
(2011) 01 MAD CK 0092

In the Madras High Court

Case No : Second Appeal No. 1915 of 1997

Dhanabaghyam Ammal (died) and Others

APPELLANT

Vs

Dhanavel, Dhandapani and Adhikesavan

RESPONDENT

Date of Decision : 31-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Limitation Act, 1908 — Article 142, 144
Limitation Act, 1963 — Article 64, 65

Citation : (2011) 01 MAD CK 0092

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : R. Subramanian, for the Appellant; R. Gururaj Prayer, for R3, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan, J.—The unsuccessful Plaintiff is the Appellant.

2. The Plaintiff filed the suit for declaration and for recovery of possession from the third Defendant/third Respondent herein.

3. The case of the Plaintiff was that the property originally belonged to her mother Manick am Ammal and she purchased the same under a sale

deed dated 9.4.1923, Ex.A1 and after her enjoyment and her death, the property was inherited by the Plaintiff and the Plaintiff is enjoying the same

and the Plaintiff is residing in a village 20 kms away from the suit property and therefore, she requested the first Defendant, the first Respondent

herein to look after the property and the first Respondent was also cultivating the property on her behalf and was paying the rent to the Plaintiff and

at the request of the Plaintiff, the first Defendant/first Respondent was paying kist and later, the Plaintiff came to know that the third Defendant was

looking after the property and when the same was questioned, the first Defendant did not give proper reply and on verification, it was found that

the first Defendants sold the property under Ex.B1 to the second Defendant and the second Defendant sold the property to the third Defendant

under Ex.B2 and as Defendants 1 and 2 have sold the property to the third Defendant and the third Defendant claims to be the owner of the

property, the suit was filed for declaration and recovery of possession.

4. Defendants 1 and 2 remained ex parte and the third Defendant contested the suit and filed a written statement stating that the property belonged

originally to the first Defendant's father Rat navel Padayachi and he was enjoying the same and under Ex.B1, the first Defendant sold the property

to the second Defendant and under Ex.B2, the second Defendant sold the property to the third Defendant and from the date of sale, the third

Defendant is enjoying the property and the third Defendant and his predecessors-in-title viz., Defendants 1 and 2 have also perfected title by

adverse possession and therefore, the Plaintiff is not entitled to the relief of declaration and recovery of possession.

5. The Trial Court found that the property belonged to the Plaintiff, but, dismissed the suit holding that the third Defendant prescribed title by

adverse possession and therefore, the Plaintiff is not entitled to the relief of declaration and recovery of possession. Aggrieved by the same, the

Plaintiff filed the first appeal and the learned first appellate court also held that the third Defendant and his predecessors in title have perfected title

by adverse possession and therefore, the Plaintiff/Appellantis not entitled to the decree of declaration and recovery of possession. Hence, the

second appeal.

6. At the time of admission, the following substantial questions of law were framed:

1. Whether, in law, the courts below are right in finding that the Respondents had prescribed title by adverse possession when there is no evidence

to show it?

2. Whether, in law, the courts below are not wrong in overlooking that Respondents 1 and 2 remained ex parte and that the third Respondent's

title, if any, was only from the date of Ex.B2 and that it was not for the statutory period of 12 years?

7. It is submitted by Mr. R. Subramanain, learned Counsel for the Appellants that both the courts below have erroneously held that the third Defendant has perfected title by adverse possession without properly understanding the law on adverse possession. He further submitted that once the court has held that the Plaintiff is the owner of the property, the burden is on the third Defendant to prove that he has perfected title by adverse possession and the case of the third Defendant was that the property originally belonged to the father of the first Defendant by name Rat navel Padayachi and the first Defendant inherited the same after his death and he sold the same to the second Defendant and the second Defendant, in turn, sold the same to the third Defendant and contended that the person, who claims to be the owner of the property, cannot plead adverse possession and the two claims are mutually inconsistent and hence the courts below have erred in holding that the third Defendant has perfected title by adverse possession. He further submitted that the documents filed by the third Defendant would prove only his possession and unless the third Defendant proves that he was enjoying the property as a owner hostile to the knowledge of the true owner, he is not entitled to claim adverse possession. Mr. R. Subramanian further submitted that Ex.A14 is the Adangal extract which mentions the name of the Plaintiff's mother till 1968 and only thereafter, the name of the first Defendant and his father were entered in the Adangal and even assuming that they were in possession of the property, long possession will not prove their case of adverse possession unless there is evidence to show that they enjoyed the property with required animus. He submitted that the competent witness to speak about the required animus is the first Defendant and he remained ex parte and therefore, the third Defendant cannot speak about the required animus to prove the adverse possession and hence, both the courts below ought to have held that the third Defendant did not prove adverse possession and ought to have decreed the suit.

