

(2002) 07 MAD CK 0073
In the Madras High Court
Case No : S.A. No. 1598 of 1988

Marappa Gounder (deceased), Kaliasammal, M. Ramalingam
and Gomathi

APPELLANT

Vs

Ramalingam (deceased), Nataraja Gounder, R. Mothilal, R.
Sathyamoorthy, R. Thangavel, R. Gandhimathi and
Velammal

RESPONDENT

Date of Decision : 15-07-2002

Acts Referred:

Limitation Act, 1963 — Article 65

Citation : (2002) 4 LW 300

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : M.M. Sundaresh, for the Appellant; P. Seshadri, for RR3 to 7, for the Respondent

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—Marappa Gounder, the plaintiff is the appellant herein. Ramalingam and Nataraja Gounder, the defendants are

the respondents herein.

2.The plaintiff filed the suit for partition and separate possession of his half share in the suit property, contending that the same was purchased from

the brothers of the defendants. The suit was decreed by the trial Court. However, the lower appellate Court, in the appeal filed by the defendants,

set aside the judgment and decree of the trial Court and the suit was dismissed, upholding the contention of the defendants that they are in adverse

possession. Challenging the same, the plaintiff has filed the second appeal before this Court.

3.The case of the plaintiff is as follows:-

The suit property is an extent of 3.06 acres in S.No.490-C, situated in Kolanalli Village. The suit property originally belonged to two brothers, by

name, Seeranga Gounder and Muthusamy Gounder. Sellakumaraswamy Gounder is the son of Seeranga Gounder. Ramalingam and Nataraja

Gounder, the defendants, are the sons of Muthusamy Gounder. After the death of Seeranga Gounder and Muthusamy Gounder,

Sellakumaraswamy Gounder and the defendants partitioned the property through a registered partition deed/Ex.A-2, dated 4-6-1952. As per this

deed, half share in S.No.490-C was allotted to Sellakumaraswamy Gounder and the other half share was allotted to the defendants--Ramalingam

and Nataraja Gounder. Even after the partition, the property was enjoyed in common. On 27-7-1974, Marappa Gounder, the plaintiff purchased

half share under Ex.A-1 from Sellakumaraswamy Gounder. Even after the purchase, the suit property was enjoyed by the plaintiff along with the

defendants 1 and 2 in common. Since the plaintiff felt that it was no longer possible for him to enjoy the property in common, he demanded

partition through notice and since there was no response, the plaintiff filed the suit for partition of the half share and separate possession.

4.The case of the defendants is as follows:-

The plaintiff's claim that he had purchased the common half share in the suit property from Sellakumaraswamy Gounder by the sale deed dated

27-7-1974, is incorrect. The property comprised in S.No.490-C was in enjoyment of two other persons, by name, Ramasami Gounder and

Periasamy Gounder. Originally, the defendants were in possession of S.No.490-B belonging to the above said persons. By oral sale, the

defendants purchased half share in S.No.490-B, but actually possession was given only in S.No.490-C. In 1957, there was an exchange between

the defendants 1 and 2 on the one hand and Sellakumaraswamy Gounder, the vendor of the plaintiff, on the other, by which, the vendor of the

plaintiff obtained half share in S.No.490-B from the defendants 1 and 2 and in lieu thereof, he gave his half share in S.No.490-C, and thereby,

from the year 1957, the defendants had become entitled to the entire extent of S.No.490-C. From then onwards, the defendants have been in

exclusive possession and enjoyment of the suit property. At any rate, the defendants have perfected title by adverse possession and ouster. In the

year 1974, the plaintiff's vendor had no subsisting right over the suit property and therefore, no title could be passed on to the plaintiff through the sale deed. Earlier, a suit has been filed by the plaintiff against the defendants and the vendor/Sellakumaraswamy Gounder. The plaintiff's vendor had recognised absolute right on the defendants, and therefore, the plaintiff's vendor and the plaintiff are estopped from putting forth any claim or right in the suit property. The suit is liable to be dismissed.

5. On the basis of the above pleadings, necessary issues were framed by the trial Court. During the course of trial, the plaintiff examined himself as

P.W.1 and through him, Exs.A-1 to A-26 were marked. The first defendant examined himself as D.W.1 and through him, Exs.B-1 to B-30 were

marked. The trial Court, on an appraisal of the materials available on record, decreed the suit filed by the plaintiff as prayed for. As noted above,

the lower appellate Court allowed the appeal and dismissed the suit.

