
(1997) 11 AP CK 0059
In the Andhra Pradesh High Court
Case No : S.A. No. 588 of 1997

Kola Prabhakara Rao and Others

APPELLANT

Vs

Kola Kanthamma and Others

RESPONDENT

Date of Decision : 24-11-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Specific Relief Act, 1963 — Section 34, 35, 6

Citation : (1998) 1 ALD 462

Hon'ble Judges : B.K. Somasekhara, J

Bench : Single Bench

Advocate : Mr. K. Harinath, for the Appellant; Mr. Raghu Ram for B. Adinarayana Rao, for the Respondent

Judgement

1. The Appellants (plaintiffs) are the defendants in O.S.No. 103 of 1981 on the file of the learned Subordinate Judge, Chirala. The respondents are the Legal Representatives of the plaintiff in the suit. The suit was filed for declaration of title and possession of the suit property, a site measuring an extent of 1520 Sq. ft. i.e., 3-1/4 cts. out of 6-1/2 cts. of poramboke site in T.S. No.33/4 situated at Chirala. The plaintiff claimed the suit property based on partition with his brothers by virtue of partition list dated 4-1-1969. He challenged that the defendants trespassed into the suit site by removing the thatched house and they also constructed a cattle shed there and they unauthorisedly put up two bunks on the eastern side of the property and rented them out to tenants and when they did not oblige to vacate the site, the suit was filed for the reliefs. The defendants denied the plaintiff's right or possession of the suit site muchless the dispossession as alleged and, on the other hand, they contended that the entire suit site of 6-1/2 cts. being part of survey No.33/4 was with the family members of the defendants and their; father Prasadarao, that they were in possession and enjoyment of the same both during the life time of Sri Prasadarao and thereafter till the date of the suit. They challenged the partition list dated 4-1-1969 as rank forgery. They questioned the right of the plaintiff to get possession of the suit

property. Therefore, these controversies became the subject matter of the issues, namely,--

1. Whether the plaintiff is entitled to ask for declaration in respect of the plaint schedule property in his favour ?
2. Whether the plaintiff is entitled to ask for possession of the plaint schedule property from the defendants ?
3. Whether the defendants perfected their right to plaint schedule property by adverse possession ?
4. To what relief

2. In a trial afforded to both sides, the plaintiff examined himself as PW1 and two more witnesses as per PWs.2 and 3 and defendants 2 to 4 were examined as DWs.2 to 4 and witnesses as per DW1 and DWs.5 to 8. Exs.A1 to A7 were marked for the plaintiff, Ex.B1 was marked for the defendants and Ex.1 as Court document. With these materials and after hearing both the sides, the learned Subordinate Judge held the issues in favour of the plaintiff and decreed the suit with costs.

3. The unsuccessful defendants took up the matter before the learned District Judge, Ongole in A.S. No.62 of 1992. The learned District Judge after hearing both the sides, with the reassessment of the materials before the Court, confirmed the Judgment and Decree of the learned Subordinate Judge and dismissed the appeal asking the parties to bear their own respective costs. With such concurrent findings and decisions by the two Courts below, this second appeal is filed. In view of the grounds taken in the appeal, in addition to the specific contentions raised by Mr. Harinath for the appellants, these substantial questions of law were raised:

1. Whether the suit can be based on the pleading without the title or without establishing the title in the sense that title known in law should be pleaded and proved ?
2. Whether a suit for declaration of title and possession can be decreed if the title known in law is not properly pleaded or proved?
3. What is the type of the present case to be dealt with in relation to the questions of title and possession etc. particularly with reference to Sections 34 and 35 of the Specific Relief Act and also Section 9 of the CPC ?
4. Mr. Harinath, the learned advocate for the appellants specifically relied upon the decision of the Supreme Court in Nagar Palika, Jind Vs. Jagat Singh, Advocate, , in support of his contention that in a suit for declaration of title and possession, there must be proper plea of acquiring title and secondly the proof of title, particularly when the suit is based on title for possession, and in view of the clear finding of the learned District Judge that neither of the parties have got title to the suit property and when both sides were basing their right on open

