

(1952) 08 MAD CK 0028
In the Madras High Court

Maddela Krishnayya

APPELLANT

Vs

Maddela Udayalakshamma and Others

RESPONDENT

Date of Decision : 08-08-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101

Citation : (1953) 2 MLJ 241

Hon'ble Judges : Subramania Ayyar, J

Bench : Single Bench

Judgement

1. The properties which are the subject-matter of this litigation belonged to one Gopalu, as his self-acquisitions. He had five sons and two daughters. One of the sons Ramiah died on 24th December, 1915, leaving behind his widow Seshammal. As a provision for her maintenance Gopalu settled on her one acre in Survey No. 585/B which was of the total extent of two acres and six cents. The deed of settlement Exhibit P-8 provides that she would enjoy this property during her lifetime without powers of alienation and that on her death it should revert to the family. The remaining one acre and six cents in Survey No. 585/B was settled by Gopalu on one of his sons Venkayya who is the second defendant in the suit. On 12th July, 1917, Seshammal leased the property which was settled on her under Exhibit P-8 to one Adappa for a period of nine years, as per Exhibit P-2. On the termination of this lease the second defendant became a lessee under Seshammal of the property comprised in Exhibit P-8 and was in possession as her tenant. Seshammal died on 13th September, 1928 and the property then devolved as per the terms pf Exhibit P-8 on the plaintiff, this second defendant: and their two brothers as co-owners. Venkayya who got into possession of the, property as a lessee under Seshanamal continued in possession without break even after her death on 13th September, 1928. In 1935 this property was transferred to the patta of the second defendant (vide Exhibit: D-2). On 4th June, 1945, Venkayya executed a deed of settlement transferring this property along with others to his daughter, the 1st defendant. On 14th May, 1946, the first defendant leased them to the seventh defendant

under Exhibit D-4. On 25th July, 1946, the plaintiff instituted the present suit for partition and delivery to him of his one-fourth share in the property; that is item 1 in the schedule of properties to the plaint.

2. Items 2 and 3 in the plaint are vacant sites which belonged to Gopalu. Under a will Exhibit P-4, dated 7th November, 1925, he bequeathed them to the plaintiff and to his two daughters who are defendants 5 and 6 in the suit. These properties were also included in Exhibit D-3 the settlement deed executed by the second defendant in favour of the first defendant. The plaintiff prayed that an injunction might be issued restraining defendants 1, 2 and 7 from interfering with the possession by the plaintiff and defendants 5 and 6 of items 2 and 3. Both the courts below have refused this prayer because they found that neither the plaintiff nor defendants 5 and 6 were in possession of the properties on the date of the suit. The appellant disputes the correctness of this finding on the ground that in O.S. No. 77 of 1938, on the file of the Sub-Court, Nellore, which was a suit for partition among the parties a final decree was passed on 21st September, 1939, Exhibit P-5 effecting a division of these properties. If the matters stood there, I should have had considerable difficulty in agreeing with the courts below, in view of the fact that the plaintiff and defendants 5 and 6 have a clear title to the properties under Exhibit P-4 and as they are vacant sites, possession must be presumed to follow title unless effective acts of possession are established by defendants 1, 2 and 7. But the decision of the courts below can be supported on another and simpler ground. Under Exhibit P-5 items 2 and 3 are not allotted to the plaintiff. That is conceded by Mr. K. Umamaheswaram on behalf of the appellant. That being so, there being no title in him, he is not entitled to any relief with reference to them. It is for defendants 5 and 6 to vindicate their rights in appropriate proceedings. On this ground the dismissal of the suit as regards items 2 and 3 must be sustained.

