

(2015) 07 KAR CK 0009
In the Karnataka High Court
Case No : R.S.A. No. 1015/2011 (DEC/INJ)

Pilla Akkayamma and Others

APPELLANT

Vs

Channappa and Others

RESPONDENT

Date of Decision : 22-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 68
Transfer of Property Act, 1882 — Section 122, 123

Citation : (2015) ILR Kar 3841

Hon'ble Judges : S. Abdul Nazeer, J.

Bench : Single Bench

Advocate : Rajanna, Advocate, for the Appellant; M.S. Varadarajan and Santhosh, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

S. Abdul Nazeer, J.—This appeal is directed against the judgment and decree in R.A. No. 110/2008 dated 11.1.2011 on the file of the Fast Track Court, Devanahalli.

2. The appellants are the legal representatives of the plaintiff-Smt. Subbamma in O.S. No. 402/1996 on the file of the Additional Civil Judge (Jr. Dn) & JMFC, Devanahalli. Subbamma filed the aforesaid suit for cancellation of the gift deed dated 12.3.1979 executed by Byamma, second wife of Venkatarayappa in favour of the second defendant and for permanent injunction restraining the defendants from interfering with their possession and enjoyment of the suit schedule properties. Alternatively, they sought for possession of the suit schedule properties in case the Court comes to a conclusion that the defendants are in possession of the properties.

3. The contention of the plaintiff is that the plaint schedule properties are ancestral properties of her father Venkatarayappa, son of Byrappa. Venkatarayappa had two wives, Chikkamuniyamma and Byamma. The plaintiff is

the only daughter through his first wife Chikkamuniyamma. Venkatarayappa died on 26.6.1976 leaving behind his two wives to succeed to the suit schedule properties. After the death of the plaintiff's mother and step mother, she is in exclusive possession and enjoyment of the suit schedule properties.

4. Mariyanna is the grand father of Venkatarayappa. He had two sons, namely, Channappa and Byrappa. The first son Channappa had two sons, namely, Hanumappa and Munishamappa. The first son Hanumappa had two sons by name Channappa and Byrappa. The said Channappa, son of Hanumappa is the first defendant in the suit. The second defendant is the son of the first defendant. The second son of Mariyanna, namely, Byrappa had a son, namely, Venkatarayappa, who is none other than the plaintiff's father. Venkatarayappa had also a sister, namely Doddamuniyamma, who is no more. The plaintiff has two daughters, namely, Pilla Akkayamma and Rangalakshamma and amongst them her daughter Pilla Akkayamma is given in marriage to one Byrappa, son of Hanumappa, who is none other than the brother of the first defendant. He resides in Avathi Village and looks after the plaint schedule properties in the absence of the plaintiff.

5. During the life time of the plaintiff's father Venkatarayappa, he was in exclusive possession of the plaint schedule properties and katha of the said property stood in his name. Plaintiff and her children are ignorant about katha and revenue documents since they are illiterate. The defendants have no manner of right, tide or interest in respect of the said property. However, by colluding with the revenue officials, they have managed to change the katha of the said properties.

6. When the defendants filed the written statement on 19.7.1997, plaintiff came to know that her step mother Byamma had executed a gift deed in favour of the second defendant bequeathing some of the items of the suit schedule properties. The said document is concocted one and not acted upon. Byamma had not executed any gift deed and thumb impression found on the said document is not that of Byamma. There is no partition between the two wives of Venkatarayappa. As such, his second wife Byamma had no legal authority to execute the gift deed in favour of the second defendant.

7. The defendants have filed their written statement contending that plaintiff is not the owner or in possession of the suit schedule properties. Sy. Nos. 216/3, 229/9, 277/2, 296/3 and a house property situated at Avathi Village were exclusive properties of Byamma, wife of Venkatarayappa. She had gifted the said properties in favour of the second defendant on 12.3.1979 and properties in Sy. Nos. 218/2, 216/2, 234/5 and 238/4 of Avathi Village were gifted to Doddamuniyamma, who is none other than the sister of the plaintiff's father. The said Doddamuniyamma and her husband were living with defendant No. 1 and since they had no issues, they had treated the first defendant as their son. During their life time, the first defendant was in possession of the above properties and after his death, RTC was changed to his name. As such, defendant

Nos. 1 and 2 are in possession of the suit schedule properties. Alternatively, it is contended that the first defendant has perfected his title by adverse possession in respect of Sy. Nos. 216/2, 218/2, 234/5 and 238/4. His possession over the said properties are hostile, continuous and without any interruption to the knowledge of the plaintiff.