declaration of trespassing the suit properly, which is part of a poramboke site and on the failure of proof of dispossession, the Courts below were totally wrong in decreeing the suit for declaration of title and possession. Mr. Harinaih has pointedly postulated that although consistent findings of facts are there, the Courts below were not right in rejecting the case of the defendants about their father having been in possession since long on the suit properly and Ex.AI the so called partition list being a got up document and also an improper one as against the reliefs that the plaintiffs could not have had any right or possession of the suit property and he proposes that the evidence may be reconsidered in this regard to examine the correctness or otherwise of such findings also. At any rate, he postulates that the judgments and decrees of the Courts below, although concurrent findings, cannot stand the test of legal method and deserved to be set aside and the suit deserves to be dismissed. Mr. Harinath has also relied upon the decision of the Supreme Court in *Brahma Nand Puri Vs. Neki Puri*, , in support of his legal postulation that in ejectment suit, the plaintiff must succeed or fail on the title he possess and not otherwise.

5. Mr. Sri Raghuram, the learned advocate for the respondents, who are the legal representatives of the sole plaintiff, while repelling the above contentions has postulated that a suit between the co-tresspassers would be maintainable if the rightful possession is established in getting the property and having been enjoyed as such for a long time including the adverse possession or possessory title, as the case may be, and that such a right or possession should be maintained against every one except the real owner and in view of the fact that the true owner in this case being the Government, if the suit property is found to be part of a poramboke site, till such time the real owner takes steps to evict the plaintiff or the parties claimed through them, such right or possession should be maintained. In this regard, he has tried to fortify himself with a pronouncement of the Supreme Court in *Nair Service Society v. K.C. Alexander* AIR 1968 SC 1665. Mr. Raghuram has also tried to take shelter u/s 9 of CPC, the nature of the possession therein to be restored including exclusive possession of a person in undisturbed possession for a considerable period and thereafter dispossessed and that a suit is maintainable and in this regard he has relied upon the decision of the High Court of Nagpur in *Ajodhiya Prasad v. Ghasiram* AIR 1937 Nag. 326. In support of his contention that the entry in the revenue record cannot form the basis for title, he has relied upon the decision of the Supreme Court in *State of Himachal Pradesh v. Keshav Rao* 1997 (2) APLJ 53 (SC).

6. Both from the pleadings and the findings particularly of the learned District Judge based upon material, it is very clear that the plaintiff and the defendants belong to the same joint Hindu family which came into possession of the suit property to an extent of about 6-1/2 cts. forming part of suit T.S. No.33/4 quit a long time back, they continued in possession as such and atleast since one year prior to the date of the suit, the defendants are in possession of the same which the plaintiff say that it is a dispossession of his possession having got the suit property under a partition supported by the partition list Ex.AI. There has been

much deliberation on the question as to how the plaintiff or his father got or how the defendants or their father or ancestors of Prasadarao got it to ultimately boils down to the fact that either one of them is a trespasser or both of them are trespassers and the joint family got the possession by virtue of trespass and not by acquisition of any title as such. Although a faint attempt of expression was made that title was acquired by adverse possession as pleaded by the plaintiff in the suit, there is no proof as such in this regard and the consistent findings of facts do negate it holding that both the parties to the suit or all the members of the family with reference to the suit property are trespassers. Even the defendants did not set up any title as such to base their right to be in possession of the suit property through Prasadarao who himself had trespassed into it quite a long back. This Court finds no reason to examine them as questions of facts having been confirmed by the concurrent findings based on admissions and materials in the case. To conclude that the suit properly remained with the joint family of the plaintiffs brother Prasadarao and the father of defendants 1 to 3 and as on the date of the suit the defendants were in possession of the property. At any rate, the finding that neither of the Parties to the suit has any title to the suit property should be confirmed

