
(2009) 03 AP CK 0004

In the Andhra Pradesh High Court

Case No : A.S. No's. 938 and 1188 of 1990

Nallamilli Satyanarayana Reddy and Others

APPELLANT

Vs

Nallamilli China Venkata Reddy

RESPONDENT

Date of Decision : 20-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Evidence Act, 1872 — Section 114
Limitation Act, 1963 — Article 65
Transfer of Property Act, 1882 — Section 53A

Citation : (2009) 5 ALT 341

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : Vedula Venkata Ramana, in A.S. No. 938 of 1990 and M.V. Suresh, in A.S. No. 1188 of 1990, for the Appellant; M.V. Suresh in A.S. No. 938 of 1990 and Vedula Venkata Ramana in A.S. No. 1188 of 1990, for the Respondent

Judgement

V.V.S. Rao, J.—These two appeals are against Judgment and decree, dated 29.12.1989 in O.S. No. 207 of 1980 passed by the Court of Subordinate Judge, Rajahmundry. A.S. No. 938 of 1990 is filed by defendants (hereafter called, defendants' appeal) and A.S. No. 1188 of 1990 is filed by sole plaintiff (hereafter called, plaintiff's appeal). Both the appeals are being disposed of by this common Judgment, wherein the parties are referred to by their status in the suit.

2. Nallamilli Veerreddy, resident of Gollalamamidada owned considerable extents of landed property including the land admeasuring Acs.6.79 cents in survey No. 127/3 situated at Uppalapudi village, near Rajahmundry (hereafter called, suit schedule property). Through his first wife Rajamma, he had two sons, namely, Peda Venkatareddy and China Venkatareddy (plaintiff). The former was given in adoption to Sabella Gangireddy, who is co-brother of Veerreddy. After death of his wife Rajamma in 1940, Veerreddy married Lakshmi Devi, third defendant. Out of their wedlock, defendants 1 and 2, and four daughters were born. On 08.05.1949, Veerreddy executed a registered settlement deed, under which

plaintiff was given suit schedule property. As he was minor, Sabbella Bulliamma, w/o Gangireddy, who is co-brother of Veerreddy, acted as guardian. Each sharer under settlement deed was put in possession of their respective shares. Sabbella Gangireddy managed the property upto 1951. Thereafter, Pulagam Gangireddy, son-in-law of Bulliamma managed plaintiff's property till 1972. As he was shifted to Mysore, plaintiff's father Veerreddy was entrusted with the management of property of plaintiff. After death of Veerreddy in 1979, defendants allegedly trespassed into suit schedule property, cut away six mango trees, eight cashew trees, nine teakwood trees and one hundred and fifty Palmyrah trees worth Rs. 5,500/-. Plaintiff, therefore, issued notice dated 30.04.1979 to which defendants got issued a reply, dated 03.05.1979, denying plaintiff's version. Therefore, plaintiff filed suit for declaration of possession, for recovery of Rs. 5,500/- being the value of trees cut by defendants. The plaintiff also prayed for mesne profits by amending plaint vide orders, dated 08.02.1982 in I.A. No. 1439 of 1981.

3. Initially, defendants 1 and 2 were arrayed in suit. They filed written statements. They admitted about settlement/partition deed, dated 08.05.1949 executed by Veerreddy. They, however, denied possession of land by Sabbella Gangireddy, and thereafter Pulagam Gangireddy. They alleged that their father alone was in possession of land till his death and thereafter their mother came into possession. They also allege that their mother Lakshmi Devi purchased suit schedule property from plaintiff in 1968 for valuable consideration and that she alone was in possession and enjoyment of suit schedule property. They also contended that they perfected title by adverse possession. According to them, plaintiff received sale consideration in full, who refused to execute sale deed.

4. The third defendant - mother of defendants 1 and 2 was impleaded by order of trial Court, dated 23.06.1988 in I.A. No. 1296 of 1987. She did not file any written statement. The plaintiff, however, filed rejoinder denying allegations and averments in written statements of defendants 1 and 2. He denied executing agreement of sale in favour of third defendant.