8. On the basis of the pleadings of the parties, the Trial Court has framed the following issues and additional issues:

"Issues:

(1) Whether the plaintiff proves that she is the absolute owner in possession of the suit schedule property?

(2) Whether the plaintiff proves the alleged interference by the defendants?

(3) Whether the plaintiff proves that the gift deed dated 12.3.1979 in favour of the second defendant is not acted upon and it is null and void?

(4) Whether the 1st defendant proves that he has perfected his title to property bearing Sy. Nos. 218/2, 216/2, 234/5 and 238/5 of Avathi Village by adverse possession?

(5) Whether the plaintiff is entitled for the relief of declaration and permanent injunction as prayed?

(6) What order or decree?"

Additional Issues:

(1) Whether suit is barred by limitation?

(2) Whether plaintiff is entitled for the relief of cancellation of gift deed dated 12.3.1979?

(3) Whether the plaintiff is alternatively entitled for possession of the suit schedule property?

(4) Whether plaintiff's alternative relief of possession barred by time?"

9. Rangappa, the third legal representative of the deceased plaintiff was examined as P.W. 1 and a witness was examined as P.W. 2. Documents Ex. P1 to Ex. P31 were marked in their evidence. The first defendant during his life time got examined himself as D.W. 1. The second defendant Ramanjinappa got himself examined as D.W. 3 and a witness was examined as D.W. 2. Documents Ex. D1 to Ex. D47 were marked in their evidence. On appreciation of the materials on record, the Trial Court has held issue Nos. 1 to 5 and additional issue Nos. 2 and 3 in the negative. The Trial Court has also held that the suit is barred by limitation while answering additional issue Nos. 1 and 4. The suit was accordingly dismissed on 24.10.2008.

10. The plaintiffs filed an appeal R.A. No. 110/2008 on the file of the Fast Track

Court, Bangalore Rural District, Devanahalli, challenging the aforesaid decree. The first Appellate Court has dismissed the appeal on 11.1.2011. The plaintiffs have presented this appeal challenging the said decree of the first Appellate Court.

11. The appeal was admitted to consider the following substantial question of law:

"Whether Byamma, the second wife of deceased Venkatarayappa, father of the plaintiff through the first wife Chikkamuniyamma was entitled in law to alienate the immovable properties in Sy. Nos. 218/2, 216/2, 234/5 and 238/4 of Avathi Village, of Devanahalli Taluk left behind by deceased Venkatarayappa by way of a gift deed dated 12.3.1979 in favour of the second defendant, a minor represented by the 1st defendant-father, calling for interference with the judgment and decree of the trial Court and that of the lower appellate Court?"

12. Learned Counsel for the appellants submits that the gift deed executed by Byamma at Ex. P29 is a concocted document and that it has not been acted upon. The subject matter of the gift deed are Sy. Nos. 216/3, 229/9, 277/2, 296/3 and a house property. Since the gift deed executed by Byamma is a concocted document, it is not binding on the plaintiffs and the defendants do not have any right, tide or interest in so far as the said properties are concerned. The suit schedule properties belong to Venkatarayappa. After his death, his two wives, Chikkamuniyamma and Byamma succeeded to the said properties. There was no partition of the properties by the two wives. Byamma died issueless. After the death of Byamma and Chikkamuniyamma, Subbamma succeeded to the said properties. The said properties have not been gifted to the defendants at any point of time. It is further contended that the defendants have not perfected their title by adverse possession in respect of the said properties. The Court below is therefore not justified in dismissing the suit as barred under Article 65 of the Limitation Act.

