

(2015) 01 MAD CK 0281
In the Madras High Court
Case No : S.A. No. 426 of 2006

Krishnapillai and Others

APPELLANT

Vs

Marimuthupillai

RESPONDENT

Date of Decision : 28-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Hindu Succession Act, 1956 — Section 14, 14(1)
Registration Act, 1908 — Section 17, 49
Transfer of Property Act, 1882 — Section 123

Citation : (2015) 01 MAD CK 0281

Hon'ble Judges : R. Mahadevan, J

Bench : Single Bench

Advocate : V. Ragavachari, for the Appellant; P.G. Padmanabhan, Advocates for the Respondent

Final Decision : Dismissed

Judgement

R. Mahadevan, J.—The judgment and decree, dated 29.11.2005 and made in A.S. No. 53 of 2005 on the file of the Principal Sub Court, Tindivanam, reversing the judgment and decree dated 20.4.2005 and made in O.S. No. 104 of 1997 on the file of the District Munsif-cum-Judicial Magistrate Court, Vanur, are under challenge in this memorandum of second appeal.

2. The appellants are the legal representatives of the plaintiff in the suit in O.S. No. 104 of 1997, whereas the respondent is the defendant.

3. For easy reference and for the sake of convenience, the appellants may hereinafter be referred to as the plaintiffs and the respondent be referred to as the defendant wherever the context so require.

4. The necessary facts leading to the filing of this second appeal are as under:--

"a. One Ayyamperumal, who was the father of the plaintiff, had died intestate, even prior to 1956, leaving behind the plaintiff as his only legal heir.

b. The said Ayyamperumal had purchased the suit property and some other properties from one Abdul Mazid on 4.9.1943 for a valuable consideration under a registered sale deed and he was in possession and enjoyment of the same.

c. After the death of the said Ayyamperumal, the plaintiff has been in possession and enjoyment of the suit property without any disturbance for more than 50 years. Since the sale deed purchasing the suit property had been lost, a copy of the same has been filed. Patta also stands in the name of the plaintiff.

d. Except the plaintiff, one Ettyammal and Govindammal, who are the sisters of the plaintiff, had no manner of right or claim in the suit property. In respect of other properties, the plaintiff had executed a settlement deed in favour of the defendant in the year 1980 and it was cancelled subsequently on 19.5.1997. Since the settlement deed was cancelled, the defendant has been threatening from 19.8.1997 and therefore, the plaintiff has filed the present suit seeking the relief of declaration and interim injunction."

5. The defendant resisted the suit by filing his written statement saying that the defendant is the son of the plaintiff's sister. The said Ayyamperumal had purchased the suit property and had been in possession and enjoyment of the same. While he was alive, he gifted the suit property orally to his daughter and son-in-law, viz., Ettyammal and Periyasamy. Thereafter, he stayed along with her daughter.

6. The plaintiff had left the Nesal Village before 30 years and has been permanently residing in Vemboondi Village. At any point of time, the plaintiff had not objected to the possession and enjoyment of the defendant's parents.

7. The father of the defendant Periyasamy had dug a well in the suit property and obtained electricity connection in his name in the year 1974 and the plaintiff had not raised any objection for that, but he had given consent letter for obtaining the electricity connection in the name of Periyasamy.

8. On 30.8.1995, the suit property was settled in favour of the defendant by his mother Ettyammal under a registered settlement deed. The plaintiff had not paid any kist in respect of the suit property, whereas the parents of the defendant had paid kist.

9. The change of patta behind the back of the defendant does not affect the right and title over the property to the defendant. Since the defendant and his parents were in possession and enjoyment of the suit property for more than 50 years they are entitled for possessory right.

10. Based on the material proposition of facts arising from the pleadings of the parties to the suit, the trial Court has formulated as nearly as four issues for the better adjudication of the suit.

11. In order to substantiate their respective cases, both the plaintiff and the defendant were directed to face the trial. Accordingly, the plaintiff was examined

as P.W.1 and two more witnesses were examined on his part. During the course of their examination Exs. A1 to A6 were marked. On the other hand, the defendant was examined as D.W.1 and five other witnesses were examined. During the course of their examination Exs. B1 to B22 were marked.

