

(2009) 04 MAD CK 0386
In the Madras High Court
Case No : A.S. No. 814 of 1995

Smt. Lakshmi (died) and Others	Vs	APPELLANT
Saminathan (Deceased) and Others		RESPONDENT

Date of Decision : 20-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Constitution of India, 1950 — Article 136
Evidence Act, 1872 — Section 115
Limitation Act, 1908 — Article 113
Limitation Act, 1963 — Article 65
Transfer of Property Act, 1882 — Section 107, 5(1)

Citation : (2009) 04 MAD CK 0386

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : Thiru S.V. Jeyaraman for B. Kumarasamy and R. Babu, for the Appellant; Thiru V.R. Muthuswamy for V. Kathiravan for R2 to R8, for the Respondent

Final Decision : Allowed

Judgement

S. Rajeswaran, J.—This Appeal is filed against the judgment and decree passed by the I Addl. Subordinate Judge, Erode, in O.S. No. 533 of 1988 dated 11.11.1993.

2. The plaintiffs in O.S. No. 533 of 1988 on the file of the Sub Court, Erode are the Appellants before this Court.

3. O.S. No. 533 of 1988 was filed by the plaintiffs for a declaration to declare that the plaintiffs are the absolute owners of the suit properties, for a direction directing the defendants to vacate the suit premises and deliver vacant possession to the plaintiffs, for another direction directing the defendants to pay the damages for use and occupation at the rate of Rs. 200/- per month from the date of the suit till delivery of possession and the same has to be regulated under Order XX Rule 12 C.P.C. and also for cost.

4. The case of the plaintiffs before the trial court is that, the suit properties are situated in Erode Town and by virtue of a decree in O.S. No. 418 of 1935 of the District Munsif Court, Erode and in A.S.No.28 of 1937 on the file of the District Court, Erode, the plaintiffs became the absolute owners of the suit properties. The plaintiffs executed the decree arising out of O.S. No. 418 of 1935, in EPR.No.454 of 1939 and obtained possession through Court. Ever since the date of taking possession, and delivery of the suit properties through Court, that is on 15.6.1939, the plaintiffs have been enjoying the suit properties and other properties as the absolute owners.

5. The first defendant (who died pending suit) is the elder brother of the plaintiffs (both the plaintiffs are sisters) and out of love and affection the plaintiffs permitted the first defendant to occupy the suit property. The first defendant has been living in the suit schedule property along with his sons who are defendants 2 and 4. Now, the plaintiffs wanted the suit property for their own use and therefore, they asked the first defendant to vacate the suit property and deliver vacant possession of the same to them. But, the first defendant was evading the same and therefore, the plaintiffs issued a notice to the first defendant on 30.8.1988 calling upon the first defendant to vacate the premises within 15 days from the date of receipt of the notice. The first defendant sent a reply dated 24.9.1988 denying the very ownership of the plaintiffs of the suit schedule properties. Further, the first defendant stated that the plaintiffs sold the property to his wife Sundarammal and his wife Sundarammal has also constructed a house. The first defendant further claimed that his wife alone is in possession and enjoyment of the property in question. That apart, the first defendant went to the extent of claiming adverse possession by contending that by reason of her open, long, continuous and uninterrupted and exclusive possession of her ownership right over the statutory period, his wife had perfected her title.

6. According to the plaintiffs, the above claim of the first defendant is nothing but false as the first defendant and his family members are occupying the suit property on the leave and licence of the plaintiffs. Since the first defendant is setting up title in the name of his wife Sudnarammal, who is no more now, the defendants 2 to 6 were added as parties to the suit for proper adjudication. Hence, they filed O.S. No. 553 of 1988 for the aforesaid reliefs.

7. A written statement was filed on behalf of the third defendant which was adopted by the defendants 2, 4 to 7. In the written statement it was stated that the first defendant was born and brought up in the suit house as owner. He had sold the property under a registered sale deed dated 5.7.1969 to his wife Sundarammal. Tmt. Sundarammal constructed a house in the said portion. Thereafter, she was alone in possession and enjoyment of the suit house and after her death, her legal heirs are in possession and enjoyment of the suit property in their own right. It is further stated by the third defendant that by reason of her open, long, continuous, uninterrupted and exclusive possession in her own right over the statutory period, the said Sundarammal had perfected her

title by adverse possession in any event.