13. On the other hand, Learned Counsel appearing for the respondents submits that the properties, which are the subject matter of the gift deed at Ex. P29 were properties of Venkatarayappa. After his death, his two wives have succeeded to his entire properties. Byamma has gifted her share in the properties under Ex. P29 in favour of the second defendant. The gift deed has been proved by the defendants. The plaintiffs were aware of the execution of the gift deed. They have not taken steps to annul the gift deed. Even while filing of the suit, they did not seek the prayer for cancellation of the gift deed executed by Byamma. Secondly, it is submitted that the other suit schedule properties have been gifted to Doddamuniyamma, sister of Venkatarayappa by Nanjamma, wife of Byrappa. Even otherwise, the defendants have perfected their title by adverse possession.

14. I have carefully considered the arguments of the Learned Counsel made at the Bar and perused the materials placed on record.

15. The suit schedule properties are admixture of the properties which are subject matter of the registered gift deed at Ex. P29 dated 12.3.1979 and also

the other ancestral properties of late Venkatarayappa. To be specific, lands in Sy. Nos. 216/3, measuring 20 1/2 guntas of Avathi Village, 229/9 measuring 2 guntas of Avathi Village, 277/2 measuring 1 acre 9 guntas of Avathi Village, 296/3 measuring 13 guntas of Thatamachanahalli Amanikere, Vijayapura Hobli and a house property bearing khaneshmari No. 50 of Avathi Village are the subject matter of the above gift deed. The plaintiff claims that the remaining suit schedule properties are the ancestral properties of her father succeeded by her. The case of the defendants is that the suit schedule properties are ancestral properties of late Venkatarayappa and that the said properties have been gifted to Doddamuniyamma, sister of Venkatarayappa by Nanjamma, wife of Byrappa. Accordingly, she was the absolute owner of the properties. The said Doddamuniyamma and her husband were living with the defendants. They had no issues. The first defendant was always treated as their son and that all of them were living jointly. The first defendant is in possession of the property for the several decades even during the life time of Doddamuniyamma and after her demise, he has been enjoying the property as the owner thereof. The first defendant has also taken a plea that he has perfected his title over the said properties by adverse possession.

16. Having heard the Learned Counsel for the parties, yet another substantial question of law needs to be framed. It is as under:

"Whether the courts below are justified in holding that the defendants have perfected their title by adverse possession in respect of the suit schedule properties other than the properties included in the gift deed at Ex. P29 without proper pleadings to that effect?"

17. Having regard to the contentions urged, the first question for consideration is whether the plaintiff has established that the gift deed at Ex. P29 is invalid?

18. Section 122 of the Transfer of Property Act, 1882 (for short "TP Act") postulates that gift is a transfer of certain existing movable and immovable property made voluntarily and with out consideration by one person called the donor to another person called donee, and accepted by or on behalf of the donee. The essential element of a gift under this provision are; (a) the absence of consideration; (b) the donor; (c) the donee, (d) to be voluntary; (e) the subject matter; (f) the transfer, and (g) the acceptance. The essence of the gift is that it is a gratuitous transfer.

19. Section 123 of the TP Act states that for making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by atleast two witnesses. The proviso to Section 68 of the Indian Evidence Act, 1872 dispenses with the necessity of calling an attesting witness in proof of any document except a Will, which has been registered in accordance with the provisions of the Registration Act, 1908 when there is no specific denial by the party against whom the document is relied upon. Therefore, a registered deed of gift can be received in evidence

without examination of the attestors, if the person, who has executed the deed of gift has not specifically denied its execution.