12. On evaluating the evidences both oral and documentary, the trial court had proceeded to decree the suit.

13. Having been aggrieved by the impugned judgment and decree of the trial Court, dated 20.4.2005, the defendant had preferred an appeal in A.S. No. 53 of 2005 on the file of the learned Subordinate Judge, Tindivanam.

14. That appeal was allowed setting aside the judgment and decree of the trial Court.

15. Being not satisfied with the judgment and decree of the first appellate court, the present second appeal has been filed by the legal representatives of the plaintiff.

16. The second appeal has been admitted on the following substantial questions of law:--

"a. Does undisputed facts of the death of Ayyamperumal prior to the promulgation of Hindu Succession Act, require to be proved as held by the lower appellate court?

b. Whether the order of the lower appellate Court is not void ab-initio void, as it had been made as against the dead person?"

17. Heard Mr. V. Ragavachari, learned Counsel appearing for the appellants and Mr. P.G. Padmanabhan, learned counsel appearing for the respondent.

18. The learned counsel for the appellants has submitted that the lower appellate court has failed to appreciate that Ayyamperumal had died prior to the Hindu Succession Act came into force, which is not in dispute and therefore, on the date of death of Ayyamperumal, the plaintiff Krishnapillai alone was the legal heir and that he is entitled to the suit property and hence, the defendant has no right or claim over the suit property.

19. Further, the learned counsel has contended that though it is claimed by the defendant that the suit property was orally gifted to his mother Ettiyammal by her father Ayyamperumal, the burden is solely on the defendant to prove such oral gift, but that burden has not been discharged and therefore, the claim of the defendant cannot be accepted.

20. The learned counsel has maintained that considering all these aspects, the trial court has correctly decreed the suit, however, the lower appellate court without looking into the evidences both oral and documentary in a proper perspective, reversed the judgment and decree of the trial court and therefore, the interference of this Court with the judgment and decree of the lower

appellate court is warranted.

21. In support of his contention, the learned counsel has relied on the following decisions:--

"a. C. Masilamani Mudaliar and Others Vs. The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli and Others, (1996) 3 AD 250 : AIR 1996 SC 1697 : (1996) 3 JT 98 : (1996) 2 SCALE 864 : (1996) 8 SCC 525 : (1996) 1 SCR 1068 .

b. P.S.G. Ganga Naidu and Sons Charities Vs. The Special Commissioner and Commissioner-Land Reforms/Land Commissioner and Others, (2011) 2 CTC 88 .

c. Sudish Prasad and Others Vs. Babui Jonhia alias Manorma Devi and Others, (2013) 3 AD 497 : (2013) 2 JT 584 : (2013) 171 PLR 131 : (2013) 2 RCR(Civil) 512 : (2013) 2 SCALE 280 : (2013) 9 SCC 181 .

d. Paulsamy Nadar, A. Ganesan Nadar, Vairava Nadar and Karuthapandian Vs. Udaya Kumar Langan rep. through the Power Agent, Sathiaselvan, The Panchayat Chairman, Rayagiri Town Panchayat, The Executive Officer, Rayagiri Town Panchayat and Rajamani, (2011) 3 MLJ 52 .

e. Karewwa and Others Vs. Hussensab Khansaheb Wajantri and Others, AIR 2002 SC 504 : (2002) 1 JT 611 Supp : (2002) 10 SCC 315 : (2002) AIRSCW 40 : (2001) 6 Supreme 182 "

22. Per contra, the learned counsel for the respondent has submitted that the trial court has failed to take into consideration the fact that the plaintiff was not at all in possession and enjoyment of the suit property, whereas the daughter of Ayyamperumal, namely, Ettyammal and her husband were in possession and enjoyment of the suit property for more than 50 years and thereafter, their son Marimuthu Pillai, who is the defendant, has been in possession and enjoyment of the suit property and the suit property was settled in his favour and therefore, the trial Court erred in decreeing the suit in favour of the plaintiff.