6. At the time of admission of the second appeal, the following substantial questions of law have been framed by this Court:-

(a) Whether the lower appellate Court is right in holding that the appellant's vendor Sellakumarasamy Gounder lost his title to suit property by adverse possession?

(b) Whether the lower appellate Court is right in law in holding that the plaintiff's vendor is estopped by his conduct and declaration from

contending that the suit property in S.No.409-C-2 belongs to him in view of the judgement in O.S. No.318 of 1970?

(c) Whether the lower appellate Court has erred in holding that the first defendant has proved his exclusive possession from 1952 to 1974 to

acquire absolute title to the suit property when the plaintiff's vendor's possession and title are admitted by him in his written statement?

(d) Whether the lower appellate Court has erred in law in giving a finding as to acquisition of title by adverse possession and ouster when the plea

of oral exchange cannot be legally put forward in view of the judgement in O.S. No.318 of 1970?

7. Pending second appeal, the first appellant/plaintiff and the first respondent/first defendant died and their legal representatives were brought on

record as the appellants 2 to 4 and the respondents 3 to 7 respectively.

8. While explaining the above substantial questions of law, learned counsel for

the appellants would submit that the lower appellate Court, having held that the decision in O.S. No.318 of 1970 will operate as res-judicata against the defendants, ought not to have dismissed the suit by disturbing the well-reasoned judgement rendered by the trial Court. He would further submit that when there are no materials to establish the plea of the defendants with regard to adverse possession and ouster, the lower appellate Court cannot accept the case of the defendants with regard to the same and hold that the defendants have perfected their title by way of adverse possession and ouster. He would cite number of authorities to substantiate the above contentions.

9. Arguing contra, learned counsel for the respondents, in justification of the findings of the lower appellate Court, would contend that the plaintiff who claims title, is estopped from claiming title to the suit property in view of Ex.B-21/written statement filed by the plaintiff's vendor in the earlier suit in O.S. No.318 of 1970 and that the documents produced by the defendants, namely, Exs.B-3 to B-19, such as adangal, chitta, etc., would prove that the defendants alone were in possession of the suit property, and there is no document produced by the plaintiff that the plaintiff's vendor was in possession of the suit property from the date of partition till the date of sale deed, and as such, the defendants have perfected title by adverse possession and ouster. He would also cite number of authorities in support of his submissions.

10. I have carefully considered the submissions made by learned counsel appearing on either side and gone through the records and the judgments rendered by both the Courts below.

11. The suit property in S.No.490-C originally belonged to joint family of Sellakumaraswamy Gounder's father, Seeranga Gounder and the defendants' father, Muthusamy Gounder. Ex.A-2 would show that the suit property has been partitioned on 4-6-1952 and half share was allotted to Sellakumaraswamy Gounder, the plaintiff's vendor and the other half share was allotted to the defendants. According to the plaintiff, this half share allotted to the said Sellakumaraswamy Gounder was purchased by the plaintiff under Ex.A-1, on 27-7-1974. It is the specific case of the plaintiff that even after the partition, the property was enjoyed in common by the plaintiff's vendor and the defendants. Even subsequent to the sale

deed dated 27-7-1974, the property was enjoyed in common both by the plaintiff and the defendants.

12. According to the defendants, the plaintiff's vendor has no right to sell the half share in S.No.490-C and that in the year 1957, the plaintiff's

vendor on the one hand and the defendants on the other hand, made an oral exchange of the property, thereby, the plaintiff's vendor gave his half

share in S.No.490-C to the defendants and the defendants in turn gave their half share in S.No.490-B to the plaintiff's vendor. It is the further case

of the defendants that the plaintiff's vendor, as a third defendant in O.S. No.318 of 1970, filed a written statement in support of the said stand

taken by the defendants and as such, the plaintiff or the plaintiff's vendor is estopped from claiming any right over the title of the property. This

contention has been rightly considered by both the trial Court as well as the lower appellate Court by applying the principle of res-judicata.

