

Equivalent citations: 1999 (1) CTC 428, (1999) IIMLJ 542

Bench: K Sampath

Nagarajan vs Rajamani Aiyar And Seven Others on 2/2/1999

ORDER

1. The fifth defendant in O.S.No.51 of 1994 on the file of the District Munsif, Nannilam, is the appellant in the second appeal. The first defendant was the brother of the first respondent. The first respondent filed the suit for recovery of possession and future profits against the first defendant. Pending suit he died and his wife and children were brought on record as defendants 2 to 10. The second defendant, wife of the first defendant also died pending suit and defendants 3 to 10 were recorded as her legal representatives. Defendants 3 to 10 adopted the written statement of the first defendant in the suit. Only the fifth defendant effectively contested the suit.

2. The case as set out in the plaint was as follows:

The suit property, a house property, was the ancestral property of the plaintiff and the first defendant. In a partition this was allotted to the plaintiff on 21.2.1956. He permitted the first defendant to live in the suit house from the year 1975 and his status was that of a permissive occupant. As the first defendant did not vacate the suit house in spite of written request made by the plaintiff, the suit was filed for the reliefs already stated. Originally the suit was filed before the District Munsif's Court, Mayiladuthurai as O.S.No. 717 of 1987 and it was subsequently transferred to the file of the District Munsif's Court, Nannilam, and renumbered as O.S.No.51 of 1994. The plaint was presented on 19.10.1987.

3. The defence set up was as follows:

It was true that the suit house was allotted to the plaintiff in the family partition. In the same partition, a house in Pattamangalam Street, Mayiladuthurai Town, was allotted to the plaintiff.

Subsequently, there was an understanding between the plaintiff and the first defendant, whereby the lands in Pattamangalam Village and the first defendant's house in Pattamangalam Street were sold and out of the sale proceeds 15 Mahs of lands each were purchased for the plaintiff and the first defendant in Nalladai Village. Even though the sale proceeds from the sale of the first defendant's share was more than the sale proceeds from the sale of the plaintiff's share of the lands, still lands were purchased equally in Nalladai Village and there was an understanding between the plaintiff and the first defendant that the suit house would be given to the first defendant by way of compensation towards equalisation of shares. The plaintiff agreed to the same and the suit house was given to the first defendant. The first defendant and his family members were enjoying the same along with the dry lands adjacent to the suit house as one block. They had been in possession and enjoyment of the suit house and the adjacent land for more than the statutory period and had prescribed for title by adverse possession.

4. The learned District Munsif framed the following issues:

(1) Whether for the reasons set out in the first defendant's written statement the plaintiff is not entitled to the relief of possession of the suit property?

(2) Whether the first defendant had prescribed for title by adverse possession? and

(3) To what relief is the plaintiff entitled?

The learned District Munsif held that the first defendant had been in possession and enjoyment of the suit property right from the year 1958, that the case of the first defendant that the suit property was agreed to be given to the first defendant towards equalisation of the shares as pleaded in the written statement was true and that in any event, the first defendant and after him his legal representatives had prescribed for title by adverse possession. The learned District Munsif also found that the first defendant had been treating the house as his own property by spending a large sum on its renovation and maintenance, which was also admitted by the plaintiff as P.W.1 and according to the learned District Munsif, this was a further circumstance supporting the case of the first defendant. By his judgment and decree dated 22.8.1995 the learned District Munsif dismissed the suit.