7. Regarding the suit property, namely, an extent of about 3-1/4 cts. falling to the share of the plaintiff in a partition with Prasadarao under Ex.AI partition list, the document is depended upon to prove the plea that there was partition between the brothers. Although the learned Subordinate Judge has accepted such a document to think that the plaintiff/has got the title to the suit property, the learned District Judge was not specific about it but he is still believed the case of the plaintiff Mr. Harinath is right in postulating that if Ex.AI is considered to be a partition list between the Parties, it is inadmissible because neither it is registered nor has any legal focus for enforcement. That it supported the plaintiffs possession to the suit property till the alleged dispossession about one year prior to the suit also throws lot of improbability that except the suit properly no other property of the family was partitioned and on the other hand the case of the plaintiff is that except the suit property, the rest of the properties were kept joint. It may be the arrangement between the two trespassers that one of them to be in possession till the family properties are divided by metes and bounds. Beyond that, Ex.AI may not give any legal assistance to such a document. Therefore, on facts, concurrently found and established, the suit property remained in the joint family of the plaintiff and defendants, however, that some arrangement allegedly undertaken under Ex.AI not conferring any specific title in law to be accepted for the purpose of enforcement.

8. In view of the pure questions of facts as above in regard to which there is deliberation although with wrong inferences, this Court has not chosen to dismiss the appeal except to hold that the Court is called upon to decide the rights of two trespassers or the members of a joint Hindu family.

9. Mr. Harinath, the learned senior advocate is totally justified in relying upon

Nagar Palika, Jind case (supra) in support of his contention that in a suit for ejectment based on title and when title and possession are prosecuted from the stage of the written statement, it is incumbent on the part of the Court below to record finding on claim of title over suit land and the failure of the Court to make an investigation is serious error on record and relief cannot be granted to the plaintiff merely on the basis of entries in the revenue record. Same thing has happened in this case also, inspite of the clear finding by the first appellate Court and without a finding of the learned Munsif about the proof of title of the suit property by the plaintiff, the suit is decreed for possession. It is not an error of facts. It is a serious error of law disentitling the plaintiff from getting the relief of possession. In Nagar Palika case (supra), while dealing with the question of a suit for possession u/s 6 of Specific Relief Act, the rule to prove the title as if it is a suit for possession based on title u/s 9 of the Specific Relief Act has been considered. The distinctions between two title suits not being different, it has been concluded in the context that when once the suit has been filed by the party claiming to be the owner and being in possession of the land in question, that suit cannot be treated as a suit based on possession and dispossession without reference to title. Such a question has been answered in the negative.

10. In *Nair Service Society v K.C. Alexander*, (supra), the law is declared that in law as it stands in India, the plaintiff could maintain a possessory suit under the provisions of Specific Relief Act in which, title would be immaterial, or a suit for possession within 12 years in which the question of title could be raised, provided, the suit is based on possession and dispossession and not based on title. But, the culminating conclusion of the precedent in Nagar Palika case (supra) is certain that in a suit for possession based on title, unless the title is established, relief of possession cannot be given. Therefore, the findings of both the Courts below and the final decision in granting relief cannot be supported in the manner they have been given.

11. However, the matter has not ended there. But, Mr. Sri Raghu Ram, the learned advocate has a silver lining in the black clouds even while postulating that in a suit between two trespassers, the possession of one of the trespassers can be maintained, either in a suit for injunction or even suit based on possession or dispossession to get possession as postulated in *Nair Service Society* case (supra). Almost in similar circumstances, the Hon'ble Supreme Court with approval, quoted the pronouncement of the Madras High Court in *Mustafa Saheb v. Santha Filial* ILR (1900) Mad 179 as follows:

"..... that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title."

Referring to Privy Council also, such a dictum which became the rule of law in the law of precedents, the Hon'ble Supreme Court concluded as follows:

"The rule in question is so firmly established as to render a lengthened discussion

about it quite superfluous. *Asher v. Whitlock*, (1865) 1 QB 1 and the rulings of the Judicial Committee in *Mt. Sundar v. M Parbati*, (1888) 16 Ind App 186 (PC) and *Ismail Ariff v. Mahomed Ghous* (1893) 20 Ind App 99 (PC) not to mention numerous other decisions here and in England to the same effect, are clear authorities in support of the view stated above..... Section 9 of the Specific Relief Act cannot possibly be held to take away any remedy available with reference to the well-recognised doctrine expressed in *Pollock and Wright* on possession thus:

"Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title (P. 19)."