23. The learned counsel has maintained that the plaintiff never claimed any interest in the suit property and objected to grant electricity connection in the name of Periyasamy, who is the husband of Ettyammal, and therefore, the plaintiff himself has admitted the oral gift made by his father and that the plaintiff's father had not died intestate.

24. The learned counsel has contended that soon after the suit property was gifted orally, the suit property was delivered to the parents of the defendant and the same was accepted, which is sufficient to constitute a valid gift. Further, the value of the property did not exceed Rs. 100/- individually before 50 years and therefore, it did not require any registration.

25. The learned counsel has pointed out that the plaintiff has taken inconsistent stand by seeking declaration as well as the adverse possession, which clearly shows that the plaintiff neither had a title nor in adverse possession and therefore, the suit itself ought to have been dismissed on this sole ground.

26. The learned counsel has submitted that though the execution of Ex. B.1 settlement deed executed by Ettyammal, on 30.8.1985 in favour of the defendant, neither it was questioned nor it was objected or no action was taken to nullify the settlement deed and therefore, the claim of the plaintiff on any ground cannot be accepted.

27. In support of his contention, the learned counsel has relied on the following decisions:--

"a. The Chairman and Managing Trustee Krishnaswamy Educational Trust Vs. Smt. C.V. Rajeswari Ammal (Deceased) and Others, (2013) 4 CTC 586 : (2013) 3 LW 381 : (2013) 5 MLJ 620 .

b. Bondar Singh and Others Vs. Nihal Singh and Others, AIR 2003 SC 1905 : (2003) 2 CTC 635 : (2003) 2 SCALE 589 : (2003) 4 SCC 161 : (2003) 2 SCR 564 : (2003) AIRSCW 1383 : (2003) 2 Supreme 512 .

c. Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others, AIR 1996 SC 869 : AIR 1995 SC 869 : (1995) 8 JT 466 : (1995) 6 SCALE 809 : (1996) 8 SCC 128 : (1995) 6 SCR 41 Supp ."

28. I have considered the aforesaid submissions and perused the materials available on record.

29. It is not in dispute that Ayyamperumal had purchased the suit property from one Abdul Mazid on 4.9.1943 for a valuable consideration under a registered sale deed and thereafter, it was in the possession and enjoyment of Ayyamperumal. It is also an admitted fact that the suit property is not an ancestral property.

30. The learned counsel for the appellants has contended that the burden is solely on the defendant to prove the oral gift in favour of her mother Ettyammal by her father Ayyamperumal and the claim by way of oral gift has no sanctity in the eye of law. To substantiate his contention, the learned counsel has relied on the following judgments:

"a. In P.S.G. Ganga Naidu and Sons Charities Vs. The Special Commissioner and Commissioner-Land Reforms/Land Commissioner and Others, (2011) 2 CTC 88 gives answer to the question whether an oral or an unregistered gift is permissible in law. The finding of this Court is as follows:--

"22. Whether an oral or an unregistered gift is permissible in law:

22.1. Section 17 of the Registration Act, 1908 prescribes the transactions for which a registration is compulsory. Accordingly, an instrument of immovable property has to be registered. Section 49 of the Act speaks about the effect of non-registration of documents required to be registered. It clearly spells out that a gift deed which is required to be registered under Section 17 of the Act if not done so would not affect the immovable property concerned. In other words, in the absence of any registration which is mandatorily required there is no transfer of title and the alleged transaction would be a nullity and void in the eye

of law. Hence for a transfer of an immovable property by way of a gift a registered deed is necessary.