5. In view of the rival pleadings, learned trial Judge framed as many as six issues. Thereafter, first defendant alone filed additional written statement alleging that third defendant is entitled to protect her possession u/s 53-A of the Transfer of Property Act, 1882 (TP Act, for brevity). First defendant filed another additional written statement alleging that plaintiff is estopped from questioning the agreement of sale in favour of third respondent (sic. defendant) long after such plea was taken by defendants 1 and 2. Therefore, trial Court framed two additional issues. These are - as presently seen, the two core issues before the trial Court as well as urged before this Court are with regard to the validity of alleged agreement of sale executed by plaintiff in favour of third respondent (sic. defendant). This includes the question of adverse possession pleaded by defendants 1 and 2. The second question is with regard to mesne profits.

6. During trial, plaintiff gives evidence as P.W.1 and examined P.Ws.2 and 3 while marking Exs.A-1 to A-16. The first defendant gave evidence as D.W.1 besides

examining D.Ws.2 to 6. Exs.B-1 to B.10 were also marked for defendants. On considering oral and documentary evidence, trial Court held that defendants failed to establish the truth of agreement of sale, Ex.B-1, as well as possession over suit schedule property. The trial Court, however, denied decree for mesne profits observing that plaintiff has not placed any evidence to show the profits over suit schedule property. In view of this, plaintiff's appeal is limited to the claim for mesne profits alone.

7. In defendants' appeal, learned Counsel submits that defendants 1 and 2 have concern with suit schedule land and are only cultivating on behalf of third defendant. Ex.B-1, agreement of sale, dated 25.01.1968 was proved and learned trial Judge was in error in appreciating evidence let in to prove agreement of sale. Alternatively, he submits defendants had been in possession of suit schedule land even prior to Ex.B-1, and when plaintiff does not choose to admit the agreement, the plea of adverse possession would arise and defendants must succeed on the plea. According to learned Counsel, plaintiff was not in possession for more than twelve years prior to filing of suit, and therefore, inference has to be drawn against him, when entry of defendants 1 and 2 in suit schedule land is not disturbed and when no relief of possession was claimed against third defendant. Learned Counsel would place reliance on *Ambika Prasad v. Ram Ekbal Rai* AIR 1966 SC 605, *B.L. Sreedhar and Others Vs. K.M. Munireddy (Dead) and Others*, and *Karnataka Board of Wakf Vs. Government of India and Others*, .

8. In plaintiff's appeal for mesne profits, learned Counsel made the following submissions. The suit was filed on 22.07.1980 and it is within time as father of plaintiff and defendants 1 and 2 died on 22.02.1979 and they trespassed the land only thereafter. When defendants take a plea of coming into possession pursuant to agreement of sale, Ex.B-1 and also claim part performance u/s 53-A of Transfer of Property Act, they cannot be permitted to raise the plea of adverse possession. He submits that adequate evidence was let in to show that after death of Sabbella Gangireddy, Pulagam Gangireddy managed the property on behalf of plaintiff till the former left to Mysore in 1972, and thereafter father of plaintiff managed property on behalf of plaintiff till his death. Defendants 1 and 2 trespassed into suit schedule land and immediately thereafter notice Ex.A-2 was issued on 30.04.1979 to which reply was sent by defendant on 03.05.1979. Therefore, all through after Ex.A-1, settlement/partition deed, as he was minor, property was managed either by Gangireddy or Veerreddy on behalf of plaintiff and it would be incorrect to say that defendants were in possession of property prior to Ex.B-1, agreement of sale. Non-filing of suit for specific performance would improbably the case of defendants, especially, when Veerreddy was alive for ten years after alleged agreement of sale. In support of plaintiff's appeal, he submits that in addition to claim of Rs. 5,500/- being the value of trees cut, by amending plaint, relief of mesne profits was prayed and therefore, it was incumbent on the part of trial Court to order enquiry into the same as per Order XX Rule 12 of the Code of Civil Procedure, 1908. He relies on Full Bench Judgment of Madras High Court in *Basavayya v. Guravayya* AIR 1958 Mad 938

and Sri Venkateswara Oil Company Vs. Guduru Jalaja Reddy and Others, . In the background of the case, and having regard to rival submissions, two points that would arise for consideration are: (i) Whether the suit is barred by limitation and defendants perfected title by adverse possession; and (ii) Whether plaintiff is entitled for mesne profits.