8. According to the third defendant, the first defendant is the grandson of Subburaya Pillai who is the original owner of the property in question and the first defendant alone is entitled to succeed to the property of Subburaya Pillai.

9. In fact, it is the first defendant who permitted the plaintiffs to occupy a portion of the house as the plaintiffs are his sisters. Since the first defendant demanded the plaintiffs to vacate the house in the month of July 1988, the plaintiffs have filed this vexatious suit. Hence, they prayed for the dismissal of the suit.

10. With the above pleadings, the trial court framed the following issues:

1. Whether the defendants are entitled to the suit schedule property by way of adverse possession ?
2. Whether there is proper cause of action for the suit?
3. Whether the plaintiffs are entitled to the decree of declaration as prayed for ?
4. Whether the plaintiffs are entitled to get delivery of possession of the suit schedule properties ?
5. Whether the parties are entitled to any other reliefs?

11. The daughter of the first plaintiff was examined as P.W.1 and Thiru Agnilingam was examined as P.W.2 and Exhibits A1 to A8 were marked on behalf of the plaintiffs. Similarly, the second defendant was examined himself as D.W.1 and Exhibits B1 to B21 were marked on behalf of the defendants.

12. While answering Issue No. 1, 3 and 4, the trial court adverted to the fact that P.W.1 is the daughter of the first plaintiff and P.W.2 is a relative of the plaintiffs and none of the plaintiffs came forward to examine themselves as witnesses. The trial court has also found that no evidence was let in on behalf of the defendants to prove that the suit schedule property is their hereditary property. On the other hand, the trial Court found that the plaintiffs proved their case with regard to their claim of taking possession of the property through court auction as is evident from Ex.A3 (decree of the District Munsif Court, Erode in O.S. No. 418 of 1935) and Ex.A4 (possession receipt made in E.P.No.457 of 1939, in O.S. No. 418 of 1935). Thus, the trial court on the basis of the above evidence found that the plaintiffs are the owners of the suit schedule property. But, the trial court did not accept the oral evidence of P.W.1 and P.W.2. As none of the plaintiffs came forward to depose that they gave permission to the first defendant and no documents were filed to prove that the first defendant was given permission to occupy the property, the trial court came to the conclusion that the plaintiffs did not prove their case that they permitted the first defendant to occupy the suit schedule property.

13. While appreciating the evidence of the defendants, the trial court found that the defendants have been in occupation of the suit schedule property for more

than thirty years. Further, it was found that property tax was paid by the plaintiffs only from 1978 onwards, whereas it was the first defendant who paid the property tax from 1941 to 1957. From the tax receipts, the trial court came to the conclusion that the first defendant occupied the property even before the year 1941 and therefore, it was proved that the defendants are entitled to the suit property by way of adverse possession.

14. While considering the Issue No. 2, the trial court found that issue in favour of the plaintiffs and while considering the issue No. 5, the trial court granted a decree of declaration with regard to the property which is in the possession of the plaintiffs and accordingly, the suit was partly decreed with regard to the declaratory relief. With regard to the other reliefs, the suit was dismissed.

15. Aggrieved by the judgment and decree dated 11.11.1993, the plaintiffs filed the above appeal before this court.

16. Heard Thiru S.V. Jeyaraman, the learned Senior Counsel for the Appellants and Thiru V.K. Muthuswamy, the learned Senior Counsel for the respondents. I have also gone through the documents including the judgment of the Court below.

17. The learned Senior Counsel for the appellants/ plaintiffs submits that the trial court has totally misconceived the issue with regard to adverse possession and if the pleadings and the evidence let in on behalf of the defendants are properly appreciated and evaluated, it will certainly prove that the defendants have miserably failed to prove their title to the property by way of adverse possession. The learned Senior Counsel further submits that once it is established that the defendants are not entitled to claim the property by way of adverse possession, then their possession is only permissive and therefore, the plaintiffs are entitled to the relief of declaration as well as recovery of possession.

18. In support of his submission, the learned Senior Counsel has very much relied on the decision of the Hon'ble Supreme Court reported in AIR 2008 (41) SCW 6996 (Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and Ors.).