22.2. "Gift" has been defined under the Transfer of Property Act, 1882. Section 123 of the said Act prescribes that a transfer of gift must be effected by a registered instrument signed by the donor and attested by atleast two witnesses. In the present case on hand, there was neither a written document nor it was registered with attestation. Therefore, in such an eventuality the very plea of the petitioner would fall on the ground in as much as there is no transfer in the eye of law. In Smt. Gomitibai (dead) through LRs. and others Vs. Mattulal (dead) through LRs., (1996) 8 AD 310 : AIR 1997 SC 127 : (1996) 9 JT 454 : (1996) 7 SCALE 715 : (1996) 11 SCC 681 : (1996) 7 SCR 155 Supp : (1996) AIRSCW 4287 : (1997) 6 Supreme 283 , the Honourable Apex Court has observed as follows:

"4. Thus, it is seen that the gift of immovable property should be made only for transferring the right, title and interest by the donor to the donee by a registered instrument signed by or on behalf of the donor and must be attested by at least two witnesses. The pre-existing right, title and interest of donor thereby stand divested in the donee by operation of Section 17 of the Registration Act only when the gift deed is duly registered and thereafter the donor would lose title to the property. It must also be proved that the donee had accepted the property gifted over under the instrument. In this case, though the transfer of gift was acted upon by Kusturibai as per the correspondence and evidence on record, but, admittedly, there is no written instrument executed by the donor, namely, the plaintiff and the defendant in favour of their cousin sister Kusturibai and it was got attested by at least two witnesses and registered in accordance with the provisions of the Stamp Act and the Registration Act. In the absence of compliance of these formalities, at best what could be seen from the partition deed is that the original plaintiff and the defendant have expressed their intention to gift over the land to their cousin sister Kusturibai. As held earlier, in the absence of any registered instrument of gift and acceptance thereof by the donee, the said property could not be said to have been legally transferred in favour of their cousin sister; in other words, the gift is not complete in the eye of law. Therefore, the District Court has rightly set aside the decree of the trial court which was later confirmed by the High Court. We do not find any error of law warranting interference."

22.3. Hence on a consideration of the provisions contained in the Transfer of Property Act, 1882 read with the Registration Act, 1908 and applying the ratio laid down by the Honourable Apex Court the alleged transactions even assuming are true are void, ab initio, without the sanction of law. "

b. In Sudish Prasad and Others Vs. Babui Jonhia alias Manorma Devi and Others, (2013) 3 AD 497 : (2013) 2 JT 584 : (2013) 171 PLR 131 : (2013) 2 RCR(Civil) 512 : (2013) 2 SCALE 280 : (2013) 9 SCC 181 , the Hon"ble Supreme Court has held that the claim by way of oral gift has no sanctity in the eye of law and the

relevant portion is extracted hereunder:--

"14. Coming back to the instant case it appears that Bal Kishun Mahto immediately after the appointment as Guardian started dealing with the property against the interest of Sukai. Not only he entered into a compromise in a suit filed in 1933 but executed two zerpesgi deed in the year 1940 in favour of his nephew Mahadev Mahto and also in favour of Dev Raj Mahto without the permission of Court and without any consideration. After the death of Sukai Mahto in 1946 at the age of 23 years leaving behind the plaintiff who was only 3 years old, he continued possession of the suit property as trustee. Curiously enough the said Bal Kishun Mahto claimed to have acquired a portion of the suit property alleged to have been orally gifted to him by Sukai in lieu of his services as Guardian. The said claim by way of oral gift has no sanctity in the eye of law."

c. In Paulsamy Nadar, A. Ganesan Nadar, Vairava Nadar and Karuthapandian Vs. Udaya Kumar Lingam rep. through the Power Agent, Sathiaselvan, The Panchayat Chairman, Rayagiri Town Panchayat, The Executive Officer, Rayagiri Town Panchayat and Rajamani, (2011) 3 MLJ 52, Madurai Bench of this Court has held that the oral gift alleged to have been given by the predecessor in title is not legally valid and injunction shall not be awarded to person, if his title and interest in property was illegal. The relevant portions are as follows:--

"22. Now the Court has to look into the oral gift alleged to have been given by the predecessor in title of the plaintiff in favour of the school authorities mentioned in the written statement filed on the side of the defendants 2 and 4.