13. In the said suit in O.S. No.318 of 1970, a decree was passed against the defendants by granting the prayer sought for by the plaintiff and the

same was confirmed by the appellate Court as well. Under those circumstances, the finding with regard to the stand taken by the defendants that

half share in S.No.490-C was handed over by the plaintiff's vendor to the defendants in exchange of S.No.490-B, has become final, as there is no

appeal against the said finding. But the fact remains that the lower appellate Court, having held that such a stand taken by the defendants with

regard to the exchange of properties, cannot be countenanced, would dismiss the suit holding that the defendants 1 and 2 acquired title by adverse

possession and ouster, merely, on the basis of the documents filed by the defendants showing the possession of the suit property by the

defendants.

14. In this case, it is noticed that both the parties have produced documents to show their possession of the suit property. The plaintiff filed kist

receipts/Exs.A-8 to A-14 relating to the period subsequent to the purchase of the suit property. The defendants filed Exs.B-3 to B-19 and some

of the documents would relate to the year 1956. On this basis, the lower appellate court would hold that the defendants have perfected title by

adverse possession. This finding, in my view, is wrong in view of the settled position of law as laid down in various decisions.

15. The following are the decisions relied on by learned counsel for the appellants:-

Dr. J.N. Banavalikar Vs. Municipal Corporation of Delhi and another, ;

(b) Karunai Ammal Vs. Karuppa Gounder and Another, ;

(c) Ramachandra Naidu (died) and Others Vs. Seshachala Naidu and Others, ;

(d) S.SUBBA REDDIAR AND OTHERS VS. BHAGYALAKSHMI AMMAL AND ANOTHER (1996) 2 L.W. 31 ;

(e) VEEPATHUMMAL.N. & OTHERS VS. V.SHERIF BEEVI & OTHERS

(1996) 2 L.W. 522);

(f) ROOHNISHA BEEVI AND 15 OTHERS VS. A.M.M.MAHUDU MOHAMED AND 29 OTHERS

(1998) 1 L.W. 244 ;

(g) Lakshmiammal and another Vs. C.P. Nanjappan and 2 others, ;

(h) Kannappan Vs. Pargunan and 9 others, ;

(i) PAZHAMARUTHAI @ MARUDAMATHU VS. M.SUBRAMANIAM

(2001) 3 C.T.C. 142 ;

(j) SABARIARADIMAI VS. MARIA RETNAM

(2002) 1 C.T.C. 665 and

(k) R.KARITHIMMA NAIDU VS. R.VENKATRAMA GOUNDER AND OTHERS

(2002) 2 L.W. 647.

16. The following are the principles laid down in the above said decisions of this Court as well as the Supreme Court and the discussion in relation

to the applicability of the said decisions in this case:-

(i) It is well settled that a party can plead adverse possession only when he admits that another person has got title. In this case, admittedly, the title

of the plaintiff or the plaintiff's vendor has not been admitted. It is the case of the defendants that there was an oral exchange in 1957, in pursuance

of which, they were in exclusive possession of the suit property. As indicated earlier, this oral exchange was not accepted by the civil Court in the

earlier suit. In this case, no material has been placed by the defendants to prove that the defendants, in pursuance of the oral exchange, have been

in exclusive possession of the suit property. In the absence of the said material with reference to the oral exchange, it can be stated that the suit

property was in common possession and enjoyment by the plaintiff's vendor as well as the defendants. As such, the plaintiff's vendor can be the co-owner.

(ii) In the case of a co-owner, mere possession however long it might be, would not constitute adverse possession. The possession must be over

the statutory period and there must be clear ouster to the knowledge of the co-owner against whom the adverse possession is pleaded. When a

co-owner is in possession of the property, the law presumed that he is representing for the other co-owners and the possession of one is

considered to be the possession of all. Where one co-owner pleads adverse possession against another, then, it is not enough to show that one out

of them is in sole possession. It is the well settled rule of law as between the co-owners that there must be open assertion of hostile title coupled

with exclusive possession and enjoyment by one of them to the knowledge of the other so as to construe ouster in order to make out a case of

ouster against the other co-owner. In this case, it is necessary for the defendants to plead that they had asserted a hostile title coupled with

exclusive possession and enjoyment of the property to the knowledge of the plaintiff or the plaintiff's vendor. In this case, neither in the written

statement nor in reply to the notice of the plaintiff, any stand was taken that the right of the plaintiff's vendor was denied through ouster or adverse

possession. No evidence has been let in by the defendants to show that such a right to the plaintiff's vendor was openly denied by the defendants,

which would be considered as an ouster.