9. At the outset, this Court observed that in the appeal filed by defendants, there is no serious challenge to the finding of lower Court on Ex.B-1, dated 25.01.1968, which is allegedly agreement of sale executed by plaintiff in favour of third defendant. The observations and findings of trial Court in this regard may, however, be noticed as they have some bearing on the point under consideration. The lower Court held that though Ex.B-1 is in two pages, signature of the plaintiff was obtained only on second page, that there is a difference between the signature of plaintiff on deposition as P.W.1 and on Ex.B-1, agreement, that admitted signature of plaintiff do not tally with the signature on Ex.B-1, and that defendants failed to explain as to why third defendant paid only Rs. 2,000/- on the date of executing Ex.B-1 when she had Rs. 9,500/- which she got by sale of some other property under Ex.B-8. The learned Judge also disbelieved that third defendant was in possession of the property prior to Ex.B-1 and that defendants trespassed into the land after death of Veerreddy. In paragraph 13 of their written statement, defendants admitted that ever since the date of Ex.B-1, third defendant has been in uninterrupted possession and enjoyment of property in her own right. Probably for this reason, learned trial Judge opined that third defendant came into possession of property only pursuant to Ex.B-1. Be it noted that by inadvertence, learned trial Judge in paragraph 25 of the Judgment, observed that third defendant was put in possession pursuant to Ex.B-1, which is obviously a mistake. Be that as it is, as admitted by defendants 1 and 2 in their written statement, third defendant came into possession of suit schedule property only pursuant to Ex.B-1, dated 25.01.1968. This is an important admission, which remained unexplained and it is the starting point for considering the question of limitation.

10. Article 65 of Schedule to the Limitation Act, 1963, prescribes a period of twelve years for filing a suit for possession and the time begins to run when the possession of defendant becomes adverse to plaintiff. The plaintiff, there cannot be any doubt, filed suit based on his title derived from Ex.A-1, partition/settlement deed executed by Veerreddy on 08.05.1949, when the plaintiff was a minor. For the reason that the interest of Veerreddy is adverse to that of plaintiff, Sabbella Bulliamma, wife of Gangireddy, acted as guardian at the time of partition and it was she who was in possession of property that fell to the share of plaintiff. Her husband Gangireddy, a co-brother of Veerreddy, but in all probability, was cultivating the land, died in 1951. Thereafter his agnate, Pulagam Gangireddy, who is also a close relative of Bulliamma was managing the property of plaintiff. It appears he left for Mysore in 1972. Plaintiff's father Veerreddy himself took possession of the property and was cultivating the land till his death in 1979. Whether it is Bulliamma, her husband Gangireddy or her

agnate Pulagam Gangireddy or Veerreddy, who were cultivating and managing the property, it is only on behalf of plaintiff, who in law is deemed in constructive possession of suit schedule property. There is no denial or dispute that under Ex.A-1, plaintiff got suit schedule property and it was he who was having title and possession of property though others were managing the property. Veerreddy died on 22.02.1979. Alleging that defendants 1 and 2 trespassed into the land, plaintiff issued Ex.A-2, notice on 30.04.1979. This only shows within two months after death of their father, disputes arose between plaintiff and defendants 1 and 2 with regard to possession and at the earliest point of time, plaintiff demanded and claimed possession by issuing Ex.A-2, notice. In reply, defendants 1 and 2 sent Ex.A-3, notice, on 03.05.1979 setting up Ex.B-1, agreement, in favour of third defendant, in which it was claimed that third defendant obtained possession pursuant to Ex.B-1, agreement. Thereafter, plaintiff filed suit on 22.07.1980. The defendants did not adduce any convincing evidence to show that they were in possession of property twelve years prior to Ex.A-2 or some time prior to Ex.B-1, agreement. As their plea of agreement of sale in favour of third defendant is not proved, it follows that the suit filed on 22.07.1980 is within time and is not barred by limitation. Before taking up the question of adverse possession pleaded by defendants, four decisions of Supreme Court need to be noticed. These are Ambika Prasad (supra), Mohan Lal (Deceased) through his Lrs. Kachru and Others Vs. Mirza Abdul Gaffar and Another, , Karnataka Board of Wakf (supra) and V.G. Padma Bai and Others Vs. R. Jagannadha Rao (died) by LRs., .