23. At this juncture, it would be more useful to look into section 123 of the Transfer of Property Act, 1882 and the same reads as follows:

Transfer how effected.- For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

24. Even a cursory look of the said provision would clearly show that a gift of an immovable property should be effected only by way of registered instrument and the same should be signed by donor or on behalf of the donor and also attested by at least two witnesses. In view of the provision of section 123 of the Transfer of Property Act, 1882, oral gift alleged to have been given by the predecessor in title of the plaintiff in favour of the school authorities mentioned in the written statement filed by the defendants 2 and 4 is not legally valid."

d. In Karewva and Others Vs. Hussensab Khansaheb Wajantri and Others, AIR 2002 SC 504 : (2002) 1 JT 611 Supp : (2002) 10 SCC 315 : (2002) AIRSCW 40 : (2001) 6 Supreme 182, the Hon'ble Supreme Court has held that mere statement of fact in the written statement is not a rebuttal of presumption of correctness of an entry in the revenue record. The relevant paragraph is extracted hereunder:--

"3. Learned counsel then urged that presumption of the correctness of an entry

in the revenue record is a rebuttable presumption. The appellant rebutted the presumption by stating in his written statement that respondent No. 1 came into possession of the land on the basis of agreement for sale executed in the year 1972 and, therefore, the entry in the revenue record that the respondent was a tenant of the land in the year 1973 is incorrect. We do not dispute the legal position as stated by the learned counsel for the appellant, but the presumption of correctness of an entry in revenue record cannot be rebutted by a statement in the written statement. Mere statement of fact in the written statement is not a rebuttal of presumption of correctness of an entry in the revenue record. The respondent was recorded as a tenant in the revenue record in the year 1973 and under law the presumption is that the entry is correct. It was for the appellant to rebut the presumption by leading evidence. The appellant has not led any evidence to show that entry in the revenue record is incorrect. We, therefore, do not find any merit in the contention."

Citing the above, the learned counsel for the appellants contended that the claim of the other side cannot be considered.

31. On the side of the respondent, with regard to adverse possession, the learned counsel relied on the following decisions:--

(i) In the decision in *The Chairman and Managing Trustee Krishnaswamy Educational Trust Vs. Smt. C.V. Rajeswari Ammal (Deceased) and Others*, (2013) 4 CTC 586 : (2013) 3 LW 381 : (2013) 5 MLJ 620 , this Court has held that if the original transfer was void, then the alienee or the donee in this case would have been in adverse possession from the date of transfer. The relevant paragraphs are extracted hereunder:--

"60. In *S.K. Venkatasubramania Ayyar and Others Vs. S. Sivagurunatha Chettiar and Others*, AIR 1938 Mad 60 , one of the questions which fell for consideration before the Division Bench of this Court was the date from which adverse possession of alienee starts in cases of void and voidable transfers. In the case on hand, the defendants contention is that Ex. P2 gift deed being an unregistered document, no title flows from the same and the same is inadmissible. The Division Bench while considering such question held as follows:--

On the other hand, if the original transfer was void, then the alienee would have been adverse possession since the date of transfer i.e., 1900 in the case above put. The above is the effect of 44 Mad 831 [*Vidya Varuthi v. Baluswami Iyer*], 12 Pat 251 [*Ram Charan Das v. Naurangi Lal*], A.S.S. Subbaiya Pandaram Vs. Mahamad Musthapa Maracayar and Others, (1917) 5 LW 690 : (1917) 32 MLJ 85 ; and the cases there cited and later cases such as AIR 1983 PC 44 [*Mahadeo Prasad Singh v. Karia Bharthi*], which follow the above. The 12 Pat 251 , group is dealing with the case of a transfer that is effective up to a time; the A.S.S. Subbaiya Pandaram Vs. Mahamad Musthapa Maracayar and Others, (1917) 5 LW 690 : (1917) 32 MLJ 85 group with cases void ab initio. Both groups date the adverse possession from the moment the alienee is without lawful title. That time

is, in the case of a void transfer, the date of the transfer; in the case of a voidable transfer, the date of the avoidance; in the case of a transfer effective for a period (whether because of estoppel or otherwise), the date of the termination of the period.