5. However, on appeal in A.S.No. 3 of 1997 the learned Principal Subordinate Judge, Nagapattinam, allowed the appeal, set aside the dismissal of the suit and decreed the suit by his judgment and decree dated 4.4.1997. The learned Subordinate Judge, in coming to the conclusion that the plaintiff was entitled to the relief prayed for in the suit, relied on the following factors: Prior to the filing of the suit the plaintiff had issued a notice under Ex.A-2 on 16.2.1982 calling upon the first defendant to surrender the suit property. According to the fifth defendant/appellant, all his family members asked the plaintiff to execute a document in respect of the suit property in favour of the first defendant and the plaintiff demanded a sum of Rs. 11,000 as a consideration for the same. The plaintiff did not oblige the defendants, but the defendants also did not call upon the plaintiff to give the property as a gift as agreed to between the plaintiff and the first defendant in the year 1958. So far as the oral evidence of D.W.2 is concerned, the lower Appellate Court observed that D.W.2 did not know about the partition that had taken place between the brothers in the year 1956 and he also did not know regarding the allotment of the suit house to the plaintiff or the first defendant and that what he had said was that the plaintiff had agreed to give up the suit property in favour of the first defendant, but he did not know as to the mode by which it was to be done. He also said that the plaintiff had told about his giving up his right in the suit property only to him and not to the first defendant and this was a material circumstance to discredit the case of the first defendant. So far as the fifth defendant was concerned, he was examined as D.W.1 and he was only three years old in 1958 and he could not have known anything about what happened between his father and the plaintiff. The lower Appellate Court has also adverted to a particular aspect of the oral evidence of D.W.2, in that he had said that the plaintiff did not tell him as to what he would do after giving up his rights in the only house property allotted to him. The appellant as D.W.1 has also admitted that till the plaintiff joined the service as teacher he was only living in the suit house. In those circumstances, it was probable that the plaintiff, the first defendant and their mother were living in the suit house in the year 1958, but this was contrary to the pleading by the first defendant that he went to the suit property only in 1966. It had to be held that the first defendant was in occupation only on a permissive basis. When once it was found that he was in permissive occupation, the relief on the basis of adverse possession would not be available to him. The learned Subordinate Judge referred to a number of authorities on adverse possession and ultimately held against the defendants and in favour of the Plaintiff.

6. Aggrieved, the present second appeal has been filed.

7. Notice of motion was ordered on 29.8.1997. The contesting first respondent took notice through Counsel after filing caveat and the main second appeal itself was taken up by consent.

8. Mr.S.V. Jayaraman, learned Senior Counsel appearing for Mr.S. Sounthar for the appellant, raised the following points in support of the case of the appellant : According to the plaintiff, the first defendant was inducted into possession in the year 1975 on a permissive basis and this had not been substantiated by any acceptable evidence, except the interested testimony of P.W.1. P.W.1 had admitted that the defendants were in possession of the suit property even prior to 1975 and the finding of the lower Appellate Court that prior to 1975 the plaintiff and the first defendant were living as joint family in the suit house, was not supported either by pleading or by evidence. Admittedly, the plaintiff had stated that his mother was living with him and she died in his house at Mayiladuthurai and this would falsify his case that his mother was living in the suit house. Thus the attempt on the part of the plaintiff to explain the possession of the first defendant one way or the

other had been falsified by materials available on record in the suit and the lower Appellate Court ought to have accepted the case of the first defendant that he was in possession in his own right and that himself and after him his heirs had prescribed for title by adverse possession. The lower Appellate Court erred in not acting on the oral evidence of D.W.2, who was admittedly a close associate of the family and there was no enmity between him and the plaintiff and his version that the suit house had been given to the first defendant should have been accepted. There was no warrant for disbelieving his evidence. On the basis of the oral and the documentary evidence, the lower Appellate Court ought to have confirmed the decision of the trial court and dismissed the appeal.

9. On the basis of the materials on record, the following substantial questions of law are framed for decision in the second appeal;

(1) Whether the lower Appellate Court was justified in coming to the conclusion that the defendants and the plaintiff were living in the suit property subsequent to 1958 and the possession of the defendants could not be regarded as hostile to the plaintiff when the same was not supported by the pleadings in the plaint, but only by subsequent im-provement in the case at the time of argument? and

(2) Whether the lower Appellate Court is justified in ignoring the evidence of D.W.2, who deposed that the suit house was given to the first defendant and he had been enjoying the same as his own property when the plaintiff himself had admitted as P.W.1 that there was no enmity between him and D.W.2?

10. Mr.K. Chandramouli, learned Senior Counsel for Mr.A. Muthukumar for the respondents, submitted that admittedly the suit property was allotted to the share of the first defendant. It was for the first defendant to take a definite stand as to the date from which he was in occupation of the suit property and prove his possession was adverse to the plaintiff. He had no consistent case. While in the pleadings he has given the year as 1966, in the evidence he developed a new case as if he had been in possession from the year 1958. A person setting up adverse possession must state clearly as to when the possession commenced and when it became adverse to the true owner. The learned Senior Counsel also relied on two judgments of this Court.