11. In Ambika Prasad (supra), Supreme Court considered presumption of continuity of possession. It was held that

The presumption of future continuance is noticed in Illustration (d) to Section 114 of the Indian Evidence Act, 1872. In appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under this section, though on this point the section does not give a separate illustration. The rule that the presumption of continuance may operate retrospectively has been recognised both in India, see Anangamanjari Chowdhurani v. Tripura Soondari Chowdhurani 14 Ind App 110 (PC) and England, see Bristow v. Cormican (1878) 3AC 641 Doe v. Young (1845) 8 QB 63: 115 ER 798. The broad observation in Manmatha Nath v. Girish Chandra Roy 38 Cal WN 763 : Manmatha Nath Haldar and Another Vs. Girish Chandra Roy, and Hemendra Nath v. Jnanendra Prasanna 40 Cal WN 115 : Hemendra Nath Roy Choudhury Vs. Jnanendra Prasanna Bhaduri and Others, that there is no rule of evidence by which one can presume the continuity of things backwards cannot be supported. The presumption of continuity weakens with the passage of time. How far the presumption may be drawn both backwards and forwards depends upon the nature of the thing and the surrounding circumstances.

12. As per the above ratio, if it is shown that a person is in possession of a thing at a given point of time, unless contrary exists, it is always presumed that within

reasonable proximate time such person continues to hold the thing forwards and backwards. Learned Counsel for defendants relies on this Judgment to show that in the absence of any specific allegation by plaintiff as to when he was dispossessed by defendants 1 and 2, by alleged trespass, an inference can be drawn that defendants alone are in possession of property prior to Ex.B-1, agreement. The submission is misconceived. In para 10 of the plaint, a clear allegation is made that, "immediately after death of Veerreddy, the defendants with the active assistance and help of Sathi Madireddy, Medapati Bhoolakareddy and Padala Manda Reddi trespassed into the land and occupied illegally, unauthorisedly without any manner of right". It is known to everybody that Veerreddy died on 22.02.1979. In para 9 of the plaint, it is clearly stated that Veerreddy died on 22.02.1979. It is not a case where the plaintiff is in doubt as to when trespass took place. Therefore, no inference can be drawn in favour of defendants that they were in possession of property prior to agreement of sale, Ex.B-1. Even otherwise in view of the admission of defendants 1 and 2 in written statement, that third defendant took possession pursuant to Ex.B-1, agreement, they cannot take advantage of the presumption of continuity of possession as laid down by Supreme Court in the above Judgment.

13. In Mohan Lal (supra), the appellant came into possession of the suit lands pursuant to agreement of sale, dated 08.03.1956, after paying part consideration. Subsequently, Mirza Abdul Gaffar purchased the land by sale deed, dated 23.03.1960. In the meanwhile, the appellant's suit for specific performance of contract was dismissed. In the suit filed by respondent for possession, the appellant raised a plea of adverse possession and also contended that he is entitled to retain possession by operation of Section 53-A of TP Act. The plea of adverse possession and part performance was not accepted by Supreme Court and it was held as under (Paras 4 and 5).⁰ As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., upto completing the period of his title by prescription "nee vi nee clam nee precario". Since the appellant's claims is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.... The question then is whether he is entitled to retain possession u/s 53-A. It is an admitted fact that suit for specific performance had been dismissed and became final. Then the question is whether he is entitled to retain possession under the agreement. Once he lost his right under the agreement by dismissal of the suit, it would be inconsistent and incompatible with his right to remain in possession under the agreement. Even otherwise, a transferee can avail of Section 53-A only as a shield but not as a sword. It contemplates that where any person contracts

to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has performed or is willing to perform his part of the contract, he would be entitled to retain possession and to continue in possession which he has already received from the transferor so long as he is willing to perform his part of contract. Agreement does not create title or interest in the property. Since the agreement had met with dismissal of the suit his willingness to perform his part of the contract does not arise.

