
(1996) 03 MAD CK 0136
In the Madras High Court

Pappammal (Died) and Others	Vs	APPELLANT
Valiammai (Died) and Others		RESPONDENT

Date of Decision : 08-03-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12

Citation : (1996) 2 MLJ 194

Hon'ble Judges : S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—Plaintiff who filed O.S. No. 256 of 1966, on the file of the District Munsif's Court, Karur, died during the pendency of the suit, and plaintiffs 2 to 5 were impleaded as additional plaintiffs. Of them, after the filing of this second appeal, plaintiffs 2 and 3 died and appellants 5 to 7 herein have been impleaded.

2. The suit was one for declaration of title and recovery of possession of C Schedule property, mentioned in the plaint. A plan is also appended.

3. Relevant facts which are necessary for the proper disposal of this second appeal are as follows: Plaint A Schedule Property is having an area of nearly 3 acres. The said property along with other properties were purchased by the original plaintiff under Ex.A-1, dated 17.1.1946. The original plaintiff paid a consideration of Rs. 25,000. It is said that he obtained physical possession of the entire property. The plaint C Schedule property is a portion of A Schedule, which is situated on the north western portion of the entire A Schedule property. As per allegations in the plaint, the C Schedule property has got an extent of 20 x 18 sq. ft. It is also stated that B and D Schedule items are portions of A Schedule. It is said that in so far as the D Schedule item is concerned, which is situated on the southern side of C Schedule, the defendants trespassed 17 years back and have put up a construction. In so far as B Schedule is concerned, plaintiffs allege that they are in physical possession. It is also averred that sometime in October, 1959, a suit notice was issued by the original plaintiff stating the illegal acts

committed by the defendants and wanted them to surrender the trespassed area. At that time, there was some mediation through panchayat. Then, the defendants had also trespassed into the C Schedule property. That was in the year 1959. The mediation was accepted by both the parties, and the defendants agreed that in so far as C Schedule Item was concerned, they will pay a monthly rent of Rs. 10 and that they were paying that amount till December, 1962. Thereafter, they committed default in paying the rent. Finally suit notice was issued in 1964 seeking possession of C Schedule property. The defendants also sent a reply denying the mediation and also the rental arrangement insofar as the C Schedule property was concerned. They also denied the title of the plaintiff. Therefore, the plaintiff filed the suit for declaration of plaintiff's title over C Schedule and for recovery of possession with mesne profits.

4. In the written statement filed by the defendant, he contended that the plaintiff had no title over A Schedule property. He also denied the alleged mediation in 1959. Insofar as the notice issued in 1959, he did not answer the same, but said that he does not remember to have sent any reply to the notice dated 1.10.1959. He also denied the rental arrangement. In paragraphs 7 and 10 of the written statement, he said that he had been and continues to be in possession of the entire A Schedule, long before 1949 and he has perfected his right, title and interest and possession to the suit property by adverse possession and prescription. He further said that the plaintiff is not entitled to recovery of possession.

5. On the above pleadings, the parties went on trial.

6. Before the trial court, Exs.A-1 to A-8 were marked and the 5th plaintiff was examined as P.W.1. Three other witnesses were also examined, on the side of the plaintiffs, including the Commissioner who was deputed during trial, and also the Karnam of the Village. On the side of the defendant, two witnesses were examined and Exs.B-1 to B-84 were marked. D.W.1 is the brother of the defendant and D.W.2 is a Block Extension Educator.

7. After evaluating the entire evidence, the trial court came to the conclusion that the plaintiff has proved his title to the property, and that the defendant has not proved his prescriptive right over the C Schedule property, and the suit was decreed appending the Commissioner's Report and Plan to the decree. Regarding mesne profits, the same was relegated to separate proceedings under Order 20, Rule 12, C.P.C.

8. Against the judgment, the defendant preferred A.S. No. 59 of 1975. By the time the appeal was filed, the original defendant was no more, and the appellants in that appeal were his legal representatives. The lower appellate court set aside the judgment and held that the plaintiff has lost his title by adverse possession. A second appeal was filed before this Court as S.A. No. 1620 of 1976. This Court set aside the judgment of the lower appellate court and directed the lower appellate court to consider the case afresh. After remand, as

per the revised judgment, the lower appellate court again allowed the appeal and dismissed the suit. It is against the said judgment, the present second appeal has been filed.

9. At the time of admission of the second appeal, the following substantial question of law was framed for consideration:

Whether the lower appellate court is right in holding that the defendant has acquired/title by adverse possession as regards the suit C Schedule property?

10. In this case, the defendants have admitted during evidence the antecedent title of the plaintiff. The case put forward during trial was that the original plaintiff, defendant and his father were all closely associated. Defendant's father was a "Siddha Vaidya", and, for the treatment of plaintiff's father, plaintiff took him to defendant's father, and thereafter they became very intimate. He also said that there some business connection between plaintiff and the defendant and in consideration for all this, plaint property was given to them, and ever since 1948, they are physical possession of the entire property.

