 dated 05.12.1981. Several house tax receipts in the name of Arokiasamy as well as P.W.1 were also filed. In fact, the vendor was examined as P.W.2 and the plaintiff was examined as P.W.1. When once the title to the property is established, the burden shifts on the defendants to prove the plea of adverse possession.

9. The learned counsel for the respondents relied on Thangamani ..vs.. Santhiagu ((2000) 3 MLJ 589), wherein it is observed as follows:

"The expression that there should be animus against the real owner came to be made in particular cases, where the question arose as to whether the contesting party was the real owner of the property or not and in cases where the person in possession was required to prove ouster strictly and particularly against specific individual or individuals as in the case of a co-owner pleading ouster and adverse possession or a case of possession which was permissive at the inception and the person in occupation claims to have acquired hostile title. But in cases where the occupier and the predecessors in title have been in open and continuous occupation asserting positive title in themselves and against every one and the real owner does not take any step to assert his right and to interrupt the running of the period, there is no reason as to why the occupier cannot claim adverse possession".

10. Reliance is placed on Arumugha Thevar ..vs.. Melavasaga Thevar and others (1999-3-L.W.621) that "person concerned must be in a position to exercise control or power over the thing or object; he must intend or will to exercise this control or power. Physical (corpus) and mental (animus) aspects or elements should be present to constitute possession".

11. Reliance is also placed on Sadasiva Gounder and another ..vs.. Purushothaman ((2000) 3 MLJ 785) that "Person claiming adverse possession setting up title himself - Failing to prove title - He can still claim adverse possession - General principles relating to adverse possession stated".

12. There is no dispute about the principles enunciated in these decisions and the applicability of the same depends upon the facts and circumstances in each case. So far as this case is concerned, the 1st defendant happened to be the daughter of the original owner Arokiasamy and the father permitted the daughter, namely, the 1st defendant to occupy the constructed area. It appears that the 1st defendant had also applied for plan, put up construction, assessment was made in her name and she had also paid house tax. But, however, under Ex.A-3, the original owner had mortgaged the property to a third party. Now, the suit was filed only in the year 1986. P.W.2, the original owner had sent a notice to the daughter under Ex.B-66 calling upon her to vacate. No doubt, a reply had been sent by the 1st defendant repudiating title to the property. Any period of possession cannot be construed as adverse unless he will be able to prove any animus against the real owner. Now, in the present case, the 1st defendant claimed title to the property and only in the additional written statement, raised the plea of adverse possession. Considering the relationship of the parties as father and daughter, there cannot be adverse possession to the daughter against the father and as such, the animus can be inferred under law only from the date of notice under Ex.B-66 dated 03.11.1977. The suit has been filed in the year 1986 and when the suit is filed within 12 years from the date of commencement of the adverse possession, naturally the plaintiff having established title to the property, is entitled to get a relief in his favour.

13. There is nothing in the pleadings to show as to from what date the 1st defendant got animus against the real owner. Simply because for a period of 36 years the daughter happened to be in possession of the property, it cannot be equated as adverse possession. It has also come out in evidence from D.W.5 that the brother of the 1st defendant also ran a cigar company in the said place. The lower appellate court has misdirected itself and taking into consideration of the only factor about the number of years of possession, concluded that the defendants have established the plea of adverse possession. Even assuming that the attempt made by Arokiasamy to transfer the assessment in his name was dismissed in 1975 as per Ex.B-60, adverse possession can commence only from 1975; but the suit has been filed within 11 years. Nothing has been discussed in the lower appellate court about the commencement of the adverse possession, etc. Any length of possession will not be an adverse possession in the eye of law in the absence of animus. It is settled position of law that there should be animus on the part of a person in possession against a real owner. The 2nd defendant had also not been examined in the case for reasons best known. The learned counsel for the respondents contended that the finding of the lower appellate court relating to adverse possession is only a question of fact and hence, it cannot be interfered with in the second appeal. The finding is a reverse one and the learned counsel for the appellant clearly established that the animus to hold the property could have commenced only from 1977 and not earlier to that and the suit having been filed in 1986, it cannot be said that the defendants had prescribed title by adverse possession. Considering the fact that the lower appellate court has not properly appreciated the legal position relating to adverse possession and the relationship of the parties was also ignored and simply carried away by the length of possession, the finding is a perverse one and as such, interference is called for.

14. For the reasons stated above, the Second Appeal is allowed and the judgment and decree of the lower appellate court are set aside and the judgment and decree of the trial court are restored. No costs. Consequently, CMP No.19522 of 1999 is closed.