8. On the other hand, Mr. R. Gururaj, learned Counsel for the third Respondent submitted that the second appeal is not maintainable as there is no substantial question of law arises for consideration. He submitted that the question of adverse possession is not a pure question of law and it is mixed question of fact and law and therefore, whether the Defendants have perfected title by adverse possession cannot be a substantial question

of law and therefore, the appeal is not maintainable. In support of that contention, he relied upon various judgments. He further submitted that the collusion between the Plaintiff and the first Defendant was proved by the production of Exs.A4 to A8 and Exs.A4 to A8 are the kist receipts in the name of the first Defendant and those receipts were reproduced by the Plaintiff which would prove that the Plaintiff and the first Defendant colluded together. Further, the first Defendant borrowed money from the third Defendant and the third Defendant sent notice to the first Defendant to repay the same and also filed a suit which is evidenced by Exs.B16 to B18. Therefore, the first Defendant colluded with the Plaintiff and therefore, then on-examination of the first Defendant is not fatal to the case of the third Defendant. He further submitted that Ex.B3 is a sale deed wherein the first Defendant was shown to be the owner of the neighbouring land and therefore, even in the year 1975, the first Defendant was enjoying the property as the owner and therefore, his name was mentioned as the neighbouring owner when the neighbouring land was sold under Ex.B3 and the various kist receipts would prove that the property is in enjoyment of the Defendant and therefore, both the courts below have rightly held that the third Defendant has perfected title by adverse possession.

9. The main contention of the learned Counsel for the third Respondent was that the second appeal is not maintainable as the first substantial

question of law viz., whether the Defendants have perfected title by adverse possession cannot be termed as a substantial question of law.

10. Though the learned Counsel for the third Respondent submitted a number of Supreme Court judgments and other High Court judgments, they

have not dealt with this aspect and they have dealt only with the question as to what is a substantial question of law as per law. But, in the judgment

reported in *Santosh Hazari v. Purushottamtiwari* AIR 2001 SC 965, the Honourable Supreme Court held that whether the appellate court was

right in holding that the case of adverse possession was made out by the Defendant and the suit filed by the Plaintiff was liable to be dismissed as

barred by time under Article 65 of the Limitation Act, 1963 is a substantial question of law and therefore, in this case also, the first substantial

question of law framed by this Court comes within the ambit of Section 100 of the CPC and therefore, it cannot be stated that there is no

substantial question of law to be decided in the second appeal.

11. It is the specific case of the Appellant that the property originally belonged to her mother and after her death, she inherited the same and she

was enjoying the property and she requested the first Defendant to take care of the property and the first Defendant was looking after the property

and subsequently, she came to know that the property was sold to the third Defendant and therefore, she filed the suit for declaration and recovery

of possession. The third Defendant purchased the property in the year 1982 under Ex.B2 and under Ex.B1 dated 20.8.1981, the first Defendant

sold the property to the second Defendant, but, the suit was filed in the year 1992 and therefore, the suit was filed within twelve years from the

date of the sale by the first Defendant to the second Defendant. Though it is contended by the third Defendant that the suit property originally

belonged to the father of the first Defendant, by name Rat navel Padayachi, no document has been produced by him to prove the same. Even in

the sale deed, Ex.B1, the first Defendant did not say that he was enjoying the property ancestrally and that property was sold to the second

Defendant. It has only been stated in Ex.B1 that the property belonged to him and it was in his possession and he sold it to the second Defendant

whereas the Plaintiff has produced Ex.A1 sale deed in favour of the Plaintiff's mother and Exs.A2 and A3 also prove the fact that the Plaintiff's

mother was the owner of the property and she was paying the kist. Ex.A14 would also prove that till 1968, the assessment was in the name of the

Plaintiff's mother. Therefore, the Plaintiff has proved her title over the suit property and both the courts below have held that the Plaintiff is the

owner of the suit property. Once the Plaintiff has proved her title, she is entitled to the relief of recovery of possession unless the Defendant is able

to prove that he perfected title by adverse possession. Therefore, the burden is on the Defendant to prove that he perfected title by adverse

possession.

