

(1981) 09 MAD CK 0078
In the Madras High Court

L.A.K. Shanmughasundaram Chettiar and Another	APPELLANT
Vs	
Municipal Council and Another	RESPONDENT

Date of Decision : 08-09-1981

Acts Referred:

Citation : (1990) 2 MLJ 224

Hon'ble Judges : V. Sethuraman, J

Bench : Division Bench

Judgement

V. Sethuraman, J.—The plaintiffs in O.S. No. 92 of 1973 in the Court of the Subordinate Judge of Tuticorin are the appellants. They filed the suit for declaration of their title and for injunction in respect of the suit property. The suit was filed by them as representatives of a community called the 24th Manai Telugu Chettiar Community of Sankarankoil. Defendants are the Municipal Council, Sankarankoil, which was previously a Panchayat, and one Kandasamy Naicker, who was a contractor working for the Municipal Council. The suit property is situated in Sankarankoil Town immediately west of the Main Road running north to South. The entire property is described as item 1 in the plaint and its measurements are 115 1/2 feet east to west and 112 3/4 feet north to south. There are two buildings, a hotel and a mandapam in the north-eastern portion of this property. In fact, it runs to a good portion of the north in the plan as prepared by the Commissioner. The east-west measurement of those buildings is 60 feet north to south and 49 1/2 feet east to west. The remaining portion is a vacant site situated immediately west and south of those buildings. The total extent of the disputed item is 25 1/2 cents and the total extent of the buildings is 6 cents.

2. The plaintiffs-Sangam purchased the said property under Ex.A.1 dated 11th July, 1904. According to the plaintiffs, the presiding deity of the Sankaranainar temple used to-be taken to the mandapam in question on the 19th day of the festival called Adi Thapas. A large congregation gathers at the time of this festival and the plaintiffs case was that the disputed property was being used for

cooking and for parking bullock-carts brought by the visitors to the town on the festival day in 1973.

3. The second defendant who is a contractor under the first defendant started the work of constructing a bus stand in the disputed item. At that stage, the suit was filed by the plaintiff's Sangam on 23.6.1973 for a declaration of its title and for injunction restraining the Municipality and the contractor from interfering with the plaintiff's possession and enjoyment of the same. The defence of the defendants was that the suit item was part of a Oorani Poromboke belonging to the Government, that it had been assigned by the Government to the first defendant and that from 1958 onwards the first defendant was running a daily market in the suit item openly and adverse to the interests of the plaintiffs so that the first defendant had, in any event, acquired title by prescription."

4. The Trial Court accepted the case of the plaintiffs regarding the title to the suit item, but it held that the first defendant had acquired title by adverse possession to the southern portion of the suit item. At this stage it is enough to mention that the portion south of the letters K.Q. in Ex.C.3, the Commissioner's plan, was considered to be the area over which the first defendant had acquired title by prescription. The result was that the trial court decreed the suit in favour of the plaintiffs in respect of the remaining extent.

5. The first defendant-Municipal Council filed A.S. No. 165 of 1974 in respect of the area over which the plaintiffs had succeeded and the plaintiffs filed A.S. No. 191 of 1974 of 1974 in respect of the area over which they had failed.

6. Both the appeals came to be heard by the learned Additional District Judge, Tirunelveli. He went into the question whether the plaintiffs had title to the suit item and if so whether the first defendant had acquired title by adverse possession. On the question of title he found in favour of the plaintiffs, but on the question of adverse possession he held that the entire area even north of the letters K.Q. in the plan was a subject of acquisition of title by adverse possession by the Municipality. The result was that the suit was dismissed. The present second appeal has been filed against the said judgment of the learned District Judge.

7. At the time of the admission of the second appeal, the following question was formulated:

Whether the lower appellate Court has misconstrued the evidence and failed to consider material evidence in reversing the judgment and decree regarding the adverse possession in the northern portion of the property, namely, the area in the northern portion marked by letters K.Q.

8. However, at the time of the hearing of the second appeal, the learned Counsel for the appellant contended that the question of adverse possession with reference to the entire area was actually in dispute. I do not consider it necessary to restrict the appeal only to the area north of the line K.Q. In order to

appreciate the points in controversy, it would be better to give a rough sketch of the area based on Ex.C.3.