20. The main contention of the appellants is that Byamma had no right to execute the gift deed in favour of the second defendant since after the death of Venkatarayappa, both his wives had succeeded to the suit properties. According to her, there was no partition between her mother Chikkamuniyamma and her step mother Byamma during then-life time and after their death, she has succeeded to the plaint schedule properties. It is not the case of the plaintiff that Byamma had no share in the properties of Venkatarayappa. Perusal of the gift deed would clearly indicate that Byamma had an exclusive right to gift the properties included in the gift deed. The plaintiff has not established that there was no partition between her mother and her step mother. The extent of Sy. No. 216/3 as given in the plaint is 1 acre 4 guntas including 3 guntas of kharab land. Through the gift deed, Byamma had gifted 20 1/2 guntas, which is roughly half extent in the said survey number, the western boundary in the gift deed is shown as land of Chikkamuniyamma. The second item, which is the subject matter of the gift deed is 2 guntas in Sy. No. 229/9 of Avathi Village and its total extent as shown in the plaint schedule is 4 guntas. The western boundary of this land in the gift deed is also shown as land of Chikkamuniyamma. The third item is the land measuring 1 acre 9 guntas in Sy. No. 277/2 of Avathi Village and in the plaint schedule, the total extent is shown as 2 acre 29 guntas and the western boundary in the gift deed is also mentioned as remaining land of Chikkamuniyamma. Another item in the gift deed is Sy. No. 296/3 of Thatamachanahalli Amanikere, Vijayapura Hobli, measuring 13 guntas gifted by Byamma to the second defendant. The last item of gift is 8 ankana house bearing khaneshumari No. 50 of Avathi Village. In all the above landed properties, the subject matter of the gift is roughly half extent and the fact that the western boundary of most of the gifted properties are shown as Chikkamuniyamma's property, presupposes that after the death of Venkatarayappa, there was partition between his two wives, wherein eastern side of the above properties had fallen to the share of Byamma and the western side had fallen to the share of plaintiff's mother Chikkamuniyamma. The demarcation of Chikkamuniyamma's properties itself suffice to presume that there was a partition between the two wives of Venkatarayappa and the properties which fell to the share of Byamma were gifted by her in favour of the second defendant.

21. As noticed above, originally the suit was filed only for declaration that plaintiffs are the owners of the suit schedule properties. After filing of the written statement, the plaintiffs have amended the plaint challenging the gift deed. According to them, the alleged gift deed is a concocted document and it is a forged document. Where an improper conduct is alleged, the particulars of such conduct have to be given in the plaint. It is well settled that general allegations, however strong, are insufficient even to amount to an averment of fraud of which any Court will take notice.

22. Ex. P29 is the gift deed executed by Byamma, step mother of the plaintiff in favour of the second defendant. Rangappa, the third legal representative of the plaintiff-Subbamma was examined as P.W. 1. In his chief examination, he has only stated that the gift deed is a bogus document created by the defendants. In his cross-examination, it is stated that he has not seen the LTM of Byamma in the gift deed at Ex. P29. One H.B. Nanjegowda, son of Pilla Akkayamma, the daughter of the plaintiff was examined as P.W. 2. He has stated that there was no division of properties between his grand mother Chikkamuniyamma and Byamma. The so called gift deed does not bear the signature or LTM of deceased Byamma. The entire oral evidence of the plaintiffs was not focused on the execution of the document. The effort was to show that the properties were not divided between Chikkamuniyamma and Byamma. As stated earlier, the gift deed at Ex. P29 clearly indicates that there was partition of the properties between Chikkamuniyamma and Byamma. The original of the gift deed was marked through defendant No. 1 as Ex. D30. It contains the LTM of Byamma. It was identified as Ex. D30(d). The witnesses to this document were Hanumappa and Nanjundappa and their signatures are identified as Ex. D30(a) and Ex. D30(c). The witness to the document Hanumappa was examined as D.W. 2. He has stated in his chief-examination that he has signed the gift deed in the office of the Sub-Registrar. Nothing worthwhile has been elicited in his cross-examination to discredit his evidence. It is clear that the plaintiffs have proved the execution of the gift deed at Ex. P29/Ex. D30. The findings of fact recorded by the Courts below on this question do not call for interference. The first substantial question of law is answered accordingly.

23. That brings me to the next question as to whether defendants have established that the suit schedule properties other than the properties covered under the gift deed at Ex. P29 have been gifted to Doddamuniyamma?

24. It is the specific case of the plaintiff that the aforesaid properties have been gifted to Doddamuniyamma, sister of Venkatarayappa by Nanjamma, wife of Byrappa. Accordingly, she was the absolute owner of the said properties. For making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by atleast two witnesses. This is clear from Section 123 of the TP Act. The defendants have failed to produce the registered gift deed evidencing the gift of the properties. Therefore, it cannot be held that there was a valid gift of these items of the properties in favour of Doddamuniyamma.

25. The last question for consideration is whether the defendants have perfected tide by adverse possession in respect of the suit schedule properties other than the properties gifted under Ex. P29?