3. The questions that are raised with reference to item 1 are of a more substantial character. The contesting defendants pleaded that even if the plaintiff became entitled to a fourth share of item 1 on the death of Seshammal on 13th September, 1928, as per Exhibit P-8 he did not obtain possession of the land or enjoy it at any time thereafter that it was the second defendant that throughout continued to be in sole possession and enjoyment thereof and that consequently the title of the plaintiff is extinguished by the operation of the statute of limitations. It is on this issue that the courts below have differed. Both of them recognise that the question must be answered with special reference to the position of the plaintiff and second defendant as co-owners and that the plaintiff could not be held to have lost his title by adverse possession, unless an ouster for the statutory period is established. Nor is there any difference between them on the facts which they find to have been proved on the evidence. The plaintiff pleaded that the second defendant cultivated the lands under an arrangement that he should divide the produce among the co-sharers and Exhibit P-3 was put forward in support of this arrangement. Both the courts below have held that this document was not genuine, that the arrangement was not established and that

the plaintiff never participated in the income from the lands. They also found that patta was transferred for item i in the name of the second defendant in 1935 and that he set up an exclusive title under the settlement deed Exhibit D-3, dated 4th June, 1945. On those facts the learned District Munsif held that there was no evidence of ouster prior to 1935 and as the suit was filed within 12 years thereof, it was not barred by limitation. The Subordinate Judge on the other hand held that the assertion of an exclusive title involved in Exhibit D-2 was an "overt act" which showed that the enjoyment of the land by the second defendant "throughout since 1928 was exclusive and hostile to his co-sharers " and that the title of the plaintiff became accordingly extinguished. It is the correctness of this conclusion that is in question in the second appeal.

4. On behalf of the respondent it was strenuously contended that the question whether possession was adverse or not was one of fact and that the finding of the lower appellate court on that question was not liable to be disturbed in second appeal. This is too broad a statement of the position and is based on the assumption that the determination of a question of adverse possession involves only determination of questions of fact. That, however, is not correct. In (1891) L.R. 19 I.A. 48 (Privy Council) dealing with this very question the Privy Council observed that

The question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law, or a mixed question.

In that case the High Court had set aside the concurrent findings of the Courts below on a question of adverse possession between co-owners and it was held that as the question involved was the proper legal conclusions to be drawn from findings of fact, the High Court was at liberty to come to conclusions different from those of the Subordinate Judge on the point. In (1919) L.R. 46 I.A. 197 (Privy Council) the question for decision was whether on the documentary evidence adverse possession had been established. The Courts in India had concurrently held that it had not been. In reversing this conclusion the Privy Council observed:

It is with reluctance, that their Lordships differ from the concurrent opinions of the two courts; below on this point; but it is one in reality of legal inference from documents and not of finding of fact, and their Lordships are unable to draw the inferences made by the Subordinate Judge and followed by the High Court.

In *Balaram Guria v. Shyama Charan Mandal* 24 C.W.N. 1057 the point for determination was whether the title of the plaintiff to a share in the properties had been lost by adverse possession of the defendant who was a co-owner of the plaintiff. The lower appellate Court in reversal of the judgment of the District Munsiff had held that adverse possession had been established. In second appeal Mookerjee, C.J. and Fletcher, J., came to the conclusion that on the facts proved there was no ouster and that the plaintiff's title had not been extinguished. Then the respondent raised the objection that the finding of the Subordinate Judge

was one of fact and was binding in second appeal. Repelling this contention Mookerjee, C.J., observed as follows:

It has been contended on behalf of the respondents, as a last resort, that this is a matter with which we are not competent to deal in second appeal. It is plain, however, from the decision of the Judicial Committee in the case of (1891) L.R. 19 I.A. 48 (Privy Council) that the question of adverse possession which we have to determine is a mixed question of fact and law. In respect of the facts found by the lower appellate court, which is the final court competent to deal with facts, we are bound to accept them as conclusive. But when we are called upon to consider whether from the facts found an inference can fairly be drawn that the possession was adverse, it is a question of law which we are entitled to investigate. The facts found need not be questioned; it is the soundness of the conclusion from them that is in question, and this is a matter of law.

Jogendra Nath Mukherjee v. Rajendra Nath Bhattacharjee 26 C.W.N. 890 is another decision on the same point. Here again the respondent contended that the finding of the lower appellate Court on the question of adverse possession was binding on the High Court in second appeal as a finding of fact. In rejecting this contention the Court, observed:

On behalf of the respondent, it is contended that the question of adverse possession is a question of fact and that the finding of the lower appellate Court on the point cannot be considered by this Court in second appeal. The question of adverse possession, however, is a mixed question of fact and law. The facts found by the Judge must of course be accepted, but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law and can be considered by this Court.