61. Therefore, if the original transfer was void, then the alienee or the Donee in this case would have been in adverse possession from the date of transfer, which in the instant case is 06.01.1985, the date on which according to the defendant, the plaintiff is without lawful title. This decision fully supports our conclusion that the date from which the plaintiff is in possession adverse to the interest of the defendants is 06.01.1985. "

(ii) In *Bondar Singh and Others Vs. Nihal Singh and Others*, AIR 2003 SC 1905 : (2003) 2 CTC 635 : (2003) 2 SCALE 589 : (2003) 4 SCC 161 : (2003) 2 SCR 564 : (2003) AIRSCW 1383 : (2003) 2 Supreme 512 , the Hon'ble Supreme Court has held that the unregistered and unstamped document is not admissible in evidence, but can be looked into for collateral purpose in order to show possession and the Hon'ble Court has given a finding that the plea of adverse possession is clearly established. The relevant paragraphs are extracted hereunder:--

"5. The main question as we have already noted is the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 9.5.1931 by Fakir Chand, father of the defendants in favour of Tola Singh, the predecessor interest of the plaintiff, is an admitted document in the sense its execution is not in dispute. The only defence set up against said document is that it is unstamped and unregistered and therefore it cannot convey title to the land in favour of plaintiffs. Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land..... There is other reliable evidence on record which establishes that the plaintiffs have been in continuous possession of the land in question. There is a notice dated 16.4.1956 Exhibit P.6. The notice was issued on behalf of the defendants and is addressed to the predecessor interest of the plaintiffs. By the notice the defendants called upon the plaintiffs to hand over possession of the suit land to them. According to the notice, the plaintiffs were trespassers on the suit land and were liable to hand over its possession to the defendants. This notice is an admission on the part of the defendants that the plaintiffs were in possession of the suit land at least on the date of the notice i.e. 16th April, 1956.....

6. It appears that having failed to obtain possession of the suit land through lawful means, the defendants tried to dispossess the plaintiffs forcibly which led to the present suit being filed on 15.4.1972. The claim of the defendants regarding taking possession of suit land from plaintiffs in 1957-58 having been

found to be false, it follows that the defendants never came into possession of the suit land. Another significant conclusion which follows from these facts is that the defendants started asserting their title to the suit land since at least 1956 when they issued the notice Exhibit P.6 while the plaintiffs have been denying their title to the suit land and were setting up their own title to the same. This lends support to the plea of adverse possession set up by the plaintiffs. It will be seen from this clear and clinching evidence on record that the plaintiffs were in continuous and uninterrupted possession of the suit land since 1931 and they had been setting up a hostile title thereto as against the defendants. The defendants were asserting their title to the land since 1956. They had however failed to get possession of the suit land. The plea of adverse possession raised by the plaintiff is thus clearly established."

(iii) In Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others, AIR 1996 SC 869 : AIR 1995 SC 869 : (1995) 8 JT 466 : (1995) 6 SCALE 809 : (1996) 8 SCC 128 : (1995) 6 SCR 41 Supp , the Hon'ble Supreme Court has held that "'possessed'" in Section 14 means right to possess and not actual physical possession. The relevant paragraph reads as under:--

"29. Sri Arun Mohan, learned counsel for the appellant-third defendant, submitted that inasmuch as the plaintiff has not invoked or relied upon Section 14 of the Hindu Succession Act and also because no reference to the said provision is found in the judgment of the learned Single Judge or the Division Bench, she should not now be allowed to invoke the said provision for the first time in these appeals. Learned counsel submitted that neither in the plaint nor at any time during the arguments in the Courts below was this contention urged by the plaintiff. Counsel also submitted that had the plaintiff raised this contention in the plaint, the defendant-appellant would have had an opportunity of establishing that Section 14 has no application for the reason that she was not "possessed" of the said first floor on the date of coming into force of the Act. Counsel submitted that Satyawati was never living in the first floor; she was either living with the first defendant or with other relatives. We have given our anxious consideration to the said submission but are unable to agree with it. In the plaint, it is repeatedly stated that the plaintiff is claiming the suit property both through Ram Nath and Satyawati. It is true that there is no specific reference to Section 14 of the Hindu Succession Act but we are of the opinion, having regard to the law applicable to pleadings (Order 6 Rule 2 of the Civil Procedure Code) and the decisions of this Court in that behalf [See Kidar Lall Seal and Another Vs. Hari Lall Seal, AIR 1952 SC 47 : (1952) 1 SCR 179 that it would not be just and proper not to give effect to the said highly salutary provision on the above ground which, in the facts and circumstances of the case, is a mere technicality. Section 14 operates on its own force once the facts requisite for attracting its application are established. It must be remembered that the settlement between Satyawati and the first defendant was arrived at on January 27, 1955 whereas the Hindu Succession Act came into force in June, 1956, i.e., within less than seventeen months. Moreover, we are concerned with