26. The expression "title by adverse possession" is not merely an equitable but a complete legal tide. The law creates and confers the tide arising from adverse possession. It does not flow from a contract between the parties which could be reduced to writing and put on record. There is no privity between the possessor

and him, who is dispossessed, and the right of the former does not result from any act of the latter, but is the effect given by the law to his possession. Tide by limitation and title by prescription to real estate are practically synonymous (See P. RAMANATHA IYER's THE LAW LEXICON, 2nd EDITION AT PAGE 1978).

27. The concept of adverse possession contemplates a hostile possession i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person, who does not acknowledge others' rights but denies them. Possession implies dominion and control and the consciousness in the mind of the person having dominion over an object that he has it and can exercise it. Mere possession of the land would not ripen into possessory title. Possessor must have animus possidendi and hold the land adverse to the tide of the true owner. Occupation only implies bare use of the land without any right to retain it. In order to constitute adverse possession, there must be actual possession of a person claiming as of right by himself or by persons deriving tide from him. To prove tide to the land by adverse possession, it is not sufficient to show that some acts of possession have been done. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. In other words, the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation.

28. In T. Anjanappa and Others Vs. Somalingappa and Another, , the Apex Court has held that mere possession however long does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of tide by adverse possession is that such possessions are in denial of the true owner's tide. It has been held thus:

"20. It is well recognized proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession, the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

29. An owner is the person, who holds legal title to the property. The ownership consists of a bundle of rights over some property. Ownership imports three fundamental rights, namely, right to possession, right to enjoy and right to dispose. The owner of the property is not only entitled to possess but also has the right to exclude all others from the possession or enjoyment of it. If the owner is wrongly deprived possession, he has a right to recover possession from

any person, who may possess it. But an absolute owner may deprive himself of such right by an assignment, e.g., grant of lease, and may thereby become a limited owner. The right to possession may be limited or restricted in various ways, either by a voluntary act or involuntarily. An owner who has, however, suffered a limitation in respect of his right to possession can hardly be regarded as an absolute owner.

30. In a suit falling under Article 65 of the Limitation Act, plaintiff must establish his title to the property. He need not prove that he was in possession within 12 years. If he fails to prove his title, the suit fails, and the question of adverse possession does not arise in such a case. When the plaintiff has established his title to a land, the burden of proving that he has lost that title by reason of the adverse possession of the defendant lies upon the defendant. If the defendant fails to prove that he has been in adverse possession for more than 12 years, the plaintiff is entitled to succeed simply on the strength of his title. A person alleging that he has become owner of immovable property by adverse possession must establish that he was in possession of the property peaceably, openly and in assertion of a title hostile to the real owner. Stricter proof is required to establish acquisition of title by adverse possession for the statutory period.

31. In *Annakili Vs. A. Vedanayagam and Others*, , the Apex Court has held that when a suit is for possession based on tide and the defendant resisting the suit on the basis of hostile title, burden of proof lies on the defendant to show that he/she was in possession of the said property on the basis of hostile title since past 12 years which has resulted in extinguishing the title of plaintiff. It has been held thus:

"It was not obligatory on the part of the respondent-plaintiff's seeking possession to file a suit for declaration of their title also. As the title of the respondents in the suit property had already been adjudicated upon, a suit for recovery of possession on the basis of the said title attracted Article 65 of the Schedule appended to the Limitation Act, 1963. In terms of the said provision, it was for the appellant-defendant to show that she and her predecessor had been in possession of the suit property on the basis of the hostile title and as a result whereof the tide of the respondent-plaintiffs stood extinguished."

It has been further held as under:

"24. Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well-settled principle of law that mere possession of the land would not ripen into possessory tide for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in

the said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more does not ripen into a tide."

32. It is also settled that plea of adverse possession is not a pure question of law but a mixed question of fact and law. Therefore, a person, who claims adverse possession should plead and establish on what date he came into possession, what was the nature of his possession, whether factum possession was known to the other party, how long his possession has continued and his possession was open and undisturbed. However, declaration of ownership of land on the basis of adverse possession cannot be sought by the plaintiff. But the claim of ownership by adverse possession can be made by way of defence when arrayed as defendant in the suit against him.

33. In *S.M. Karim Vs. Mst. Bibi Sakina*, , the Hon''ble Supreme Court has held that the alternative claim of adverse possession must be clearly made and proved. Long possession is necessarily not adverse possession. The adverse possessor has to assert hostile title against the owner. It has been held thus:

"There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. 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. There is no evidence here when possession became adverse, if it at all did and 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."