To the same effect are the decisions in Dipnarain Rai v. Pundeo (1946) ILR 25 Pat. 412 and Nizamuddin and Others Vs. Mangal Sen and Another, . In Timiti Venkata Charlu and Another Vs. The Rajah of Vizianagaram and Another, it was held by King, J., that.

The question whether certain admitted facts constitute an open assertion of title is a question of law

and that it was open to consideration in second appeal. These authorities form only one illustration of a wider rule that when the point for determination is one of proper inference of law on the facts found, that itself is a question of law In 23 CWN 345 (Privy Council) discussing the powers of interference by the High Court in second appeal, the Privy Council observed as follows:

Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law.

The same question came up once again for consideration before the Privy Council in Dhanna Mai v. Meti Sagar (1927) 52 M.L.J. 663 : L.R. 54 IndAp 178 : ILR 8 Lah. 573 (P.C.). The High Court had reversed in second appeal the finding of the

District Court that there was permanent tenancy. Rejecting the contention that it was not competent to the High Court to reverse this finding of fact Lord Blanesburgh observed as follows:

Now their Lordships would be last to seek to abridge the effect of Sections 100 and 101 of the CPC or weaken the strict rule that on second appeal the appellate court is bound by the findings of fact of the court below. They are well aware, moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seem to them in a case like the present, to be a legal inference from facts and not itself a question of fact.

It is on this principle that acquiescence was held to be not a question of fact but one of legal inference from facts (vide 3 CWN 502 (Privy Council)) The question as to whether there was a division of status in a joint Hindu family has likewise been held to be a question of law open to consideration in second appeal; vide *Yella Papayya Vs. Yella Suryanarayana by Mother and Next Friend, Ammanna*, wherein *Yahya Ali, J.*, observed as follows:

It is well settled that when in the appraisal of facts and in the process of drawing an inference therefrom a legal principle has been or is to be applied, there is a question of law involved. As stated by the Privy Council as early as the decision in *Ramgopal v. Shamskhaton* (1892) L.R. 19 IndAp 328 : ILR 20 Cal. 93 (P.C.) the facts found need not be questioned but it is the soundness of the conclusions from them that is in question and that is a matter of law.

In *Murugappa Chettiar v. Chengalvaraya Chettiar* (1944) 2 M.L.J. 8 it was held that the question whether on the facts proved a legal inference of fraud could be made was one of law for the purpose of second appeal. The contention of the respondent that the finding of the lower appellate Court on a question of adverse possession is final and conclusive must, therefore, be overruled. Its findings on the factum of possession will of course be binding in second appeal. But it is for this Court to come to its own conclusion whether on the facts found the possession was adverse or not.

5. The plea of adverse possession must now be considered on the merits. The Courts below have found that the second defendant was in exclusive possession and enjoyment of the land from 13th September, 1928, and that the plaintiff did not at any time participate in the profits therefrom. These are findings of fact which have to be accepted and if the question had arisen between strangers, they would have sufficed to support a finding of adverse possession. But, where, as here, the parties stand in the relation of co-owners, different considerations arise. In law, the possession of one co-owner is the possession of all the co-owners. To constitute adverse possession, therefore, there must be something more than mere exclusive perception of profits. There must be an ouster. That is to say, there must be a denial of the rights of the co-owners over the property

and that denial must be made to their knowledge. In *Jttappan v. Manavikrama* (1897) 8M.L.J. 92 : ILR Mad. 153 Shephard, J., observed as follows:

There being no article especially applicable to the case of tenants-in-common, Article 144, which is appropriate to the case of a possession which was in the beginning lawful but has become adverse, must be applied. Now, as between tenants-in-common, mere non-participation of the profits by the one tenant and exclusive occupation by the other is not sufficient to entitle the former to a decree for joint possession or consequently to make a case of adverse possession (1890) L.R. 17 I.A. 110 (Privy Council) . The party claiming to hold adversely must at least go on to prove that it was in denial of the other's title that he excluded him from enjoyment of the property. According to the English cases, there must be something amounting to ouster of the person against whom adverse possession is claimed (*Ctilley v. Doe detn Tayierson* (1840) 11 A & E. 1008 : 13 E.R. 697).