11. Trial court held that it was not proved that the property was given to the defendant, and it further held that the antecedent title of the plaintiff stood. Before lower appellate court also, the only question agitated was, regarding adverse possession and limitation.

12. I will first consider what is the law of adverse possession, and how it should be pleaded and proved.

13. In so far as pleadings are concerned, in S.M. Karim Vs. Mst. Bibi Sakina, , their Lordships held thus:

...Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea....

14. In Abubakar Abdul Inamdar (dead) by LRs. and others Vs. Harun Abdul Inamdar and Others, , in paragraph 5, their Lordships reiterated the law thus:

With regard to the plea of adverse possession, the appellant having been successful in the two courts below and not in the High Court, one has to turn to the pleadings of the appellant in his written statement. There he has pleaded a duration of his having remained in exclusive possession of the house, but nowhere has he pleaded single overt act on the basis of which it could be inferred or ascertained that from a particular point of time his possession became hostile and notorious to the complete exclusion of other heirs, and his being in possession openly and hostilely. It is true that some evidence, basically of

Municipal register entries, were inducted to prove the point but no amount of proof can substitute pleadings which are the foundation of the claim of a litigating party. The High Court caught the appellant right at that point and drawing inference from the evidence produced on record, concluded that correct principles relating to the plea of adverse possession were not applied by the courts below. The finding, as it appears to us, was rightly reversed by the High Court requiring no interference at our end.

[Italics supplied]

Though it is a case between co-owners, the principle of pleading applied to all cases.

15. Insofar as the proof of adverse possession is concerned, Rustomji on Limitation - 7th Edition (1992) has stated thus at page 1021:

No court should take the plea of acquisition of title by adverse possession casually and no importance should be attached to the evidence of witnesses who simply depose that the land is in possession of somebody or other. The burden of proving adverse possession is a heavy one. It must not be lost sight of that acts sufficient to constitute possession on the owner may not be sufficient to constitute possession in the trespasser. In determining the question of acquisition of title by adverse possession, the court must depend on clear, full and definite evidence relating to different points of time....

In the same book, at page 994, the learned author has further stated thus:

In the case of the rightful owner possession of a part of the property is considered possession of the whole property. But the trespasser stands on a different footing. He will not be deemed to be in possession of the whole of a property simply because he is in possession of a part of it. The trespasser's adverse possession is normally confined to the area actually occupied by him....

16. AIR commentaries on Limitation Act - 4th Edition (1965), commenting on Articles 64 and 65, has dealt with the meaning of "Adverse possession" and its ingredients (at pages 1255, 1256 and 1257):

The expression "adverse possession" means a "hostile possession, that is a possession which is expressly or impliedly in denial of the title of the true owner. In *Ejas Ali v. Special Manager, Court of Wards*, their Lordships of the Privy Council observed:

The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.

In *Arunachalam v. Venkatachalapathy*, their Lordships of the Privy Council held that the possession of the defendant was adverse to the plaintiff, inasmuch as the plaintiff had stood by while the defendant continued to possess in practical

contravention of the plaintiff's alleged rights. Dr. Markby in his Elements of Law observes that possession to be adverse must be possession "by a person who does not acknowledge the other's rights but denies them.

The principle that in order to constitute adverse possession the possession must be in denial of the title of the true owner, has been recognised in numerous decisions, though expressed in different ways. Thus, it has been held that in order to constitute adverse possession the acts of the person in possession should be irreconcilable with the rights of the true owner, that the person in possession must claim to be so as of right as against the true owner, that adverse possession is possession which is wrongful, that the possession must be by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession, and that the possession of the wrongdoer must be exclusive. A contrary view, namely, that the possession of a person may be adverse to another even though he may admit the title of that other, has been held in the under-mentioned case. It is submitted that this view cannot be accepted as correct.

It follows from the above that possession on the part of a A consistent and reconcilable with the title of B cannot be adverse to B....

17. On the basis of the above principles of law, let us consider the case on hand.

18. I have already said that the only question that has to be considered in this case, is, whether the suit is barred by limitation and adverse possession. The relevant pleadings that are raised in the written statement are contained in paragraphs 7 and 10. The only statement in para 7 reads thus:

...The divisions of properties into B, C and D Schedules are giving with a view to escape from the law of adverse possession so that to treat one portion as vacant site and another portion as building portion. The entire property as described in A Schedule within the four boundaries, absolutely belongs to the defendant. The defendant is and has always been in possession of the entire property in his own right as owner and he is in open, continuous, exclusive and hostile possession and enjoyment of the entire A Schedule property having his own constructions with the knowledge of the plaintiff and Ors. long before 1949 till to-day, by paying tax to the Municipality for the property and thus the defendant has perfected his right, title, interest and possession for the suit property by adverse possession and prescription. The property stands registered in the name of the defendant with the Municipality. The plaintiff has absolutely no right or interest in the A Schedule or B, C and D Schedule properties and the claim in any manner either for B Schedule or C Schedule property is unsustainable and the plaintiff have absolutely no right or interest over the property and the claim in the plaint as though the plaintiff is entitled to the property and as though he is in possession of the same, are absolutely false and unsustainable.