(emphasis supplied by me)

34. In *Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others*, , the Supreme Court has held that the plea of adverse possession is not a pure question of law but a mixed question of fact and law. The party pleading adverse possession must state with sufficient clarity as to when his adverse possession commenced and the nature of his possession. A person pleading adverse possession has no equities 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 necessary to establish his adverse possession.

35. In *R. Chandavarappa and Others Vs. State of Karnataka and Others*, , the Apex Court has held that if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. It has been held thus:

"The question then is whether the appellant has perfected his title by adverse possession. It is seen that a contention was raised before the Assistant Commissioner that the appellant having remained in possession from 1968, he perfected his title by adverse possession. But the crucial facts to constitute adverse possession have not been pleaded. Admittedly, the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The Counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant."

36. The same position has been reiterated in *D.N. Venkatarayappa and another Vs. State of Karnataka and others*, . It has been held that the petitioners were required to plead and prove that they disclaimed the title under which they came into possession, set up adverse possession with necessary animus of asserting open and hostile title to the knowledge of the true owner and the owner allowed them, without any let or hindrance, to remain in possession and enjoyment of the property adverse to his interest until the expiry of the prescribed period. That having not been done, plea of adverse possession cannot be held to be proved.

37. In *Karnataka Board of Wakf Vs. Government of India and Others*, , the Apex Court has again held that a person pleading adverse possession has no equities in his favour and since such a person is trying to defeat the rights of the true owner, it is for him to clearly plead and establish necessary facts to establish his adverse possession. It has been held thus:

"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec claw, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into

possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities 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 facts necessary to establish his adverse possession".

It has been further held as under:

"A plaintiff, filing a title suit, should be very clear about the origin of title over the property. He must specifically plead it. The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced..... In this case, the respondent obtained title under the provisions of the Ancient Monuments Act. But, the alternative plea of adverse possession by the respondent is unsustainable. The element of the respondent's possession of the suit property to the exclusion of the appellant with the animus to possess it is not specifically pleaded and proved. So are the aspects of earlier title of the appellant or the point of time of disposition."

38. In Chatti Konati Rao and Others Vs. Palle Venkata Subba Rao, , it has been held that in a claim of adverse possession, there are no equities in favour of claimant. Therefore, the claimant must clearly plead and establish all facts necessary to establish adverse possession. It has been held as under:

"15. Animus possidendi as is well known is a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until the possessor holds the property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner duration of possession and that possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation overriding property rights. The plea of adverse possession is not a pure question of law but a blended one of fact and law."

(emphasis supplied by me)

39. Recently, the Hon'ble Supreme Court in Gurudwara Sahib Vs. Gram Panchayat Village Sirthala and Another, , has held that even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to that effect. Only if the proceedings are filed against it, it can use this adverse possession as a shield/defence. It is held thus:

"8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse

possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

40. In the instant case, in paragraph 3 of the written statement, the defendants have stated that the properties other than the one covered under the gift deed at Ex. P29 have been gifted to Doddamuniyamma, sister of Venkatarayappa by Nanjamma, wife of Byrappa. Accordingly, she is the absolute owner of the properties. Doddamuniyamma and her husband were living with the defendants. They had no issues. They treated the first defendant as their son and all of them were living jointly. The first defendant is in possession of the properties for the past several decades and even during the life time of Doddamuniyamma. After her demise, the first defendant has been enjoying the properties as owner. In paragraph 9, the defendants have stated that the first defendant has perfected his title over the said properties by adverse possession. It is further pleaded that the first defendant has been in continuous uninterrupted open possession to the knowledge of the world. The plaintiff has not disturbed his possession. In his examination-in-chief, D.W. 1 has stated that after the death of Doddamuniyamma, he has been in possession of the properties. There is no evidence as to when his possession became adverse.