Subramania Ayyar, J., stated:

Consequently, sole occupation by one tenant-in-common is prima facie not inconsistent with the right of any other tenant-in-common. And in such cases there is no ouster or adverse possession until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances.

The latest decision on the subject is the one reported in *Lakshminarasamma v. Rama Brahmam* (1950) 1 M.L.J. 350. Discussing the question of adverse possession among co-owners this Court observed as follows:

If then the first defendant and the plaintiff were in law co-owners, the question is whether there is evidence of ouster or exclusion. As laid down in the leading case of *Corea v. Appuhamy* (1912) A.C. 230 the possession of the 1st defendant was in law the possession of his co-owner the plaintiff. Possession is never considered adverse if it can be referred to a lawful title. Mere non-participation in the profits of the property by one co-owner and exclusive possession by the other will not be sufficient to constitute adverse possession by the latter. To constitute ouster by a co-owner there must be open and unequivocal denial of the title of the other coparcener to the knowledge of the latter. Uninterrupted sole occupation of common property without more must be referred to the lawful title possessed by the joint holder to use the joint estate and cannot be regarded as an assertion of right to hold it as separate.

6. The question then is whether the defendants have proved any facts from which an ouster can be inferred. In Ex. D. 3 the settlement deed executed by the second defendant in favour of the first defendant, he does set up an exclusive title in himself. But that was on 4th June, 1945, and the suit was instituted on 25th July, 1946. Ex. D. 2 is the extract from the settlement register for the year 1935. That shows that survey No. 585/B which stood registered in the name of Bulla Venkatasubba Reddi was transferred to Patra, No. 529 which, as appears

from the evidence of P.W. 4, is the patta of the second defendant. Bulla Venkatasubba Reddi was the person from whom Gopalu purchased this property and the patta, therefore, had not been transferred in the name of Gopalu and there is no evidence that notice of the transfer of patta to the name of the second defendant was ever issued to the plaintiff or to the heirs of Gopalu. In view of the fact that the second defendant was also exclusively entitled to one acre and six cents in Survey No. 585/B it is difficult to hold that the transfer of patta in his name is an unequivocal assertion of a hostile title. Certainly there are no materials for holding that the plaintiff had knowledge of this. In this view, it must be held that there was no ouster prior to the date of Ex. D. 3.

7. But even if Ex. D. 2 is to be regarded as amounting to an open denial of the title of the plaintiff made to his knowledge, as the Courts below were apparently inclined to think, even then there was no ouster for the statutory period as the suit was instituted within twelve years thereof. It is on this ground that the learned District Munsiff overruled the plea of limitation. But the Subordinate Judge was prepared to treat the assertion of 1935 as an overt act of a hostile intention which must have existed from 13th September, 1928, and in that view he held that there was ouster for the statutory period. But this view is clearly erroneous. If the law is and that is not and cannot be disputed--that there is ouster only when the assertion of a hostile title is made to the knowledge of the co-owner, then any secret and unpublished hostile intention of the co-tenant in possession cannot amount to ouster and cannot avail to start limitation against his co-tenants. As observed by Lord Macnaghten in *Corea v. Appuhamy* L.R. (1912) A.C. 230:

His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result.

In accordance with this principle, it has been held that when a hostile assertion is made such as will amount to ouster, the full statutory period must be reckoned from the date of such assertion. In *Ayenessa Bibi v. Sheikh Isuf* 16 C.W.N. 849 Jenkins, G.J., and Ghattejee, J., stated the law in these terms:

The law on the subject I take to be well settled. In order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that exclusion or ouster must be for the statutory period... I do not read the judgment of the Subordinate Judge as satisfying both these conditions, that is to say, first of all, that there has been an exclusion, and secondly, that subsequently to that exclusion there has been an adverse possession for the statutory period of twelve years and upwards.

