

Bench: S Thangaraj

Nallan Alias Keerimuthan vs Vellaiyankudumban And Ors. on 19/4/2000

JUDGMENT

S. Thangaraj, J.

1. The unsuccessful appellant in A.S. No. 86 of 1987 on the file of the VI Additional Subordinate Judge, Trichirappalli has filed this second Appeal Challenging the Judgment and decree of the said Court.

2. The sub-first respondent/plaintiff filed O.S. No. 11 of 1985 on the file of the District Munsif, Manapparai for declaration and injunction. The trial Court after full trial decreed the suit as prayed for by the plaintiff. The appeal filed by the first defendant/ appellant herein was dismissed and hence the present Second Appeal.

3. When the Second Appeal was posted for final hearing, it was found that nobody appeared for the respondents Nos. 1 to 9, since the time of filing of the Second Appeal. Therefore the arguments of the learned counsel for the appellant heard and records perused in open Court to decide the substantial questions of Law raised in the Second Appeal.

The substantial questions of law framed in the Second Appeal are as follows;

(i) Whether the lower appellate Court was right in holding Srirangammal was entitled to a half share when she had only a life interest succession and opened prior to the Hindu Succession Act, 1956 and she had alienated her interest even in 1953?

(ii) Whether the lower appellate Court was right in finding adverse possession for the fifteen and half cents with the plaintiff when there is no evidence to support the same?

(iii) Whether the lower appellate Court was right in finding adverse possession of the fifteen and half cents with the plaintiff when admittedly she would be only a co-owner and here was no plea of ouster ?

(iv) Whether the lower appellate Court was in error in decreeing suit for injunction when admittedly the plaintiff was not in possession nor any evidence to substantiate trespass subsequent to suit?

4. The suit property is in Manapparai taluk, Kannudaiyanpatti village in Iyen punja S.F. No. 290/1 to an extent 31 cents on the Eastern most portion out of the total extent of 2.83 acres. Originally the entire property belonged to one Muthukaruppan and according to the plaintiff/first respondent, he had two wives by name Valliammal and Srirangammal. Muthukaruppan, Valliammal and Srirangammal are all dead. The defendants Nos. 1 to 3 are their children. The appellant and respondents 2 and 3 herein are the son and daughters of Muthukaruppan. The fourth respondent is the wife of the appellant and the respondents 5 and 6 are the son and daughter of the appellant. The seventh respondent is the sister of respondent No. 4 and eight respondent is the daughter-in-law of respondent No. 4. The ninth respondent is the mother of respondent No. 8. It was the case of the first respondent/plaintiff that after the death of Muthukaruppan, Srirangammal one of the wives of Muthukaruppan for herself and as guardian and stepmother of the first defendant and second defendant joined together executed a sale deed on 27-6-1953 in favour of the first respondent which is marked as Ex. A1. Under the said sale deed a specific extent of 31 cents in the eastern most portion of the total extent with specific four boundaries was sold to the appellant /first respondent. The patta book in the name of the first respondent is Ex. A2, and Kist receipt in his name for the Fasli 3093 and 3094 are Ex.A3 and Ex. A4. The case of the respondents was that the appellant herein was born to Valliammal and his father Muthukaruppan had no wife by name Srirangammal and the said Srirangammal had no right to execute any sale deed in favour of the first respondent representing as the mother and guardian while he was a minor. The second defendant

though not filed a separate written statement has also questioned along with the other defendants, the validity of Ex.A1. The Courts below have accepted the contention of the plaintiff/first respondent in the Second Appeal. Learned counsel for the appellant /first defendant has vehemently contended that the findings of the Courts below are erroneous and they are bound to set aside the questions of law raised in the Second Appeal.

5. The first Appellate Court has given two grounds to support the Judgment and decree passed by the trial Court, firstly that it has held that Srirangammal was the wife of Muthukaruppan and after the advent of the Hindu Succession Act, 1956, the rights of the female Hindu member has been enlarged into an absolute right and thereby Srirangammal being the widow of Muthukaruppan had a right to sell her half share under Ex. A1 to the first respondent herein. In respect of the other half share of the appellant herein, the Court that Srirangammal was only a de facto guardian of the appellant, while he was a minor and that she had not obtained any permission from the Court to alienate the share of the minor in his interest and therefore the said alienation of the share of the present appellant is invalid in law. However, the first appellate Court further held that since 26-6-1953, the date of Ex, A1 sale deed the first respondent has been in possession of the remaining fifteen and half cents of the lands belonging to the appellant herein without any interruption for over the period of twelve years thereby he has prescribed title over the share of the appellant by "adverse possession."

