
(1958) 07 MP CK 0018

In the Madhya Pradesh High Court

Case No : Second Appeal No. 77 of 1952

Beni Madhavprasad and Others

APPELLANT

Vs

Rasklal Ambalal and Others

RESPONDENT

Date of Decision : 14-07-1958

Acts Referred:

Limitation Act, 1908 — Article 142, 144
Registration Act, 1908 — Section 49

Citation : AIR 1959 MP 23 : (1958) JLJ 831 : (1959) 4 MPLJ 617

Hon'ble Judges : P.V. Dixit, J

Bench : Single Bench

Advocate : K.A. Chitale and V.P. Trivedi, for the Appellant; D.C. Bharucha, for the Respondent

Final Decision : Allowed

Judgement

P.V. Dixit, J.

The suit, out of which this appeal arises, was instituted by the present appellant's father Ramratanlal in the Court of Civil Judge, First Class, Mhow, against the respondents for the recovery of possession of house No. 1963 situated in Bhoi Mohalla, Mhow, and of a room in an adjacent house bearing No. 1012 and for mesne profits.

The plaintiff Ramratanlal claimed that the property belonged to a joint Hindu family of which he was the Karta; that his father Ramkrishan had permitted his Munim Chunnilal, the father of the defendant-respondents Nos. 3, 4, 5 and 6 to live in house No. 1963 with his family free of rent; that after the death of Chunnilal, his widow & other members of his family were also allowed to occupy the house; that Chunnilal, who used to look after the management of houses belonging to the joint family, got one of the rooms in the adjoining house No. 1012, which had been rented out, vacated from the tenant for his own use and occupation, that Chunnilal and his family continued to use the room and were still in possession of it; that in 1939 when the plaintiff asked the defendants to

execute a document evidencing the ownership of the plaintiff over the house and the room in question, the defendants first consented to do so but later on evaded the issue; and that when subsequently a registered notice was given to the defendants asking them to vacate the house and the room, the defendants for the first time intimated to the plaintiff that house No. 1963 had been gifted by Ramkishan to Chunnilal. On these allegations the plaintiff sued for the recovery of the possession of the property in suit.

The defendants admitted that the two houses first belonged to the plaintiff's joint family and that Chunnilal and his family had been allowed by Ramkishan to occupy house No. 1963 free of rent. It was also admitted by them that Chunnilal got a room in house No. 1012 vacated from a tenant for his own use and occupation. Their main defence was that on 15-9-1921 the plaintiff's father Ramkishan made a gift of house No. 1963 to Chunnilal for "long and faithful" services rendered by Chunnilal to Ramkishan, and that since then Chunnilal was in possession of the house as owner and after his death they were the owners of the house and as such in possession of it. In regard to the room in house No. 1012, the defendants averred that it was in adverse possession of Chunnilal and after his death in their possession for over twenty-five years.

The learned Civil Judge held that the deed, on which the defendants relied for proving their title to house No. 1963 as being gifted by Ramkishan to Chunnilal, being unregistered could not be received in evidence to prove the defendants' title to the house? that it was not attested by any witness and not acted upon, as admittedly even after the execution of the alleged deed, the house continued to stand in the name of Ramkishan in the register of the Cantonment Board; and that the rates and taxes on the house were paid and were still being paid by the plaintiff.

He further found that Chunnilal died on 1-4-1933 and that the defendants had failed to establish that they were in adverse possession of the property in suit. On these findings, the plaintiff's claim for possession in regard to house No. 1963 and the room in house No. 1012 was decreed. The plaintiff's claim as regards mesne profits was, however, disallowed. The defendants then appealed to the District Judge of Indore. The second Additional District Judge of Indore, who heard the appeal, agreed with the finding of the trial Court as regards the inadmissibility of the deed on which the defendants relied to show that house No. 1963 was given by Ramkishan to Chunnilal.

He, however, took the view that the license in respect of house No. 1963 was to Chunnilal, and that after his death his widow and the defendants were no better than trespassers; and that, therefore, the defendants' possession of the house since the death of Chunnilal on 1-4-1933 became adverse and consequently the plaintiff's suit filed on 25-2-1947 was barred by limitation so far as his claim against house No. 1963 was concerned.

In regard to the room in house No. 1012, the lower appellate Judge accepted the

finding of the trial Court that the defendants had failed to establish that they were in possession of the room adversely to the plaintiff for over twelve years. Accordingly, the decree of the trial Court was modified and the plaintiffs claim as regards house No. 1963 was dismissed. The plaintiff has now appealed to this Court. The defendants have also filed a cross-objection claiming possession of the room in house No. 1012 and mesne profits.

It is common ground that house No. 1963 belonged to the plaintiff's joint family, that the present appellant's grand-father Ramkishan had allowed his Munim Chunnilal to occupy the house free of rent for his residence and for the residence of his family, and that all these years the house stood in the name of the plaintiff in the register of the Mhow Cantonment Board and the plaintiff had been paying municipal rates and taxes in respect of the house. It has also been found by the Courts below that Chunnilal died on 1-4-1933. This finding has not been challenged before me and indeed could not be.