19. Per contra, the learned Senior Counsel for the defendants submits that as none of the plaintiffs came forward to examine themselves as witnesses, an adverse inference has to be drawn against them and their claim that they permitted the first defendant to occupy the property. That apart, the learned Senior Counsel submits that the property tax receipts would definitely prove that the defendants are entitled to the property by way of adverse possession. He further submitted that originally the property was only a vacant land and it was the first defendant and his wife who put up the construction with the knowledge of the plaintiffs and therefore, the defendants have proved their case of adverse possession. Once adverse possession is proved, there is nothing in this appeal and the judgment and decree of the trial court is only to be confirmed. In support of his submissions, the learned Senior Counsel relied on the following decisions:

1. AIR 1943 Mad 425 (Fatima Bibi and Anr. v. A. Hajee Muhammad Usman Sahib (died))
2. Makina Atchayya Patrudu Vs. Jalaluddin Sahib and Others,
3. Srirangam Venkataratnam and Others Vs. Perambadur Bullemma and Another,
4. N.E. Vedammal Vs. S.R. Krishnamoorthy Iyer,
5. AIR 1980 Gau 70 (Sailala v. Smt. Ngurtaiveli)
6. Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc.,
7. Thakur Kishan Singh (dead) Vs. Arvind Kumar,
8. AIR 1999 SCW 1129 (Vidhyadhar v. Manikhras and Anr.)
9. 2007 (3) C.T.C. 59 (T. Tamilarasan v. Arokkiasamy and Ors.)
20. I have considered the rival submissions carefully with regard to facts and citations.
21. For the sake of convenience, the parties are referred to as per their rankings in the suit.
22. In the light of the above pleadings and the judgment of the trial court, the following issues are arising for consideration in this first appeal.
 1. Whether the claim of adverse possession put up by the defendants have been proved as upheld by the trial court?
 2. Whether the plaintiffs are entitled to the decree of declaration with regard to the entire suit schedule property?
 3. Whether the plaintiffs are entitled to the relief of delivery of possession?
 4. Whether the plaintiffs are entitled to a damages for use and occupation as prayed for by the plaintiffs?

23. Issue No. 1:

According to the plaintiffs, they are the absolute owners of the suit schedule properties having obtained possession through Court by filing E.R.P. No. 454 of 1939 and they only permitted their brother, the first defendant to occupy the suit property out of love and affection. This was sought to be resisted by the first defendant by contending that he sold the property under a registered sale deed dated 5.7.1969 to his wife Sundarammal and she was alone in possession and enjoyment of the suit house and after her death, her legal heirs are in possession and enjoyment of the suit property in their own right. Conversely, it was contended by the defendants that by reason of her open, long, continuous, uninterrupted and exclusive possession in her own right over the statutory period, the said Sundarammal perfected her title by adverse possession.

24. In this context, the initial burden of proving the title to the suit schedule property is on the shoulders of the plaintiffs and accordingly, to prove their case that they are the absolute owners of the suit schedule property, the plaintiffs marked Ex.A3 and Ex.A4. Ex.A3 is a certified copy of the decree dated 10.8.1936 in O.S. No. 418/35 filed by the plaintiffs herein when they were minors represented by their next friend Thirugnanasambanda Gounder. The suit in O.S. No. 418 of 1935 was filed for recovery of possession of the plaintiff mentioned property with further rent from defendants 2 and 3 and for the cost of the suit from the second defendant and the other contesting defendants. The case of the plaintiffs in O.S. No. 418 of 1935 on the file of the District Munsif, Erode is that the plaintiffs are the lawful owners of the plaintiff mentioned house and that the second defendant, A.Subbiah Pillai trespassed into the house and he is occupying it unlawfully. The District Munsif Court by decree dated 10.8.1936 declared that the plaintiffs are entitled to the suit house property and the defendants two and three shall put the plaintiffs in possession of the suit property.

25. Ex.A4 is the possession receipt showing that to execute the decree passed in O.S. No. 418 of 1935, the plaintiffs herein filed E.R.P.No.457 of 1939 and obtained delivery of possession. Therefore, Ex.A3 and Ex.A4 proved the case of the plaintiffs as stated in the plaint and in fact, the trial court has also adverted to the two documents and found that the plaintiffs are the owners of the suit properties. In such circumstances, now, the onus is shifted to the defendants to prove that:

- 1) they are the owners of the properties and
- 2) conversely they perfected the title to the suit schedule property by way of adverse possession.