right to possession and not physical possession. It has been repeatedly held by this Court [See the several decisions referred to under the heading "possessed - meaning of"" in Mulla's Hindu Law (Sixteenth Edition at Page 810)] while construing the expression "possessed"" in Section 14(1) that the said expression means and refers to a right to possession and not necessarily actual or physical possession. So long as she has a right to possession, the mere fact that the female Hindu was not in physical possession matters very little. Therefore, it is immaterial whether Satyawati was physically occupying the said first floor or not. So long as she had the right to possession over the said first floor, Section 14(1) is attracted. There has never been any suggestion by Defendant Nos. 2 to 5 that Satyawati had given up the said right. On the contrary, Exh. D-28 (a former statement of Satyawati in a suit), filed and relied upon by the appellant, shows that Satyawati herself was holding a General Power of Attorney from the first defendant (executed in 1960 and in 1964) and was managing all his properties in India. This is also the testimony of the plaintiff in this suit. She has deposed (Page 47 of Vol. II Paper Book) that till three months before her death, Satyawati was residing in the said house along with a maid servant and her son. Nothing worthwhile has been brought out in her cross-examination to doubt this statement of hers. We accept her statement. The facts established herein do clearly attract Section 14 of the Hindu Succession Act. The ends of justice demand that the said provision is given effect to. The plea of lack of opportunity is at best a technical one, in the particular facts and circumstances of the case. We are, therefore, not inclined to accept Sri Arun Mohan's plea that Section 14(1) should not be allowed to be invoked by the respondent in these appeals."

32. It is an admitted fact that Ayyamperumal had died even prior to 1956. While he was alive, the suit property was gifted to his daughter Ettiyammal and son-in-law Periyasamy and thereafter, they were in possession and enjoyment of the suit property and after the settlement in favour of the defendant, he has been in possession and enjoyment of the same.

33. Though there was no documentary evidence to prove that the suit property was orally gifted to Ettiyammal, after the alleged oral gift, the suit property was in possession and enjoyment of Ettiyammal and her husband Periyasamy.

34. To prove the possession and enjoyment of the suit property, Exs. B7 to B13 Kist receipts were marked. It is the case of the defendant that his father Periyasamy had dug a well in the suit property and obtained the electricity connection in his name, for which, the plaintiff had given a consent letter to the electricity department. Thereafter, the electricity bill was paid by Periyasamy and to prove this fact, Exs. B2 to B6 were produced and marked. That apart, Ex. B17 Abstract for the annual minimum assessed for the year 1975-76, Ex. B18 Test Report and Exs. B20 to B22 Electricity receipts have been produced and marked.

35. It is pertinent to note here that the original sale deed, dated 4.9.1943 executed between Ayyamperumal and one Abdul Mazid from whom the suit property purchased, was produced and marked as Ex. B.14 by the defendant.

36. It is an admitted fact that Ayyamperumal after making gift in favour of his daughter Ettyammal, the parents of Ettyammal had stayed in her house till their death and delivered the suit property for her possession and enjoyment and also handed over the original sale deed dated 4.9.1943 and that is why, it could have been produced by the defendant.

37. It is not the case of the plaintiff that the original sale deed had been taken away by the defendant from the custody of the plaintiff and that is why, the plaintiff had filed only a copy of the sale deed.

38. Further, it is not the case of the plaintiff that his parents were with him till their death. On the other hand, it is an admitted fact, the plaintiff had left the suit village and has been residing in Vemboondi Village and therefore, it is clear that there was no cordial relationship between the son and the father.