6. Learned counsel for the appellant has vehemently argued that both the propositions of law held by the Court below was erroneous and there is no legal sanction to come to such a decision in the facts of the case. Admittedly, the sale deed Ex. A1 was executed on 27-6-1953 before the passing of Hindu Succession Act, 1956. The question which arises in the instant case is, whether the alienee who got the property from the female Hindu member will have the same right created under Section 14 of the Hindu Succession Act, 1956. Learned Counsel for the petitioner has relied on certain decisions in order to substantiate the contention that the enlargement of the interest in the property owned by female Hindu member cannot go in favour of the alienee.

7. In *Marudakkal v. Arumugha Gounder* reported in AIR 1958 Madras 255, a Division Bench of this Court has held at (page 258):

"Every Act speaks with effect from the date of its commencement. Therefore, the words "property possessed" occurring in the section would apply to property possessed at the commencement of the Act, that is to say, to property acquired before the commencement. But, with a view to obviate argument and litigation on that matter, the Legislature wisely introduced the clause "whether acquired before or after the commencement of the Act". The Legislature thereby made it clear that the section applied also to property which a Hindu woman had inherited before the commencement of the Act, provided it was in her possession at the commencement of the Act. To that extent, the section is retrospective

The property alienated by a Hindu widow and possessed by the alienee before the Act came into force is not within the language of Section 14(1). Nor does an enlargement of the interest owned by the alienee in the property form any part of the purpose sought to be achieved by the enactment of Section 14(1). The purpose of the section is merely to free Hindu women from the fetters imposed on them by the earlier Hindu law in relation to the holding and enjoyment of property. No such purpose would be served by enlarging alienee's interest."

8. In *Arumuga Gounder v. Nachimuthu Pillai* reported in AIR 1958 Madras 459, it is held :

"The section is retrospective and it enlarges limited estates into absolute estates. It applies to all cases where the widow was "possessed" of the property in controversy when the Act came into force".

9. In *Kanthimathinatha Pillai v. Vayyapuri Mudaliar* , this Court has held (at page 38) :

"The enlargement of the rights of Hindu woman having limited interest in the properties into an absolute interest under Section 14 of the Hindu Succession Act, 1956 will not enlarge the rights of alienees who took the property before the Act came into force with open eyes from such limited owner without justifying necessity for alienation. This principle would equally apply to usufructuary mortgages".

10. In Maragathavalli Ammal v. Mookan Chettiar reported in (1969) 82 Law Weekly 667, this Court has held;

"Under Section 14 of the Hindu Succession Act, a widow becomes an absolute owner in respect of properties which continued in her possession. But in respect of properties, which she has alienated, she cannot become and absolute owner because she is not in possession".

11. From all these decisions it is clear that the right conferred under Section 14 of the Hindu Succession Act, 1956 on a female Hindu member cannot be extended to the alienee. In the instant case the first respondent/plaintiff is only an alienee of the property from the female Hindu member and therefore he has no such right of enlargement. Such a right is given to the female member when she is in possession of the property and when once she has alienated the property, she has no such right of enlargement under Section 14 of the Hindu Succession Act, 1956. In the instant case even before the advent of Hindu Succession Act, 1956, the sale in favour of the first respondent under Ex. A1 has been effected by Srirangammal, the widow of Muthu-karuppan. Therefore, the first respondent who is only an alienee of the property from her, cannot take advantage of the said provision of law. In such circumstances, the sale in favour of the first respondent is invalid in law when Srirangammal had only limited interest in the property as widow of Muthukarauppan. After her lifetime the property should go in favour of reversioners and the first respondent herein cannot have any right over the said property alienated by Srirangammal.

12. It was contended on the side of the first respondent/plaintiff in the Court below that the appellant herein was a minor at the time of Ex. A1 sale deed and when once he attained majority, he ought to have filed a suit challenging the validity of the sale under Ex. A1 and since he had failed to take any step within the period of limitation, he cannot raise any question regarding the validity of Ex. A1 sale deed. To answer the said question raised by the plaintiff/first respondent herein, the learned counsel for the appellant has relied on a decision of the Supreme Court.

