

(2002) 08 RAJ CK 0105
In the Rajasthan High Court
Case No : Civil Second Appeal No. 279 of 2001

Nathu Lal and Others

APPELLANT

Vs

Smt. Gulab Bai and Others

RESPONDENT

Date of Decision : 07-08-2002

Acts Referred:

Citation : (2003) 1 WLC 130 : (2002) 5 WLN 552

Hon'ble Judges : B.S. Chauhan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—This second appeal has been preferred against the judgment and decree of the first appellate Court dated 22.9.2001, by which it has affirmed the judgment and decree of the trial Court dated 18.3.1997.

2. The facts and circumstances giving rise to this case are that the respondent-plaintiffs filed a suit against the appellant-defendants in the Court of the Civil Judge (Junior Division), Nathdwara for permanent injunction on the averments that they were the owners and in possession of the suit property, on which the appellant-defendants were intending to raise construction, thus, they should be restrained from raising any construction thereon. The appellant-defendants filed the written-statement denying the title of the respondent-plaintiffs and claiming their title over the land in dispute. The trial Court, on the basis of pleadings, framed large number of issues including as to whether the plaintiffs were having the title and possession over the suit property and whether the appellant-defendants wanted to encroach upon the said land. After considering the evidence led by the parties, the trial Court decided both the issues in favour of the plaintiffs holding that the respondent-plaintiffs were having the title over the suit property; but on issue No. 2, it was held that the property was of the joint possession of the plaintiffs and the defendants, thus, it was not a case of encroachment as both the parties were in possession thereof. The suit was decreed to the extent that the appellant- defendants had no right to make any

construction.

3. Being aggrieved and dissatisfied, both the parties preferred first appeals. The appeal of the appellants has been dismissed while that of the respondent-plaintiffs has been allowed by the first appellate Court vide judgment and decree dated 22.9.2001, holding that the respondent-plaintiffs were having the title over the property and as it was an open land and was merely being used by the appellant-defendants, the question of joint possession did not arise. It was further held that the use of the suit property by the appellant-defendants, if any, was permissive one. The appellants did not file appeal against the judgment and decree allowing the appeal of the respondent-plaintiffs but they have filed the second appeal only so far as rejection of their first appeal is concerned.

4. Mr. Kalla has agitated the sole issue that even if there was nothing for the appellants to show that they had a title or the land was ancestral but as they had been using the suit property for more than two decades, they had acquired the title by adverse possession. In fact, joint possession of both the parties over the suit property was held by the trial Court in view of the evidence led by the appellant-defendants that the suit property was an open land and it had been used by them also for a long time.

5. Adverse possession means a hostile possession, i.e. possession in denial of the title of the true owner. To claim successfully the adverse possession, vesting of title in the possessor should be there. More so, the possession must be actual, physical, exclusive, hostile and continued during the statutory period of limitation. Adverse possession is the possession over the land on his own behalf by a person other than the real owner having a right of immediate possession. There must be an intention to hold it adversely. Adverse possession must be adequate, in continuity and publicly to establish title. It is an open avowed claim. Possession, which was adverse at the time of commencement, may cease to be so before completion. Nature of possession depends upon the character and condition of the land as it is capable of enjoyment. Liven delivery of symbolic possession is sufficient to interrupt adverse possession.

6. Courts have to bear in mind, while deciding the case of adverse possession, the distinction between possession and permissive use of the suit property. User must be in the nature of ownership to form basis of possession. Adverse possession must be unequivocal. Adverse possession without any legal origin, continuity, publicity in extent, contingent and hostile to the others. Vide (1934) 66 MLJ 134 (Privy Council)

7. Adverse possession is possession by a person asserting interest against the true owner who is entitled to repudiate and to recover immediate possession. Vide Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others, The proper test and requirement of adverse possession are that the person asserting such a right has to prove that he has been in hostile possession for more than the statutory period. Vide Constitution Bench judgment of the