In para 10 of the written statement, the only contention is as follows:

...In short, the plaintiff was not in possession of any extent of the A Schedule properties within 12 years prior to suit. The defendant alone has been in adverse possession and enjoyment of the same as aforesaid and he has perfected his right, title, interest over the same by adverse possession by openly enjoying the same of more than 12 years." It may not be put of place to state that in paragraph 8 of the written statement, it is stated that in or about 1949, constructions were made by him in the nature of latrine for the house on the southeastern corner, and on the north eastern corner he has put up tub with a store well in the same and he has also put up a pipe therein. We must understand that none of these constructions are in portions of the property sought to be recovered.

19. Insofar as the plaintiff C Schedule property is concerned, the allegation in the plaint is that some time in the year 1959, defendant trespassed into the property and put up a shed for the purpose of training in wrestling and before that time, defendant had no possession at all. The nature of that construction in the C Schedule is also temporary.

20. I have already said that the law of adverse possession expects cogent evidence. Since it is a case of acquiring title otherwise than by a lawful method (though by passage of time it is recognised by court), the evidence must be cogent and clear. The overt act regarding hostile possession must also be clear. Even if the defendant is in possession of a portion of the entire property (in this case the D Schedule property) there is no presumption that he is in possession of the entire A Schedule. Possession of a part will not lead to the presumption that he is in possession of whole of the property. Law only recognises the illegal possession of the part occupied. But in the case of owner, if the owner is in possession of a portion, law presumes that he is in possession of the entire property. So, it is for the defendant to prove that he took possession of the entire A Schedule property which includes the C Schedule herein, at least from 1948 or 1949, as contended by him and that overt act was to the knowledge of the entire world. Mere possession alone is not sufficient. He must prove that his possession hostile to the entire world, including the real owner.

21. Even though the defendant was present in court, he did not get himself examined, and D.W.1 is only his brother. He is not a party to the suit. He claims to have resided with the defendant upto ten years prior to the filing of the suit. He also claims personally knowledge about the enjoyment over the plaintiff items.

22. In this case, even though the defendant has produced Exs.B-1 to B-84, the relevant documents that should be considered here are only Exs.B-1, B-6 to B-25 and B-46 to B-50. All the other documents are after the institution of the suit, and admittedly the defendant claims to be in possession.

23. Even in respect of documents produced that are relevant, we find that most of them are only municipal tax receipts and have nothing to do with vacant land. In so far as the vacant land is concerned, no document has been produced to

show that he was enjoying the same. The entire A Schedule is having nearly 3 acres of land. No Adangal register is produced to show that he was cultivating the vacant land at any point of time. Being a vast area, the defendant cannot contend that the vacant land is also appurtenant to his residential building, which is situated in a portion of the property. In this connection, first we have to see what is the relationship between the parties. Even though parties are not related by blood, evidence of D.W.1 itself discloses that both the plaintiff and the defendant were closely associated initially in business and also in treating the plaintiff's father. It is alleged that the plaintiff's father was afflicted with paralytic stroke and the defendant's father was treating him, and that association grew and that made the plaintiff and the defendant also become partners in business also. Though the said statement is denied by the plaintiff and accepted by the courts below as not proved, such contention by the defendant or D.W.1 will show whether he had animus to hold the property against the plaintiff. If the parties moved or associated with each other closely, and were in very good terms, there cannot be any question of animus to hold the property adversely against the plaintiff. In the evidence of D. W. 1, he further says that 15 years prior to his deposition, the original plaintiff's son was continuing as defendant's disciple and was getting coaching in wrestling. He further says that the age cannot be 17 years, but asserts that it was only 15 years. He was examined in 1974 March. That 15 years will be some time in the year 1959. If the parties were at loggerheads, plaintiffs, son would not have been a disciple under his father's own enemy. That is also a circumstance which acts against the defendant's case.

24. It is the case of the plaintiff that sometime in the year 1959, the defendant trespassed into the C Schedule property, and put up a shed. He was making use of that area as a "Godha" (wrestling coaching place) from 1959 only. Even though the defendant pleaded that constructions were made in the year 1948 along with his residential buildings in the D Schedule, the documentary evidence filed by him disproves the same. We find that the assessment by the Municipal authority was made for the two Buildings separately only long after 1959. Till then, assessment was made only for the residential building. Even during 1959, the assessment was only for a single building i.e., the residence of the defendant. If the construction was made in 1948 as alleged by the defendant, that also would have been assessed to tax.