13. In Radha Bhargava v. Hanuman Prasad Bhargava , wherein their Lordships held (at page 219) :

In the case of an alienation by a Hindu widow without legal necessity, the reversioners are not bound to institute a declaratory suit during the lifetime of the widow. They can sue after her death the alienee for possession of the alienated property treating the alienation as a nullity without the Court's intervention.

14. From this decision it is clear when the alienation itself a nullity, no duty is cast upon the appellant herein to challenge the said alienation under Ex. A1 within the period of limitation.

15. The next ground relied upon by the first Appellate Court was one of adverse possession. There is no statutory definition for "adverse possession". The adverse possession must be specifically pleaded and proved by the person who raises it. In the instant case a perusal of the plaint and other documents show that neither plaintiff/first respondent has pleaded "adverse possession" nor proved it. The first Appellate Court without looking into the plaint and connected document have come to the conclusion that the first respondent has prescribed title by adverse possession in respect of share of 15 cents of lands belonging to the appellant. Without pleading and without proper proof, the first respondent cannot have prescribed title over said property by adverse possession. Any amount of evidence let in without a proper pleading is of no use and the Court cannot rely upon such evidence, when there is no pleading for "adverse possession". The first Appellate Court has committed a clear error in coming to the conclusion that first respondent/plaintiff has prescribed title by "adverse possession".

16. This Court in *Ponnaiyan v. Manish* (died), reported in 1995 (1) Law Weekly 680, has analysed the various decisions of the Supreme Court in order to decide the question of "adverse possession" raised in the said case. While doing so, the learned Judge has referred to a Full Bench decision of Punjab High Court regarding the claim of adverse possession.

17. In *Ganda Singh v. Ram Narain*, , Punjab

High Court has held (at page 154) ;

"In order to succeed on the plea of adverse possession, several facts have to be stated and substantiated by the party basing his title on this plea. Burden of proving all the elements of adverse possession is on the party setting up such title. The plaintiff in this case, in order to succeed, had to allege and establish, that their possession was actual, adverse, exclusive, peaceful, continuous, unbroken, open, notorious, visible, distinct, unequivocal and hostile under a colour of title, or claim of right. He must further prove the date of commencement, the territorial extent and the length of his adverse possession".

In the instant case, neither such pleading nor evidence available regarding the ingredients of adverse possession.

18. This Court in *Roohnisha Beevi v. A.M.M. Mahudu Mohamed* reported in 1998 (1) Law Weekly 244, has held; relied on two decisions of the Supreme Court.

In *P. Periasamy v. Periatham* , wherein it

was held by their Lordships as follows ;

"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property".

In the same decision, this Court had referred another decision of their Lordships of the Supreme Court.

In *Annashaheb Bapusheb Patil v. Balwant* ,

their Lordships held;

"Adverse possession means a hostile assertion, i.e., a possession which is expressly or impliedly in denial of title of the true owner,"

These decisions are also further prove the necessary ingredients for proof of adverse possession.

19. This Court in *Nagarajan v. Rajamani Aiyar* , has analysed various decisions on adverse possession and held;

To constitute Adverse possession it has to be open, hostile and as a matter of right.

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.

20. From these decisions, it is clear that the necessary ingredients which are required for the proof of adverse possession. In the present case there is no plea in the plaint for adverse possession. The plaintiff who is the first respondent herein has also failed to let in any evidence in order to prove the prescription of title by adverse possession. His mere possession of the lands in question over statutory period cannot cloth any right on him to claim the prescription of title by adverse possession. When the plaintiff has failed to raise the question of adverse possession and absolutely there is no evidence to substantiate the prescription of title by adverse possession, the first Appellate Court committed an error in holding that the plaintiff/first respondent has prescribed title by adverse possession.

21. The first Appellate Court also went wrong in granting permanent injunction in favour of the plaintiff/first respondent, his title to the property, that he has not proved his possession over the land in question, as such all the four substantial questions of law framed in the Second Appeal are decided against first respondent.

22. In the result, the Judgments and decrees passed by the Courts below are set aside and the Second Appeal No. 1391 of 1988 is allowed, with costs.