Hon"ble Supreme Court in Gurbinder Singh and Another Vs. Lal Singh and Another,

8. Possession is not the same thing as user. User, to form basis of adverse possession, must be in the nature of ownership. A possession should not be permissive as it is settled law that the possession follows the title in case of waste and the vacant land. If, in its inception, the possession was permissive then person claiming adverse possession has to establish as at what point of time it changed the character and become adverse. Flimsy and temporary structure by neighbourer for storing straw on land for number of years when land is not in much use by the true owner, does not create adverse possession. Vide Prem Raj. v. Jeth Mal 1980 WLN 424 ; Rulia and Anr. v. Noor Muhmood and Anr. AIR 1926 Lah. 615 ; and Lala Asa Ram and Another Vs. Lala Ram Chander,

9. In all these cases, it has been held that the mere tethering of cattle and storing logs on waste is not possession adverse to the proprietor of the land, or where the open land is used for storing the fuel by the neighbourer, it would not amount to adverse possession. The law laid down therein has been that in such circumstances, as the possession goes with the title, the presumption is that the possession has been with the owners throughout. More so, their adverse possession depends upon the nature of animus possidendi though no particular form of expression "animus" is necessary. Therefore mental element must be present for establishing adverse possession. Vide AIR 1947 19 (Privy Council)

10. In M. Arthur Paul Ratna Raju and Others Vs. Gudese Garaline Augusta Bhushanabai and Another, it has been held by the Hon"ble Supreme Court that adverse possession becomes effective when the title of real owner is extinguished on account of adverse possession for the prescribed period.

11. In State of Rajasthan Vs. Harphool Singh (Dead) Through His L.Rs., the Hon"ble Supreme Court held that the adverse possession, being a hostile user, involves, expressly or impliedly, the denial of title of the true owner and the burden is always on the person, who asserts such a claim, to prove by clear and unequivocal evidence that his possession was hostile to the real owner and in deciding such a claim, the Courts must have regard to the animus of the person doing those acts. There must be legally acceptable evidence and the necessary legal ingredients of adverse possession to substantiate the claim of such a party. Some concrete title of the nature of occupation, with proper proof thereof, would be absolutely necessary and mere vague assertions cannot, by themselves, be substituted for such concrete proof required for open and hostile possession. Lackadaisical findings cannot be recorded upon mere surmises and conjectures in a case of adverse possession for the reason that the person claiming adverse possession must show the possession to be overt and without any attempt of concealment so that the person, against whom time is running, if he exercises due diligence, should be aware of what is happening. While deciding the said case, the Supreme Court placed reliance upon its various earlier judgments, including Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb

Babusaheb Patil (dead) by LRs. and heirs etc., and the judgment of the Privy Council in Debendra Lal Khan (supra).

12. In Dr. J.N. Banavalikar Vs. Municipal Corporation of Delhi and another, the Hon"ble Supreme Court held that for determining the issue of adverse possession adverted to, the ordinary classic requirement that it should be nec vi, nec clam, nec precario - that is, the possession required must be adequate, in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

13. In Syndicate Bank Vs. Mr. Prabha D. Naik and Another etc., the Hon"ble Supreme Court held that adverse possession is akin to prescription, but distinguished it explaining that the prescription relates to intangible rights such as easement, whereas the adverse possession applies to an interest in the actual title of the property.

14. In Mool Chand Bakhru and Another Vs. Rohan and Others, , the Supreme Court held that the plea of acquisition of title by adverse possession cannot be available to a party claiming to be in possession of the suit property either by the permission of the owner or in part performance of an agreement to sell. While deciding the said case, the Apex Court placed reliance upon its earlier judgment in Mohan Lal (Deceased) through his Lrs. Kachru and Others Vs. Mirza Abdul Gaffar and Another, wherein it was held that since the respondents therein were claiming to be in possession of the property in part performance of agreement to sell, the acquisition of title by adverse possession was not available to him. Similar view has been reiterated in Darshan Singh and Others Vs. Gujjar Singh (Dead) by Lrs. and Others,

15. While asserting the adverse possession, the party has to plead when adverse possession started. (Vide S.M. Karim Vs. Mst. Bibi Sakina,

16. If the submissions made by Mr. Kalla are examined in the light of the aforesaid settled legal proposition, there is no substance in the case of the appellant for the reason that it was merely a case of user and not of possession of the open land owned and possessed by the respondent-plaintiffs.

17. In view of the above, no substantial question of law is involved and there can be no justification to interfere with the findings recorded by the First Appellate Court.

18. The appeal is accordingly dismissed.