26. It is an admitted fact that the defendants did not let in any evidence to prove that they are the owners of the suit schedule properties as contended by them in the written statement. Once the defendants were not able to establish their lawful title to the suit schedule house, now, the onus is heavily on the shoulders of the defendants to prove that how they perfected the title to the suit properties by way of adverse possession. It is settled law that the person who pleads adverse possession has to prove the same with unimpeachable and cogent evidence. Before proceeding to find out whether the defendants have proved their pleadings of adverse possession, let me consider the judgment cited by both the learned Senior Counsel in this regard.

27. In AIR 2008(41) SCW 6996 (cited supra), the Hon"ble Supreme Court after discussing the question of adverse possession that was pleaded in that case and after referring to a number of previous judgments, observed as under:

32. Reverting to the facts of this case, admittedly, the appellants at no stage had set up the case of adverse possession, there was no pleading to that effect, no issues were framed, but even then the trial court decreed the suit on the ground

of adverse possession. The trial court judgment being erroneous and unsustainable was set aside by the first appellate Court. Both the first appellate Court and the High Courts have categorically held that the appellant has miserably failed to establish title to the suit land, therefore, he is not entitled to the ownership. We endorse the findings of the first appellate Court upheld by the High Court.

34. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

28. In the judgments referred to by the Hon''ble Supreme Court in the above decision, the following principles of law have emerged with regard to a plea of adverse possession.

- a) A plea of adverse possession is not a pure question of law, but, a blended one of fact and law.
- b) A person who claims adverse possession should show:
 - i) On what date he came into possession?
 - ii) What was the nature of his possession?
 - iii) Whether the factum of possession is known to the other party?
 - iv) How long his possession has continued?
 - v) His possession was open and undisturbed ?
- c) A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner.
- d) It is settled rule of law that between co-heirs, there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.
- e) Adverse possession must be adequate in continuity, in publicity and extent and a plea is required atleast to show when possession became adverse so that the starting point of limitation against the party affected can be found.
- f) Long possession is not necessarily adverse possession.
- g) For the purpose of proving adverse possession, the defendant must also prove

animous possidendi.

h) In the eye of law, a owner would be deemed to be in possession of a property so long as there is no intrusion.

i) Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner.

j) In terms of Article 65, the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff, but, commences from the date when the defendant's possession becomes adverse.

k) Adverse possession is based on the theory that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession.

29. Citing the above principles, the learned Senior Counsel for the appellants submits that if these settled principles with regard to the plea of adverse possession are applied to the facts of the present case, it will clearly establish that the defendants have miserably failed to establish their case that they perfected their title to the suit house property by way of adverse possession.

30. In AIR 1943 Mad 425 (cited supra), a Division Bench of this Court observed as under:

The Court was not considering the question now under discussion, but the concluding portions of the judgment in the Full Bench case when read together indicate that if a suit is filed before the 12 years period of limitation has expired the Court is entitled to decalre the rights of the parties at the date of the suit. In 11 M.L. 344, A prescriptive right had been acquired before the institution of the suit which was also the case in 49 M.L.J. 656. A decree-holder whose attachment has been raised is given by the statute the right to institute a suit for a declaration must have regard to the rights of the parties at the date of the institution of the suit. It would be a negation of the right given by Order 21 Rule 63 to hold that when the suit has been filed in time, the person wrongly in possession of the property can get a title by adverse possession after the institution of the suit. In our opinion, the institution of the suit arrests the running of time in favour of defendant 1. This means that the plaintiff-appellants are entitled to a declaration of their right to attach seven-eighths of the property in suit.