9. The northern most point is Ramanathpuram 7th street. There is a gate which opens into the area where two mutton stalls are located behind one of the mutton stalls is the property belonging to one Mohammed Sahib. That property is not the subject matter of any disputes. The present case relates to the property marked by letters ABCDKPQA in the plan or sketch given above and it would be found that south of the letters A,B there is a vacant area which leads to point C.C.D is the line which separate the mandapam from the rest of the property. South of C, D there is an opens space in which there is a thatched shed, well and a gate at point K. There is a tiled shed and some shops at the south-west corner of the property. There are some shops located around the line E.F. There is no dispute with reference to the area B,C,E),G. It is only with reference to the rest of the area that the question of adverse possession has to be considered.

10. The learned Counsel for the appellant submitted that in the case of vacant land, possession followed title and that if any person asserted that he was in adverse possession of such a property he would have to prove his case strictly. In *Kuthali Moothovar v. Perinati Kumarankutty* 41 M.L.J. 6510, the Privy Council was concerned with the claim of adverse possession of forest land. The title to the property was in A and B claimed adverse possession. It was pointed out that adverse possession must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession and the onus of establishing these things was upon the adverse possessor. Accordingly when the holder of title proved that he too had been exercising during the currency of his title various acts of possession, then the quality of those acts even though they might have failed to constitute adverse possession as against another, might be abundantly sufficient to destroy that adequacy and interrupt that conclusiveness and continuity which is demanded from any person challenging by possession the title which he held.

11. The principle of the above decision was followed in *Makina Atchayya Patrudu Vs. Jalaluddin Sahib and Others*, . In this decision of a Bench of this Court it was pointed out that possession could not be adverse unless it was held to be such circumstances as were capable in their nature of notifying mankind that the party was on the land claiming it as his own openly and exclusively and. that there ought to be nothing equivocal in a possession which was rolled upon as a bar; and in the case of vacant land the same kind of possession could not be expected as in the case of an occupied land or building and where there was no effective intrusion, the Court would be justified in giving effect to the principle of law that possession followed title. It is in this context the decision of the Privy Council in *Kathali Moothovar v. Perinati Kumarankutty* 41 M.L.J. 650 was applied.

12. In a later decision of the Privy Council in *Nageshwar Bux Roy v. The Bengal Coal Co. Ltd.* 60 M.L.J. 183, the principle laid down was that the title founded by a trespasser on adverse possession would be strictly limited to that area of which

he was in actual possession. The maxim *Tanum Prescription Quantum Possessun* was applied. In other words, the area of acquisition of title by prescription was to be limited to the area of actual possession in the hands of the person claiming such title.

13. In *Srimati Bybhapati Devi v. Kumar Ramendra Narayan Roy and Ors.* (1946) 2 M.L.J. 442, their Lordships of the Privy Council laid down that possession must be adverse to a living person and as the widow in that case was in possession under a mistake as to her husband's death, she could not claim that by her possession she was asserting a right adverse to the person when she regarded as dead.

14. The principle detectable from these cases is that the onus lies on the person who asserts title to the property by adverse possession. When once it is found that a particular person has title to the property, it would be necessary to apply strict standards of proof in respect of the acquisition of title by prescription. After all, a person who claims adversely to the title holder is more often in the position of a trespasser and would not be entitled to any equitable consideration. The area over which the acquisition of title by trespass was claimed, should also be strictly proved. The possession must be open, continuous, hostile and exclusive. It is in this background that we have to approach the problem in the present case.

15. In the plan given above, there is an area marked as thatched shed. P.Ws.3 and 6 have deposed that the plaintiffs' community leased out the thatched shed portion under Ex.A.3 to one Kattuva Rowther and that Kattuva Rowther has been paying rent for the said portion to the plaintiffs. Kattuva Rowther has executed a lease deed in favour of the plaintiffs on 24.2.1969 and there is a resolution Ex.A.16 passed by the plaintiffs for leasing out the said property to Kattuva Rowther. There is a lane in between the thatched shed and the mandapam and P.Ws. 2,3,5 and 6 have spoken to the effect that the said lane is in the actual possession of the plaintiffs. Having regard to the evidence on the part of the first defendant to show that it was the first defendant which put up the thatched shed, it has to be concluded that right up to the thatched shed, the property was in the occupation of the plaintiffs alone. The lower appellate Court has pointed out that the said Kattuva Rowther has not been examined. However, the evidence of the persons who had taken the property on rent from the said Kattuva Rowther is available. The absence of the evidence of Kattuva Rowther is thus of no significance. The result is that property right up to the thatched shed and extending to the letter K would fall within the enjoyment of the plaintiffs.