25. I have already said that the Commissioner visited the property during April, and on his assessment, he also reported that the residential building and the shed in C Schedule would not have been constructed at the same time. According to the Commissioner, the construction in C Schedule is of recent origin. But in so far as the residential buildings are concerned, he is definite that they are old.

26. The trial court, in paragraph 9 its judgment, has considered the evidenciary value of each and every exhibit and has come to the conclusion that till Ex.B-27

receipt i.e., 22.7.1965, the assessment was only in respect of one building. It also came to the conclusion that only from Ex.B-28 onwards, there is assessment for two numbers and that included the "Godha" in the C Schedule also. D.W.1 has no explanation for the non-assessment of the shed constructed in C Schedule. As held in *Abubakar Abdul Inamdar (dead) by LRs. and others Vs. Harun Abdul Inamdar and Others*, , whatever may be the basic value of the municipal register entries which deals only with residential buildings, that is not going to prove the adverse character of the entire vacant land. In fact, no evidence need be looked into, for, the pleading is defective in this case. The defendant has not stated as to from which date the adverse character of his possession began. It is only from that date, the limitation will have to be computed. In one portion of D.W.1's evidence, he also said that after the business dealings between the plaintiff and the defendant was over, there was a panchayat. But he does not give the date or year of the mediation. He says:

If that be so, possession of the defendants can only be on the basis that they were expecting a document from the plaintiff. That possession can never be adverse. Such possession is only in recognition of the owner's title.

27. I have already said that the construction in C Schedule can only be of recent origin as found by the trial court. Even though the defendant said that the assessment in respect of the buildings in C Schedule was there from the beginning, no document was produced. In fact, the document produced in this case has not been correlated in respect of the building situated in C Schedule.

28. From the description of the building situated in C Schedule, as found by the Commissioner, it can be seen that it is not a permanent construction. In *Makina Atchayya Patrudu v. Jalaluddin Sahib and Ors.* AIR 1938 Mad. 454, their Lordships held that putting up temporary construction is not an act in denial of the owner's right. In that case, the party in possession was conducting an Arabic School in a thatched shed in a vacant ground. The question was whether such a construction will amount to an overt act denying the title of the real owner. It was held thus:

Mere acts of conducting an Arabic School in a thatched shed constructed in a vacant site and conducting lectures and meetings in the vacant site for some time would not constitute possession for creating an adverse possession against the owner.

29. The lower appellate court reversed the decision on the ground that there is no evidence to show that there is separation of the properties as scheduled in the plaint. It is for the said purpose I said that when a person claims possession on the basis of trespass, that possession will relate only to that particular area trespassed and not for the whole property. Here, the acts of possession were confined to the residential building which the plaintiff had admitted that it was some years prior to the institution of the suit. Merely because there are no separate boundaries between the various portions, it cannot be inferred that the

trespass was in respect of the entire property and that the defendant was in possession of the entire A Schedule property. In this connection, the lower appellate court also said in page 9 of the judgment (in line about 40 thus):

...But at the same time, to test the case of the defendant and to disprove the same as against the evidence and the documents produced by the defendant, it is for the plaintiff who has filed the the suit for declaration and recovery of possession for his part to show that the property was in his possession and enjoyment upto certain point of time or was recorded as in his possession and enjoyment either in the municipal registers or in the revenue registers or that there are two different assessment and one assessment relates to the arena portion and it is only from 1963 onwards. That the plaintiff has not chosen to do....

The above observation by the lower appellate court, according to me, is against all settled legal principles. The plaintiff need only prove by rebutting evidence for, the presumption is in his favour. It is a vacant land. Again, under Article 65 of the Indian Limitation Act, 1963, the entire burden is only on the defendant, and not on the plaintiff to prove adverse character. Even if the defendant had been in possession as stated by him, he must further prove that it was adverse to the plaintiff and only then the title of the plaintiff will be lost. According to me, an appreciation of the evidence in this case will disprove the case put forward by the respondent.

30. According to me, the lower appellate court has wrongly cast the burden of proof on the plaintiff and has also not considered the legal principles enunciated by the Supreme Court and also the Statutes concerning the same.

31. The question of law raised in this second appeal has, therefore, to be found in favour of the appellants.

32. In the result, the judgment and decree of the lower appellate court are set aside, and that of the trial court are restored. The second appeal is allowed with costs. The appellants are entitled to costs in the courts below also. Regarding the question of mesne profits, the appellants are entitled to get the same ascertained in execution under Order 20, Rule 12, C.P.C.