The deed of gift set up by the defendants is valueless to support their title as owners of the house as it is unregistered and not attested by any witness. It is not admissible even to show that the possession of the defendants was adverse. To do so would be really to hold on the basis of the unregistered and unattested deed that the house was gifted away by Ramkishan to Chunnilal.

If the gift cannot be proved by an unregistered instrument, then clearly an inference of adverse possession based on possession as a donee cannot also be proved. There is also no dispute that a room in house No. 1012 belonging to the plaintiff and in the occupation of a tenant was got vacated by Chunnilal for his own use. On these facts, the only question to be considered in this appeal and the cross-objection thereto is whether the plaintiff's suit is barred by limitation.

Mr. Trivedi, learned counsel for the appellant, contended that the plaintiff had permitted Chunnilal and his family to live in the house No. 1963 as licensees; that after the death of Chunnilal the defendants continued to be in permissive possession of the house acknowledging the plaintiff's title to the house as evidenced by several entries in the Cantonment Board registers and by the payment of municipal taxes and rates by the plaintiff; that it was not until 1939 when the plaintiff gave to the defendants a notice to restore possession of the house that the defendants denied the plaintiff's title to the property, and that the mere fact that after the death of Chunnilal the defendants remained in possession of the house was not sufficient to alter the character of their permissive possession into an adverse one in the absence of any evidence of any overt act in denial of the plaintiff's title.

It was said that there was no such evidence. Learned counsel relied on *Mohammad Dawoodkhan v. Mt. Banubai*, AIR 1950 Nag 127 (A), to support the contention that the plaintiffs suit was governed by Article 144 of the Limitation Act and that it was for the defendants to show that their possession was adverse to the knowledge of the plaintiff and with his acquiescence. In regard to the

plaintiff's claim for possession of a room in house No. 1012, it was argued that the burden was on the defendants to establish that their possession of the room was adverse to the plaintiff and that they had failed to do so.

In reply, Mr. Bharucha, learned counsel for the respondents, submitted that the licence to occupy house No. 1963 was to Chunnilal, and not to Chunnilal and all the members of his family; that therefore, the licence terminated on the death of Chunnilal and the defendants' possession of the house after the death of Chunnilal was no better than that of a trespasser and became adverse to the owner of the house; and that as Chunnilal died on 1-4-1933, the plaintiffs suit filed on 25-2-1947, claiming possession of the house No. 1963 was barred by time.

Relying on *Bansilal v. Kesari* AIR 1953 Nag 132 (B), learned counsel for the respondents further argued that the plaintiffs suit was governed by Article 142 of the Limitation Act and it was for the plaintiff to prove that his suit was within time. As regards the room in house No. 1012, it was maintained that the evidence on record was sufficient to prove that the defendants were in possession of the room for over twelve years adverse to the plaintiff.

In my judgment, the contention advanced on behalf of the appellant must prevail. The licence to live in house No. 1963 was no doubt to Chunnilal; but it was for his residence and the residence of his family. It cannot, therefore, be said to have terminated after the death of Chunnilal. A licence is no doubt not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee, unless a different intention appears. Here it is an undisputed fact that Ramkisan had allowed Chunnilal to use the house for his residence and for the residence of his family.

If the license to Chunnilal was for his residence and for the residence of his family also, then it follows that it ensured to the benefit of the members of the family of Chunnilal and his heirs after his death. The plaintiff nowhere said that the license was restricted to the life-time of Chunnilal and that the members of his family were entitled to live with him only so long as he lived. The defendants did not also plead that the license did not survive after the death of Chunnilal. The license was not again limited by the condition of Chunnilal being in the service of Ramkishan, as the learned counsel for the respondents contended.

The plaintiff's allegation in the plaint that Chunnilal was allowed to live in the house because he was his Munim cannot be read as meaning that he was allowed to use the house for his residence and for the residence of his family only so long as he was in service. If, as I think, the license did not terminate with the death of Chunnilal, then the defendants' possession of the house after his death until their denial of the plaintiff's title in 1939 must be held to be permissive and not adverse. Even if it is held that the license granted to Chunnilal terminated with his death and that, therefore, the defendants were not

entitled to remain in possession of the house, the fact that after Chunnilal's death the plaintiff acquiesced in the defendant's possession of the house and the defendants remained in possession of it acknowledging the plaintiff's title to the property as is obvious by entries in the Cantonment Register and the payment of municipal rates and taxes in respect of the house by the plaintiff, amply shows that the defendants' possession even after the death of Chunnilal was permissive.

If then the defendants' possession was permissive, they cannot claim title to the house on the ground of possession however long, unless they show that their possession was adverse to the plaintiff to his knowledge and with his acquiescence: see AIR 1924 150 (Privy Council) and AIR 1950 Nag 127 (A). The defendants allowed the house to stand in the name of the plaintiff in the Cantonment Register. They did not pay any municipal rates or taxes in respect of the house. That liability was discharged by the plaintiff himself.

It was not until 1939, when the plaintiff made a claim for possession of the house, that the defendants denied the plaintiff's title and asserted hostile title. The plaintiff's suit was filed on 24-2-1947. It cannot, therefore, be maintained that the defendants had acquired any title to the house in question by adverse possession for over twelve years.