(1) Ponnaiyan v. Munian (died) and others 1995 (II) MLJ 294 : 1995 (I) L.W. 680 and (2) Natesan v. Chinnachi Kandar and 4 others, .

in support of his stand.

11. The case in the written statement of the first defendant is that he came to occupy the property from the year 1966. This is given a go by in the evidence and the year is shifted to 1958. It is found by the lower Appellate Court that from 1958 the plaintiff, the first defendants and their mother were living in the suit house and it could not be termed to be exclusive possession by the first defendant. The further case was that the plaintiff agreed to give up his right in the suit property as a measure to equalise the difference in the matter of allotment of properties. No document came to be executed pursuant to this alleged agreement. It is to be noted, as rightly pointed out by the lower Appellate Court, that after the suit notice under Ex.A-2 in the year 1982, the defendants approached the plaintiff and requested him to give up the property, but the plaintiff demanded Rs. 11,000 as quid pro quo. This, in my opinion, will go a long way in discrediting the case of adverse possession set up by the defendants. By 1982, even according to the defendants, they had prescribed for title by adverse possession by continuous possession from 1966 as per the written statement, where was the further need to approach the plaintiff to give up his rights in the property by executing a document. It is also admitted that when once the plaintiff refused to part with the property without taking Rs. 11,000, the defendants did not take steps to pin the plaintiff to his alleged original agreement in the year 1958.

12. Adverse possession is the exception in the recognition by law of acquisition of title only through lawful means. Adverse possession implies that possession commenced in wrong and (b) maintained against right corpus Juris Secundum. In order to constitute possession two conditions must be satisfied: The person

concerned must be in a position to exercise some control or power over the thing or object he must intend or will to exercise this control or power- there must be both physical (corpus) and mental (animus) aspects or elements present to constitute possession. The animus part of it involved the mental element, the intention to control to hold for one's own exclusive use recognising nobody else's right of possession.

13. In *Ittappan v. Manavikrama*, ILR 21 Mad. 153 it has been held on adverse possession as follows:

"Adverse possession refers to (a) actual and exclusive possession

(b) coupled with the intention to hold as owner and

(c) accompanied by such an invasion on the rights of the true owner as gives the latter a cause of action to sue for recovery of possession at once."

14. It has been held in *Rangappa v. Rangasami*, AIR 1925 Mad. 1005 that there must be express pleading of adverse possession.

15. In *Ejaz Ali Gidwai and others v. The Special Manager, Court of Wards, Balrampur Estate and others*, 68 MLJ 397 it has been held that,

"the principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

16. In *Puttathayamma and another v. Rathnarajiah and another*, AIR 1955 Mys. 33 it has been held that,

"where the plaintiff and defendant are close relations, very much more and better and stronger evidence of a positive character is necessary to establish title by prescription and adverse possession in favour of the plaintiff."

17. In *S.M. Karim v. Mst. Bibi Sakina*, it has been held by the Supreme Court that,

"adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.Long Possession is not necessarily adverse possession."

18. In *Karmega Kone v. Udayar Kone and others*, 1979 (I) MLJ 419 following the decision in *S.M. Karim v. Mst. Bibi Sakina*, Chief Justice Ramaprasada Rao observed that,

"Plea of adverse possession has to be pleaded and proved so that the real owner might set up a case (might be true in some cases) that such possession of the claimant was only permissive and was never intended to be adverse so far as his real title was concerned..... the time from which it should be deemed to have commenced should also be made specific and public, so that the real owner might be given a fair and just opportunity to plead otherwise and set up a case that such adverse possession as claimed by the other person did not begin on the date claimed by him."

19. In *Ganda Singh and others v. Ram Narain Singh*, it has been held that,

"to constitute adverse possession it should be "actual, adverse, exclusive , peaceful, continuous, unbroken, open, notorious, visible, distinct, unequivocal and hostile under a colour of title, or, claim of right. There should be given a date of commencement, the territorial extent and the length of adverse possession and they should also have to be proved."