39. On 30.8.1995 the defendant's mother Ettyammal, had executed a registered settlement deed, dated 30.8.1995 settling the suit property in favour of the defendant. But this settlement deed has not been questioned at any point of time by the plaintiff through any kind of mode.

40. It is natural that a person unless having any kind of right over any property, he could not have any dare to alienate or encumber the property. Therefore, since the suit property was gifted to Ettyammal by her father, and thereafter, she and her husband were in possession and enjoyment of the suit property and the same has been proved by examining the independent witnesses and marking the aforesaid documents and on that basis, Ettyammal had executed the settlement deed in favour of her son, who is the defendant herein.

41. It is also pertinent to note here that the plaintiff never questioned the oral gift made by his father and the possession and enjoyment of the suit property by Ettyammal and her husband. Already stated above, even Ex. B.1 settlement deed was not questioned. Therefore, it is clear that since the suit property was orally gifted and thereby, the parents of the defendant were in possession and enjoyment and thereafter, it was settled in favour of the defendant. Only in the year 1997, the plaintiff simply filed the present suit seeking declaration and injunction.

42. Even in the plaint, while he has made averments for the relief of declaration, he has also made averments in respect of the claim of adverse possession.

43. It is well settled that a person can file a suit for declaration if he has documents to prove his title to the property or for the relief of adverse possession, if he could prove that he was in possession adverse to the true owner for more than the statutory period.

44. Here, in the plaint, the averments in respect of declaration as well as adverse possession are made, which is self contradictory and on the ground itself, the suit is not maintainable. It shows that neither the plaintiff is having any title to the suit property nor he is in possession and enjoyment of the suit property.

45. Further, D.W.5 in his cross examination has deposed as under:--

Vernacular Matter omitted here

46. D.W.2 in his cross examination has stated as under:--

Vernacular Matter omitted here

47. From the above evidence of D.Ws.5 and 2, it is clear that the plaintiff was not in possession and enjoyment of the suit property, whereas the defendant has been in possession and enjoyment of the suit property and proved the execution of the settlement deed.

48. From the above discussion, this Court is of view that the plaintiff is not entitled to claim the relief of declaration and injunction for the following reasons:--

"a. Since the suit property was gifted to Ettyammal and Periyasamy by Ayyamperumal, he stayed along with his daughter till his death and handed over the possession of the suit property for the enjoyment of Ettyammal and Periyasamy and also handed over the original sale deed, dated 30.8.1995.

b. There was no cordial relationship between the plaintiff and his father and that is why, he stayed along with his daughter till his death and his funeral ceremonies were conducted by her. The plaintiff had left the native village and settled in Vemboondi village. Had he been in possession and enjoyment of the suit property, he would not have left the suit village.

c. The possession and enjoyment of the suit property has been categorically proved by the defendant by examining D.Ws.5 and 2. Further, to prove the possession and enjoyment of the suit property, Exs. B7 to B13 Kist receipts, Exs. B2 to B6 Electricity receipts were produced and marked.

d. When the settlement deed was executed by Ettyammal in favour of the defendant, there was no objection on the part of the plaintiff. Had he been really in possession and enjoyment of the suit property, it could not have been settled in favour of the defendant and further, he would have resorted to legal proceedings to nullify the same. But nothing has been done till date."

49. On the other hand, the plaintiff has not proved that he was in possession and enjoyment of the suit property through both oral and documentary evidence. No original sale deed, dated 4.9.1943 was produced by him, whereas it was produced by the defendant under Ex. B.14. Even in the plaint, the averments are not so categorical and clear. While he is seeking for the relief of declaration, there are averments in respect of adverse possession, which itself is fatal to the case of the plaintiff.

50. Considering the totality of the facts and circumstances of the case, this Court does not find any infirmity with the judgment and decree of the lower appellate court.

51. For the aforesaid reasons, the second appeal fails and the same is dismissed confirming the judgment and decree of the lower appellate court. However there will be no order as to costs.