In *Mubarak-un-nissa Bibi v. Muhammad Raza Khan* I.L.R.(1924) All. 377 where the question of adverse possession among Mohammedan co-heirs was in issue the Court observed:

The defendants Nos. 1, 2, and 3, cannot therefore, be regarded as trespassers;

and on the principle laid down in *Corea v. Appuhamy* L.R. (1912) A.C. 230 no claim to adverse title can be set up by these defendants because among co-sharers the possession of one co-sharer cannot become adverse to another except where the co-sharer in possession has explicitly denied and repudiated the title of the others and has been in possession since then for more than 12 years.

There is, therefore, neither principle nor authority for the view taken by the lower Court that even though there was no open assertion of a hostile title prior to the date of Ex. D. 2, that document could be relied on as proof of ouster from 1928.

8. It was next contended that it was open to the Subordinate Judge to presume ouster from the continued non-participation of the plaintiff in the profits from the land and he having chosen to do so, there was no error of law involved in his decision. Under what circumstances such a presumption can be made was laid down by Lord Denman, C.J., in a well-known passage in *Culley v. Doe* (1840) 11 A. & E. 1008 : 113 E.R. 697. He observed:

But, where the claimant, tenant-in-common has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the judge will direct the jury to take into consideration whether they will presume that there has been an ouster.

It will be seen that before this presumption could be made, the co-tenant must have been in possession for a considerable length of time and other circumstances also must concur. Thus *Doe v. Prosser* (1774) 1 Cowp. 217 : 98 E.R. 1052 where this presumption was held permissible the exclusive enjoyment was for a period of 36 years. In *Gangadhar v. Parashram* I.L.R.(1905) 29 Bom. 300 the period of exclusion was from 1857 to 1901 and in *Bapatla Venkata Row Vs. Bapatla Venkoba Row and Others*, it was from 1867 to 1922. In all these cases, it may be noted, the action for possession was instituted not by the original co-owners, but, long after their life-time, by their representatives. Thus in *Doe v. Prosser* (1774) 1 Cowp. 217 : 98 E.R. 1052 Mary Taylor the original co-tenant did not herself institute any action. Long after her death it was a lessee from her representatives that sued in ejectment. In *Gangadhar v. Parashram* I.L.R.(1905) 29 Bom. 300 the claimants were the sons of the original co-tenants while on the other side, three generations had been in successive management of the properties without any claim or demand. In *Bapatla Venkata Row Vs. Bapatla Venkoba Row and Others*, the litigation was among representatives of the third generation on either side. In *Parma Pande v. Ram Sarup Pande* (1920) Ind.Cas.731 which was the case most strongly relied on for the respondents, the suit was among representatives of the original co-owners. These cases do not mark any departure from the well-settled principle that to establish adverse possession against co-owners there must be a denial of their title to their knowledge and that it is not sufficient merely to prove non-participation by them in profits. When possession dates back to a time beyond living memory and it

becomes impossible to prove by direct evidence that the original co-owners had knowledge of the denial of their title and the attendant circumstances are in accord therewith a presumption of ouster can be made. In *Doe v. Prosser* (1774) 1 Cowp. 217 : 98 E.R. 1052 Ashhurst, J., put the matter thus :

After so long an acquiescence I think the jury were well warranted to presume anything in support of the defendant's title, and they might presume, either an actual ouster or a conveyance.

The presumption is thus analogous to one of a lost grant and is not to be applied when the transactions are recent and the primary parties are alive. No case has been cited where the presumption has been.,drawn when the action was between the original co-owners and when period of non-participation was only 18 years. In *Chandbhai Mahamadbhai Vora v. Hasanbhai Rahimtoola Vora* I.L.R.(1921) 46 Bom. 213 where the non-participation was for a period longer than in the present case the Court refused to draw this presumption and distinguished the case in *Gangadhar v. Parashram* I.L.R.(1905) 29 Bom. 300 on the ground that the exclusion there was for a period of 50 years.

9. On a consideration of all the circumstances established in this case I have; come to the conclusion that the defendants have failed to establish ouster for the statutory period and that the plaintiff is entitled to a decree for partition and delivery of one-fourth share in item 1. The claim as regards items 2 and 3 will stand dismissed. The appeal will be allowed to this extent and the decree of the learned District Munsiff restored.

10. The parties will give and take proportionate costs throughout. No leave.