The defendants' position is in no way improved even on the assumption that the license terminated on Chunnilal's death and thereafter the defendants' possession became unlawful. Mr. Bharucha, learned counsel for the respondents, said that in that case the possession of the defendants would become adverse to the plaintiff from the date of Chunnilal's death. I do not agree.

If the license terminated on the death of Chunnilal, the defendants' possession thereafter could at the most be said to be unlawful. But mere unlawful possession does not mean adverse possession. The possession of a trespasser is adverse to the true owner only when the adverseness of the trespasser's claim is within the owner's knowledge and sanctioned by his acquiescence.

There must be on the part of the trespasser an express or implied denial of the title of the true owner and an animus of exclusive ownership. Thus mere unlawful possession is not adverse possession. Unlawful possession becomes adverse possession only when the person in unlawful possession of the property asserts a title hostile to the true owner. In this case, even if it is held that the possession of the house by the defendants after the death of Chunnilal was unauthorised, it cannot be regarded as adverse to the plaintiff.

For, even after the death of Chunnilal the defendants continued to recognise the plaintiff's title until 1939 by allowing the house to stand in the plaintiff's name in the Cantonment Register and by acquiescing in the payment of taxes and rates in respect of the house by the plaintiff. It was in 1939 that the defendants for the first time repudiated the plaintiff's title when the plaintiff gave them a notice to vacate.

Therefore, the contention of the learned counsel for the respondents that the defendants* adverse possession commenced immediately after the death of Chunnilal or at an earlier date cannot be accepted. The defendants can at the most say that they have been in adverse possession of house No. 1963 since 1939 only. On the date of the institution of the plaintiff's suit in 1947, the defendants had not acquired any title to the property by adverse possession by more than twelve years.

The view that in this case it was for the defendants to establish that their possession was adverse to the plaintiff, to his knowledge and with his acquiescence is supported by a decision of this Court in AIR 1950 Nag 127 (A). That was also a case where the plaintiff licensor had sued the heir of the deceased licensee for possession of some land. It was held in that case-

"Possession will always be referred to a lawful title, and unless it can be shown there was such assertion which the party prescribed against could have known there would be no adverse possession particularly where the initial possession begins in a license. In such a case it must be shown that the possession was adverse to that of a licensor, to his knowledge and with his acquiescence."

On the authority of AIR 1953 Nag 132 (B), Mr. Bharucha, learned counsel for the respondents, argued that Article 142 of the Limitation Act was applicable and that it was for the plaintiff to show that he was in possession and that he was dispossessed within twelve years before the institution of the suit. The decision in AIR 1953 Nag 132 (B), is distinguishable on facts. In that case the plaintiff had alleged that he and his deceased father had been in possession of a house; that the defendant had been allowed by them to occupy the house as a licensee; and that the defendant was now refusing to vacate it claiming himself to be the owner of the house.

It was, however, found that the plaintiff was never in fact in possession of the house and that the defendant's entry in the house was not as plaintiff's licensee. On these facts it was held by a Division Bench, consisting of Sinha C. J. and Mudholkar J., that the plaintiff's suit was governed by Art. 142 of the Limitation Act.

It will be seen that Art. 142 was applied in the case of AIR 1953 Nag 132 (B), because the plaintiff had alleged possession and dispossession and the entry of the defendant in the house was not found to be under any right derived from the plaintiff or permissive. Here the defendants' entry on the property was under a license from the plaintiff and, therefore, the entry itself was not in contravention of the plaintiff's title, though subsequently the defendants began asserting hostile title.

To such a case Article 142 cannot apply. That Article applies only where the plaintiff, while in possession, has been dispossessed or has discontinued his possession. There cannot be dispossession or discontinuance of possession unless another person enters on the property in the possession of the plaintiff" in

contravention of his title: See *Meherban Lalli v. Yusufkhan* AIR 1939 Nag 7 (D).

In my judgment, it is Article 144 of the Limitation Act that is applicable here and as the defendants have failed to establish their title by adverse possession, the plaintiff's claim for possession of house No. 1963 must be decreed.

Coming to the defendants' cross-objections with regard to their title to a room in house No. 1012, they must be dismissed. The defendants rested their claim solely on adverse possession for over twelve years. But they produced no evidence to prove any overt act of theirs asserting hostile title and to show that the plaintiff knew that a hostile title was being asserted against him in respect of the room. The evidence is that Chunnilal got the room vacated by a tenant for his purposes and quietly used it without letting the plaintiff or anyone know of it. This house also stood in the name of the plaintiff in the register of the Cantonment Board and the taxes and rates on the house used to be paid by the plaintiff.

For all these reasons, I am of opinion that the plaintiff is entitled to a decree for possession of house No. 1963 as well as of the room in the adjoining house No. 1012.

In the result, this appeal is allowed, the decision of the Additional District Judge of Indore is set aside and the judgment and decree of the Additional Civil Judge, First Class, Mhow, are restored. The appellant shall have his costs in all the Courts. The defendants' cross-objections are dismissed with costs.