41. The materials on record would clearly establish that Venkatarayappa was the owner of the properties and after his death, his two wives have succeeded to the said properties. Byamma, the second wife of Venkatarayappa has gifted her share in the suit schedule properties in favour of defendant No. 2 under the gift deed at Ex. P29. After the death of Chikkamuniyamma, the first wife of Venkatarayappa, her daughter, the plaintiff herein, has succeeded to the balance of the suit schedule properties. The first defendant has neither pleaded nor established when his adverse possession commenced. He has not pleaded and established his hostile title to the knowledge of the plaintiff or her predecessor in title and that the owners have allowed him to remain in possession and enjoyment of the properties adverse to their interest until the expiry of the prescribed period. A mere statement in the written statement that the first defendant has been in continuous and uninterrupted possession or perfected title by adverse possession was not enough to raise such a plea. The defendants have not disclaimed their title and pleaded hostile claim to the knowledge of the plaintiff. They have not established the date on which they came in possession or whether the factum of their adverse possession was known to the plaintiff. They have failed to prove that they have been in adverse possession for more than 12 years as on the date of the suit, which has resulted in extinguishing of the title of the plaintiff or her predecessor in title. The second substantial question of law is answered accordingly.

42. Sri Varadarajan, Learned Counsel appearing for the respondents has relied on the decision of the Supreme Court in L.N. Aswathama and Another Vs. P. Prakash, in support of his contention that when a person is in possession

asserting to be the owner, even if he fails to establish his title, his possession would still be adverse to the true owner. In the said decision, Hon"ble Supreme Court has held that in order to establish a claim of title by prescription, that is adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. Long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. The Supreme Court has further observed that when a person is in possession asserting to be the owner, even if he fails to establish his title, his possession would still be adverse to the true owner. Therefore, the two pleas put forth by the defendant are not inconsistent pleas but alternative pleas available on the same facts. This decision is not applicable to the facts of the present case. In the instant appeal, the defendants have failed to plead and establish that they have perfected adverse possession against the plaintiff, who is the owner of the properties.

43. It is settled that where the concurrent findings of fact are vitiated by non-consideration of relevant evidence or by essentially wrong approach, the High Court is not precluded from recording proper findings under Section 100 of the CPC (See Jagdish Singh Vs. Natthu Singh,) As notice above, the defendants have failed to raise a proper plea in relation to adverse possession. There is absolutely no evidence to establish their title by adverse possession. In my view, this is a fit case for interference only in so far as the dismissal of the suit in respect of suit schedule properties (other than the properties gifted under Ex. P29) on the ground that the first defendant has perfected title by adverse possession.

44. As has been already stated, the suit of the plaintiff is for possession on the basis of title. The plaintiff has established her title to the suit schedule properties except the properties included in the gift deed at Ex. P29. The defendants have failed to establish that they have perfected their title by adverse possession in respect of the said properties. Therefore, the defendants are bound to deliver possession of the properties to the plaintiffs.

45. In the result, I pass the following:

(i) The judgment and decree in R.A. No. 110/2008 dated 11.1.2011 on the file of the Fast Track Court, Devanahalli, and the judgment and decree in O.S. No. 402/1996 dated 24.10.2008 on the file of the Additional Civil Judge (Jr. Dn) & JMFC, Devanahalli, in respect of lands bearing Sy. Nos. 216/3 measuring 20 1/2 guntas, 229/9 measuring 2 guntas, 277/2 measuring 1 acre 9 guntas of Avathi Village, 296/3 measuring 13 guntas of Thatamachanahalli Amanikere, Vijayapura Hobli, and a house property bearing khaneshmari No. 50 of Avathi Village, which

are the subject matter of a gift deed at Ex. P29 dated 12.3.1979, is sustained. The appeal is dismissed to that extent.

(ii) The judgment and decree of the first Appellate Court in R.A. No. 110/2008 dated 11.1.2011 is set-aside in respect of the suit schedule properties other than the properties covered under the gift deed at Ex. P29 dated 12.3.1979.

(iii) Similarly, the judgment and decree of the Trial Court in O.S. No. 402/1996 dated 24.10.2008 in respect of the suit schedule properties other than the properties included in the gift deed at Ex. P29 dated 12.3.1979 is also set-aside.

(iv) The instant appeal is allowed in part and the suit is accordingly decreed in part.

(v) The defendants are directed to deliver vacant possession of the suit schedule properties other than the properties gifted under Ex. P29 to the plaintiffs.

(vi) Having regard to the facts and circumstances of the case, parties are directed to bear their own costs.