16. There is oral evidence let in on behalf of the defendants and the learned trial judge has gone meticulously into this oral evidence in paragraph 11 of his judgment. He has found that the evidence of the defendants' witnesses did not establish that the area was in the possession of the first defendant. The evidence was either vague or unconvincing or negative in character. It is indeed unfortunate that the lower appellate Court has not examined the evidence of

these witnesses to find out how far their testimony would support the case of the defendants. In the absence of any discussion by the lower appellate Court of the said evidence and in the light of the said discussion by the trial Court, I think it is proper to accept the finding of the trial Court with reference to the evidence of these witnesses. The result is that right up to the letter K, it is the plaintiffs who are in possession of the property and not the defendants.

17. The rest of the area south of the letter K is an open one. The daily market is being run in this town without putting up any permanent structures. Apparently, the merchants bring their goods, sit in the open space, sell the goods and leave the place in the evening. The question is whether, with reference to such enjoyment, it can be taken that the area has been under the occupation of the first defendant openly, continuously and in a hostile manner for the requisite period. The Court below has concluded that adverse possession started from 1st April, 1958 only on the basis that the market in that place started functioning from the said date. As far as this respondent Municipality drew my attention to the Commissioner's report. The Commissioner has reported that in the thatched shed some persons had taken lease from the Municipality for running vegetable stalls. I have already considered the question of possession relating to the thatched shed and found that the thatched shed was only in the possession of the plaintiffs. It is therefore not possible to accept the Commissioner's statement about the possession being in the hands of the first defendant. He reported about the persons running a shop in the tiled shed stating that they had taken for lease the area in the said shed and that the shed belonged to the Municipality. There is pretty little discussion in the Commissioner's report as to the persons who made the statement and the actual statement that (they made. Having regard to the nature of the proof required in a case like this, it is not possible to set on the basis of the statement made by the Commissioner in his report without the evidence itself being found discussed in the report.

18. Rest of the tiled shed at about 21'3" west of the line D E there is a compound wall. The compound wall touches the mandapam. The Municipal Commissioner is stated to have represented to the Court Commissioner that the compound wall was built up by the Municipality and that the gate between K and L was also put up by the Municipality. The Municipal Commissioner has, however, given evidence in the Court and in the course of his deposition the Commissioner has clearly stated that he did not make any such statement before the Court Commissioner. The measure of acceptability of the Commissioner's report is thus clear, The Commissioner of the Municipality having denied the statement said to have been recorded by the Commissioner, the statement in the Court Commissioner's report that the compound wall was put up by the Municipality cannot be accepted. As far as the tiled shed is concerned, there is absolutely no evidence to show that it was the Municipality which had put it up. In these circumstances, the entire area south of the thatched shed has necessarily to be taken to be in the possession of the plaintiffs for the reason that it is a vacant land and that possession normally follows title, unless any person asserting title

to the contrary proves it strictly. Having gone into the evidence in the light of the legal position discussed earlier, I am not in a position to accept the conclusion of the Court below that the entire area of open space north and south of the letters K Q belonged to the Municipality by adverse possession.

19. The learned Counsel for the first respondent referred me to Ex.B.73. Ex.B.75 is a resolution dated 28th September, 1947 regarding the sanction being granted to the Telugu Chettiars' Sangam for using the area adjacent to the Mandapam. The contention of the learned Counsel for the first respondent was that if the property was already in the possession of the Telugu Chettiar's Sangam, one would not expect the Sangam making an application to the Municipality or its predecessor, the Panchayat, for making use of the area referred to in the said resolution. With reference to this resolution, evidence has been tendered by the Commissioner of the Municipality as D.W.5. He clearly admitted that there was no application given by the plaintiffs which was on his records. In the absence of any such application, it is not possible to accept the stand of the Municipality that the plaintiffs had acquiesced in the title of the Municipality with reference to the open space.

20. There is one other aspect which requires to be dealt with. In the written statement filed by the Municipality the defence was that the land had been assigned to the Municipality by the Government, which was the owner thereof, as Oorani Poromboke. The learned Counsel for the appellants contended that the enjoyment of the Municipality was sought to be traced to its own claim to the property by way of assignment and therefore possession could not have been adverse to the plaintiffs. It is only in this connection that the decision of the Privy Council in *Srimathi Bibhabati Devi v. Kumar Ramendra Narayan Roy and Ors.* (1946) 2 M.L.J. 442 was cited. The question of adverse possession is traceable to the intention of the person who asserts it. If the intention was not hostile to the plaintiffs and if it was based on one's own title, then the plea of adverse possession cannot be successfully urged by the first defendant in the present case. Thus, having regard to all the aspects, I consider that the Municipality has failed to prove its acquisition of title by adverse possession over the entire property in dispute.

21. In the result, the second appeal is allowed and the suit is decreed as prayed for. There will be no order as to costs.