12. We will have to see whether the third Defendant has perfected title by adverse possession and whether the third Defendant has proved the

same through evidence. The document, Ex.B3 is in respect of the neighbouring land and in that sale deed, the first Defendant is mentioned as the

owner of the suit property. Admittedly, the person, who sold the property or

purchased the property under Ex.B3 wasnot examined and DW2

was examined to prove Ex.B3 and DW2was only an attesting witness. Therefore, without examining the seller or purchaser under Ex.B3, we

cannot presume that the first Defendant was the owner on the basis of boundary recital found in Ex.B3. Even assuming that the various Exhibits

would prove the possession of the third Defendant and his predecessors in title, we will have to see whether that would prove adverse possession.

13. In the judgment reported in Saroop Singh Vs. Banto and Others, , it has been held as follows:

28. The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the Schedule

appended to the Limitation Act, 1908, in terms whereof it was imperative upon the Plaintiff not only to prove his title but also to prove his

possession within twelve years, preceding the date of institution of the suit. However, a change in legal position has been effected in view of

Articles 64 and 65 of the Limitation Act, 1963. In the instant case the Plaintiff-Respondents have proved their title and, thus, it was for the first

Defendant to prove acquisition of title by adverse possession. As noticed hereinbefore, the first Defendant-Appellant did not raise any plea of

adverse possession. I that view of the matter the suit was not barred.

29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the Plaintiff but

commences from the date the Defendant's possession becomes adverse. (See Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak.)

30. "Animus possidendi" is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period

for prescription does not commence. As in the instant case, the Appellant categorically states that his possession is not adverse as that of true

owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohammad Ali v. Jagdish Kalita, SCC para 21.)

14. In the judgment reported in T. Anjanappa and Others Vs. Somalingappa and Another, it is held as follows:

It is well-recognised proposition in law that mere possession however long does not mean that it is adverse to the true owner. Adverse possession

really means the hostile possession which is expressly or impliedly in denial of

title of the true owner and in order to constitute adverse possession

the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical

requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and

continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is

not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

15. Therefore, from the above judgments, it is clear that mere long possession will not amount to adverse possession and the person pleading

adverse possession must prove that he was in possession of the property with required animus and he was enjoying the property to the knowledge

of the true owner. In this case, as stated supra, the case of the third Defendant was that Rathnave IPadayachi, father of the first Defendant was the

owner and after his death, his son sold the property to the second Defendant. Therefore, the claim of the third Defendant was that his

predecessors-in-title were the owners of the property and therefore, he also claimed ownership over the property. When a person pleads

ownership over the property, he cannot plead adverse possession and this has been held in the judgment reported in M. Ganesa Reddiar and

Others Vs. C. Krishnasamy Raju, and the judgment reported in S. Ganesan v. Bharathirajan 2009 (5) CTC 558.

16. Further, the case of the Appellant was that she allowed the first Defendant to look after the property and he was looking after the property.

Therefore, the first Defendant, in the course of his management, might have paid the kist in his name and handed over the receipts to the Appellant.

Further, even though motive was attributed to the first Defendant stating that he had colluded with the Appellant, there is no reason for non-

examination of the second Defendant from whom, the third Defendant purchased the property.

17. Admittedly, the second Defendant purchased the property in the year 1981 and the third Defendant purchased the property from the second

Defendant in the year 1992 and within twelve years, the suit was filed. Both the courts below have concurrently held that the Appellant was the

owner of the property. Therefore, the burden to prove that the third Defendant perfected title by adverse possession was on him and he has not discharged that burden and therefore, both the courts below have erroneously held that the third Defendant/third Respondent proved adverse possession and erroneously dismissed the suit. Hence, the substantial questions of law are answered in favour of the Appellant and the judgment and decree of the courts below are set aside.

In the result, the second appeal is allowed. No costs.