

(2004) 12 KL CK 0059
In the High Court Of Kerala
Case No : A.S. No. 181 of 1999

George Thomas

APPELLANT

Vs

Geondy Joseph

RESPONDENT

Date of Decision : 14-12-2004

Acts Referred:

Citation : AIR 2005 Ker 108 : (2005) 1 ILR (Ker) 161 : (2005) 1 KLT 864 : (2005) 2 RCR(Civil) 175

Hon'ble Judges : S. Sankarasubban, J; Pius C. Kuriakose, J

Bench : Division Bench

Advocate : P.G. Parameswara Panicker and P. Gopal, for the Appellant; Joy George, Praicy Joseph, Sajith Paul Mathew, Priyan Peter and M. George Joseph, for the Respondent

Judgement

S. Sankarasubban, J.—This appeal is filed against the judgment and decree in O.S.No. 87 of 1996 of the Sub Court, Pala. Second defendant has come in appeal. The suit was originally filed for an injunction. But subsequently, the suit was amended for a declaration of title. The defendants filed written statements by which they raised a counter claim for recovery of possession of the property. The facts of the case are as follows:

2. The first plaintiff and the second defendant are brothers. The second plaintiff is the son of the first plaintiff. The father of the first plaintiff and the second defendant executed a deed in favour of the second defendant. That included the plaint schedule property also. Originally, the plaintiff termed this transaction as a gift. Subsequently, the plaint was amended by stating that it is not a gift deed, but a Will. In the property owned by the second defendant by the gift, the second defendant and the father were living. The first plaintiff was in Malabar. He became sick. Hence, he had to come back from Malabar. When he came back, he was allowed to reside in the building in the plaint schedule property. Even after the death of the father, the plaintiff was in possession of the property. According to him, the plaintiff has perfected title by adverse possession and limitation. The

purpose for filing the suit was that a document, Ext.B8 was executed by the second defendant in favour of the first defendant by which the property was sold to the first defendant. The plaintiff, therefore claimed declaration of title to the plaint schedule property and recovery of possession of the same.

3. The defendants filed written statement. In the written statement, it was stated that Ext.B 1 was a gift deed executed in favour of the second defendant by the father. The extent was 4 acres and odd. Out of this, an extent of 1 acre and 80 cents which is the property scheduled in the plaint schedule property was also gifted. After the property was gifted, the second defendant was staying along with his family. The father executed another gift in favour of the first plaintiff and the second defendant. That is Ext.B9. The properties are different from the plaint schedule property. The second defendant further submitted that he was ready to alienate the property, since she is the owner thereof. The lower Court, after verifying the records and after going through the evidence, declared title of the plaintiff over the plaint schedule property and the counter claim was dismissed. It is against that this appeal is filed.

4. A perusal of the judgment of the Court below will show that there has been an exclusive analysis as to whether Ext.B 1 is a gift or a Will. The Court below has now held that Ext.B 1 is a Will. According to us, it is not necessary for us to point out the nature of the transaction, whether it is a gift or whether it is a Will. There is no difference so far as this case is concerned, because even if it is found that it is a Will, the second defendant was the legatee under the Will and hence, he will be entitled to the property. The case set up by the plaintiff was that the father orally gifted the property to the first plaintiff. As rightly pointed out by the Court below, there was no evidence to show that there is oral gift in favour of the first plaintiff.

5. The Court below held that the first plaintiff has perfected title by adverse possession and limitation of the plaint schedule property. As already stated, there is a document, Ext.B 1, executed by the father in favour of the second defendant. The plaintiff would contend that it is only a will. According to him, during the life time of the father, he came into possession of the property and he has done many activities as though he is the owner of the property. He has examined some witnesses to show his acts of possession. On the basis of this, the Court below held that the plaintiff has perfected title by adverse possession. Learned counsel for the appellants contended that the finding of the Court below is wrong. He contended that there is no dispute that it was with the consent of the father and the second defendant that the plaintiff was occupying the building taking into account the health of the first plaintiff. He was in possession of the property as per the consent given by the second defendant and father. The mere fact that the second defendant and father did not prevent the plaintiff from doing some acts the possession cannot make adverse possession.

6. So far as possession by consent is concerned in *The State Bank of Travancore v. Arvindan Kunju Panicker and Ors.* AIR 1971 SC 395 it was held as follows: "A

permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of true owners for a period of twelve years or more". In Ouseph Ouseph v. Mathen Mariyamma AIR 1954 TC 297 a learned Single Judge held as follows: "The permissive character of possession can be inferred from the attendant circumstances even without direct evidence. If possession is found to be permissive at the inception, the possessor cannot prescribe or sustain title or any claim adversely to the granter of the possession". In Rosily Mathew and Others Vs. Joseph, it was observed as follows: person who claims title to the property by adverse possession, must definitely allege and prove how and when adverse possession commenced, what was the nature of his possession and whether the fact of his adverse possession was known to the real owner. A mere suggestion in the relief clause that there was an uninterrupted possession for several 12 years or that the plaintiff had acquired an absolute title is not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea". In DLF Universal Ltd. Vs. Appropriate Authority and Another, the Supreme Court held as follows: "concrete proof of open, hostile and continuous possession is required in order to substantiate a claim of perfection of title by adverse possession - Verifiable details of the nature of the occupation would be essential and mere assertions would not be adequate substitute".

7. After analysing the plea and evidence in this case, we are satisfied that it cannot be stated that the plaintiff has perfected title by adverse possession. From the evidence, it is now clear that it is the second defendant who is the owner of the property.

In the above view of the fact, we set aside the judgment and decree of the Court below and grant a decree to the second defendant to evict the plaintiffs as per their counter claim. Appeal is disposed of as above.