In the same case O "Fareli, J. points out that:

"all the dictum of the Privy Council in *Wise v. Ameerunnisa Khatoon* (1879) 7 Ind App 73 (PC) appears to amount to is this, that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having good title, he can only do so under the provisions of Section 9 of the Specific Relief Act.""

It is not necessary to refer to the other authorities some of which are already referred to in the judgment under appeal and in the judgment of the same Court reported in *Kuttan Naraman v. Thomman Mathai* 1966 Ker. LT 1 : AIR 1966 Kar. 179, The last cited case gives all the extracts from the leading judgments to which we would have liked to refer.

12. It was also pointed out that when the facts disclosed no title to either party, possession alone decides and this has happened in this case. The conclusory result of all these legal postulations and jurisprudential results finds in the law declared by the Supreme Court as follows:

"The effect of the two cases is that between two claimants neither of whom has title in himself the plaintiff if dispossessed is entitled to recover possession subject of course to the law of limitation. If he proves that he was dispossessed within twelve years he can maintain his action."

It is true that inspite of a trespasser's title not being recognised in law, as between the two trespassers one trespasser seeking possession on the ground of dispossession except against the real owner the respondents/plaintiffs were entitled to get the relief of possession subject to certain conditions. They were to prove the possession, then dispossession and the possession within 12 years next before the suit. None of the discussions of the Courts below give a finding in this regard. On the other hand, it is found that the property was in the joint family or with the two brothers. Later on there was an attempted partition under Ex A1. But, still, there was no disruption of status of joint family as made out in the document as the family continued other properties jointly except the suit property (to the extent of 3-1/4 cents). But the probability did not support such a thing. Therefore, this could not be a case of possession and dispossession as

rightly pointed out by Mr. K. Hannath that when there is no proof of putting any construction on the suit properly and when the defendants put up construction, there is no question of defendants dispossessing the plaintiff by either removing the hut or entering into the so-called building. Therefore, neither the plea nor the proof of dispossession is satisfactory". In the circumstances, it was not a suit to decree for possession.

13. In view of the clear evidence in the case that the property was with the joint family including Prasada Rao, the father of defendants 1 to 3, and in the absence of partition under Ex. A1, the presumption is that the property never went out of the joint family and continued with it like other properties, to mean that the plaintiffs and defendants continued as co-owners or co-possessioners either one or both of them using the property or retaining the property for some purpose as it might have happened under Ex. A1. Therefore, if co-owner like the plaintiff, seeks dispossession of other co-owners, the defendants, there will be inconsistency with the right of the co-owners. Both the Courts below have overlooked this. Therefore, with the premise that the plaintiff did not establish exclusive title and on the other hand found to be a co-trespasser with the defendants having co-right if any, could not get the relief of possession. The reasoning of the learned Judges of the Courts below is beyond the evidence and beyond their own findings. Therefore, this Court not only desires to set aside the findings of the learned Judges of the Courts below in regard to the possession or dispossession or the relief of possession but also proposes to set aside the judgment and decree of both the Courts below.

14. Now, the question arises as to what should be done when the plaintiffs have established the joint right to be in possession of the suit property or trespassers along with the defendants. The answer lies that normally no relief can be given. But the materials clearly go to show that the property remained with the joint family of both the plaintiffs and defendants and in the absence of the Government being the true owner and particularly when there are structures put up on the suit property either by the plaintiffs or defendants, it would be inappropriate to dislodge the possession of either one or both of them so that the ultimate rights cannot be upset either by the Government when choosing to take action to dispossess the trespasser or when the parties to the suit seek appropriate relief against the real owner or approach the real owner for regularisation of such possession according to law.

15. This Court feels that there must be some expression to continue status quo as on the date of the suit and prior thereto as to rights deciphered above.

16. In the result, the appeal is allowed. The judgment and decree of both the Courts below are set aside. The suit shall stand dismissed for the relief of declaration of title and possession. But, it is made very clear that the plaintiffs or defendants shall continue to have the suit property with their joint family in the manner they held prior to Ex. A1 till they established their title in accordance with law or till they are dispossessed by the real owner. No costs.