14. In *Karnataka Board of Wakf (supra)*, Supreme Court following *Mohan Lal (supra)* held that a person who obtains possession under agreement of sale cannot take a plea of adverse possession, as it would be inconsistent with the plea of coming into possession under the agreement.

15. In *Hemaji Waghaji Jat (supra)*, Supreme Court while referring to all important decisions on the subject of adverse possession held that when there was no specific plea of adverse possession and no issue was framed, the party setting up such plea cannot succeed at the appellate stage. Thus, the law may be taken as well settled that a person who comes into possession of immovable property pursuant to a document like agreement of sale cannot plead adverse possession and any plea of adverse possession would be inconsistent with a plea of part performance u/s 53-A of TP Act. Third defendant did not even file a separate written statement and she sailed with her sons, defendants 1 and 2. They admitted in the written statement that third defendant came into possession pursuant to Ex.B-1 and therefore, plea of adverse possession is not available. As rightly pointed out by learned Counsel for plaintiff, whoever was in possession of property in 1949, was only in possession on behalf of plaintiff, and therefore, an inference can be drawn that defendants came into possession only after death of Veerreddy. Therefore, plaintiff must succeed in a suit for possession.

16. The second point need not detain this Court any longer. There is no serious dispute with regard to legal position that when the suit is filed for possession and mesne profits, it is always open to the Court to enquire into mesne profits at the stage of trial or order separate enquiry into mesne profits. Rule 12 of Order XX of Code of Civil Procedure, 1908 (CPC) may be conveniently extracted hereunder.

12. Decree for possession and mesne profits:- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree:

(a) for the possession of the property;

(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(ba) for the mesne profits or directing an inquiry as to such mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until,-

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

17. In Sri Venkateswara Oil Company (supra), this Court considering Order XX Rule 12 of CPC laid down as under.

Under Order 20 Rule 12 of CPC where the suit is for recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree both for possession of the property and also for the rents or profits. This rule does not, in my view, make any distinction as to the basis on which the suit is filed for recovery of possession. The suit on hand is one for recovery of possession and a decree was also passed for the said relief. Therefore, the claim for past profits cannot be denied on the ground that the Court has not accepted the basis for which the claim is made for recovery of possession, although the decree was passed for recovery of possession or the relief of possession was granted on altogether a different ground. There is no room for making such a distinction on the language of Rule 12, Order 20 of CPC. Although Rule 12 contemplates that the Court may pass decree for possession and for profits, the profits should normally follow a decree for possession unless exceptional circumstances are shown.... As already stated, profits shall follow the decree for possession, unless special circumstances prevail. Award of profits is the rule, while exception is denial. I am of the opinion that no such special circumstances can be culled out from the facts of this case.

18. The plaintiff filed a suit for future profits as well. This only means that he was claiming mesne profits from the defendants for the use and enjoyment of suit schedule property from 1979 till disposal of the suit, and thereafter. It is no doubt true that in his evidence as P.W.1, he did not give details of likely income from suit schedule property. In such a case, learned trial Judge ought to have ordered enquiry into mesne profits by separate application. It is not an exceptional case where plaintiff should be denied for mesne profits, especially, when he started enforcing his rights within two months from the date of trespass by defendants 1 and 2. Therefore, plaintiff must succeed in this appeal.

19. In view of the conclusions as above, the appeal filed by defendants being A.S. No. 938 of 1990 is dismissed with costs and the appeal filed by plaintiff being A.S. No. 1188 of 1990 is allowed without costs.