20. In Anantha Pillai v. Rathnasabapathy Mudaliar and others, 1968 (II) MLJ 574 it has been held that,

"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 the other's rights, but denies them. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor."

21. In Parsinni (dead) by L.Rs. and others v. Sukhi and others, it has been held by the Supreme Court that,

"to constitute adverse possession the party has to plead and prove that he remained in possession in his own right."

22. Most of the above cases have been referred to in Ponnaiyan v. Munian (died) and others, 1995 (II) MLJ 294 : 1995 (I) L.W. 680 and the following ingredients have been formulated:

"A person by holding possession of the property for the statutory period can acquire title only when his possession is: (1) under a claim of title (2) hostile to the true owner and (3) actual, open, uninterrupted, exclusive and continuous."

This decision has been referred to and followed in Natesan v. Chinnachi Kandar and 4 others, . The learned Judge has held that,

"there can be no adverse possession if the person claiming does not know that he is enjoying somebody else's land".

These two decisions were cited by the Learned Senior Counsel Mr. Chandramouli for the contesting respondents. Though I do not subscribe to the view taken in the said two decisions that there can be no adverse possession if the person claiming does not know that he is enjoying somebody else's land, still on the other aspects these decisions lay down the correct law that there must be a claim of title hostile to the true owner and the possession should be actual, open, uninterrupted, exclusive and continuous.

23. In Abubakar Abdul Inamdar etc. v. Narun Abdul Inamdar and others, the Supreme Court highlighted the importance of

pleadings with specific reference as to when it commenced and as to when it became adverse. In that case while dealing with the plea of adverse possession, the Supreme Court observed as follows:

"With regard to the plea of adverse possession, the appellant having been successful in the two courts below and not in the High Court, one has to turn to the pleadings of the appellant in his written statement. There he has pleaded a duration of his having remained in exclusive possession of the house, but nowhere has he pleaded a single overt act on the basis of which it could be informed or ascertained that from a particular point of time his possession became hostile and notorious to the complete exclusion of other heirs, and his being in possession openly and hostilely. It is true that some evidence, basically of Municipal register entries were inducted to prove the point but no amount of proof can substitute pleadings which are the foundation of the claim of a litigating party."

24. To constitute adverse possession there should be *neccinum nec precario*.

25. In Dr. Mahesh Chand Sharma v. Rajkumari Sharma, it has been held by the Supreme Court that,

"a person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to establish his adverse

possession."

26. In *S. Subba Reddiar (died) and others v, Bhagyalakshmi Ammal and another*, 1996 (2) L.W. 31 it has been held that,

"it is for the person claiming title to prove existence of hostile title and that the person remained silent even after knowledge thereof of mere a silence or keeping animus in mind cannot make the title lost to the real owner. Definite date is required to claim adverse possessions and pleading is absolutely necessary.

27. Bearing the above principles in mind, if we examine the case on hand, it has to be held that the defendants have woefully failed to plead and prove adverse possession. The pleading is given a go by in the evidence and there was an attempt to advance the date from 1966 in the pleading to 1958 in the oral evidence. It has been found as a question of fact by the lower Appellate Court that from 1958 the plaintiff, the first defendant and their mother were living in the suit property. Some inconsistency in the oral evidence of the plaintiff cannot be taken advantage of by the defendants. As already observed, right by adverse possession is the exception in the recognition by law of acquisition of title only through lawful means. The same has to be pleaded with certainty and proved to the hilt.

28. It is also to be noticed that in the reply notice given by the first defendant to the suit notice he has not mentioned about the alleged oral gift. If really the defendants were in possession in their own right, there was no question of calling upon the plaintiff to execute a transfer deed in their favour. This would constitute a clear admission of title in the plaintiff. The essential ingredients to constitute adverse possession are not there in the present case. The criteria laid down by the various courts have not been satisfied.

29. Consequently, it has to be held that there are no merits in the case and the substantial questions of law raised have to be answered against the appellant and they are so answered. The second appeal is dismissed. However, there will be no order as to costs. The miscellaneous petition C.M.P.No. 10959 of 1997 is also dismissed.