(iii) It is settled principle that as between the co-owners, there must be evidence of open assertion of hostile title coupled with exclusive possession

and enjoyment of one of them to the knowledge of the other, so as to constitute ouster. The burden of making out ouster is on the person claiming

to displace the lawful title of the co-owner by his adverse possession. Admittedly, this burden has not been discharged in this case, as the essential

element is conspicuously absent.

(iv) As laid down by this Court as well as the Supreme Court that the person pleading adverse possession has no equity in his favour. Since he is

trying to defeat the rights of the true owner, it is for him to clearly plead and establish all the facts to establish his adverse possession. The party

pleading adverse possession must state with sufficient clarity as to from when his adverse possession commences and the nature of his possession.

Adverse possession means a hostile assertion, i.e., the possession which is expressly or impliedly in denial of title to the true owner. In other

words, the person who bases his title by adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the

real owner and amounted to the denial of his property to the claim.

(v)When the co-owners are close relations, something more is to be proved to prescribe title by adverse possession, than a case between two

strangers. Animus to hold the property against the relations must be brought to their notice.

(vi)The law also recognises acquisition of property only through lawful means. But exception is given where there is acquisition of title by

prescription. Being an exception, it is for the person claiming it to prove to the satisfaction of the Court that there was hostile title and the person

remained silent even after knowing hostility. The plea about the hostility or animus is absolutely necessary. What was the adverse character and

when it started are only within the personal knowledge of the person claiming it. He alone can plead his possession from a particular date and claim

that it was adverse. Article 65 of the Limitation Act provides for recovery of possession on the basis of title, 12 years from the date on which the

adverse possession began. So, a definite date is required to claim adverse possession.

(vii)There should a pleading of ouster and it would not be sufficient to show that one co-owner was in separate possession of the property and

another co-owner was out of possession.

(viii)The possession should be open with the assertion of hostile title and to the knowledge of the co-owner.

(ix)The adverse possession will commence only from the date of ouster.

(x)Single circumstance of payment of taxes or mutation of records, would not by itself, establish ouster or adverse possession as against the co-

owner.

(xi)The cumulative effect of the circumstances has to be properly weighed.

17.It is vehemently contended by learned counsel for the respondents on the strength of a decision of the Supreme Court reported in Bishwanath

Prasad and Others Vs. Dwarka Prasad and Others, that by virtue of Ex.B-21, the written statement filed by the plaintiff's vendor in the earlier suit,

the plaintiff is estopped from claiming title to the suit property. This document, in my view, would not be sufficient to hold that the plaintiff would

not be entitled to the decree, particularly, when in Ex.A-1, the plaintiff's vendor sold not only the share in S.No.490-C, but also the portion of

S.No.490-B, which is the subject matter of the earlier suit in O.S. No.318 of 1970 and in the said document, there is a reference about the said

suit, and thereby, there is a statement between the plaintiff and the plaintiff's vendor with reference to the claim in the said suit.

18. In view of what is stated above, the reasonings given by the trial Court for passing a decree in the present suit in favour of the plaintiff, are

perfectly justified.

19. Furthermore, it is relevant to notice that the first defendant himself as D.W.1 would admit that he knew about the execution of Ex.A-1, the sale

deed by Sellakumaraswamy Gounder in favour of the plaintiff with reference to the half share of the suit property, within ten days after the

execution of the same in the year 1974. Even then, the first defendant did not take any step to get the said sale deed cancelled, nor, informed the

plaintiff or the plaintiff's vendor that the defendants have been in enjoyment of the property exclusively to the knowledge of the plaintiff with

animus.

20. Moreover, the second defendant remained ex-parte in the suit. The judgement and decree of the trial Court was challenged in the appellate

Court only by the first defendant.

21. Under those circumstances, the finding of the lower appellate Court that the defendants have perfected title by adverse possession and ouster,

is clearly wrong, as the same was rendered without applying with principles laid down by this Court as well as the Supreme Court and as such, the

same is liable to be set aside. Accordingly, the judgement and decree of the lower appellate Court are set aside and the judgement and decree of

the trial Court are restored. The second appeal is allowed. No costs.