31. In Makina Atchayya Patrudu Vs. Jalaluddin Sahib and Others, , a Division Bench of this Court held as under:

On both these points it seems to us that the plaintiff is bound to succeed. First turning to the question of adverse possession, the acts relied upon are these: that an Arabic school was being conducted in a shed constructed on the site, that lectures were being delivered there and that meetings were being held. There can be no doubt on the evidence, that such sheds as there were, were temporary

ones built of thatch. Granting that these acts have been fully prove, do they constitute evidence of adverse possession ? The possession of the wrongdoer to avail him must be adverse in its character, importing a denial of the owner's title in the property claimed. It is settled law, that possession cannot be adverse unless it is held in such circumstances as are capable in their nature of notifying mankind that the party is on the land, claiming it as his own, openly and exclusively (see *Rustomji on Limitation*, 1922 Ed., page 604). There ought to be nothing equivocal in a possession which is relied upon as a bar (*ibid.*, page 600). Possession cannot be adverse unless the owner is in denial of his title excluded from enjoyment. In other words, the test is, are the acts of the person in possession such, as to be irreconcilable with the rights of the true owner? Possession to be adverse must be notorious, exclusive and hostile and we agree with the Subordinate Judge that the acts relied on here are not sufficient to constitute adverse possession.

Then as regards the second point, namely whether the plaintiff has been in possession within 12 years of the suit, the question is, what is the nature of the possession of which this particular property is capable? The kind of possession which will be sufficient in one may not be sufficient in another. In the case of vacant land such as the suit plot, the same kind of possession cannot be expected as in the case of an occupied land or building. Even apart from some slight acts of possession follows title would apply to a case of this sort. The owner would be considered as being in possession so long as there was no effective intrusion. As held by the Privy Council in *Kuthali Moothavar v. Peringati Kunharankutty*:

when a person establishes his title to land and proves that he has been exercising during the currency of his title various acts of possession then the quality of those acts, even though they might have failed to constitute adverse possession against another, may abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is required from an person challenging by possession the rightful title.

These observations apply to the facts here and we are clearly satisfied that the plaintiff was in possession within 12 years of the action.

32. In *Srirangam Venkataratnam and Others Vs. Perambadur Bullemma and Another*, , the Andhra Pradesh High Court observed as under:

(13) As was pointed out by the Privy Council, in *Sarat Chunder De. v. Gopal Chunder Laha* ILR 20 Cal 296 (PC), the law enacted in Section 115 of the Evidence Act, relating to estoppel as a consequence of declaration, act or omission causing another's belief and action thereon, does not differ from the English law on that subject. The main question, in determining whether estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of estoppel does not depend on the motive or on the knowledge of the matter, on the part of the

person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act, or to abstain from acting, should have been fraudulent, or that he should not have been under a mistake, or misapprehension. Thus the real question is whether the representation has caused the person to whom it has been made, to act on the faith of it. The word "representation covers declaration, act or omissions, which may be express or implied and may be made in any form. That being the scope and effect of Section 115 of the Evidence Act, I have no hesitation in holding that on the findings recorded in this case, the plaintiffs are estopped from questioning the right of the first defendant to the suit site and from seeking to evict her. Not merely had Rao and the first plaintiff stood by but Rao had actively encouraged and had even assisted the first defendant in constructing the house. In this situation the present case falls fairly and squarely within the ambit of Section 115 of the Evidence Act.

(14) Learned advocate for the appellants has, however, relied on the Privy Council ruling in AIR 1931 79 (Privy Council) as negating the application of the rule of estoppel to the facts similar to the facts found in this case. A careful reading of the judgment of the Judicial Committee, however, shows that the facts in that case were wholly dissimilar to the facts found here. Indeed the observations of the Lordships in the course of their judgment do not in the least support of the learned advocate's contention. The facts in that case were as follows: In 1913, Ariff (the appellant), having verbally agreed with Majumdar (the respondent) to grant him a permanent lease of a plot of land at Rs. 80/- per month, let him into possession. Shortly afterwards, the respondent, with the knowledge and approval of the appellant, erected structures on the land at a cost of over Rs. 10,000/-. In December 1918, the appellant definitely refused to grant the respondent the agreed lease, and, in 1923 sued to eject him after a month's notice to quit. Under the Indian Limitation Act, 1908, Schedule I, Article 113, the respondent's right to sue for specific performance of the verbal agreement was barred in December 1921.

On those facts, their Lordships held that there being no lease made by a registered document, as required by Section 107 of the Transfer of Property Act, 1882, the appellant was entitled to eject the respondent, with liberty to him to apply to remove the structures; had the respondent's right to sue for specific performance not been barred, he could have claimed the execution of an instrument, which he could have registered. Their Lordships then went on to say that the English doctrine of equitable estoppel did not arise in the case because the only contract to which the erection of the structures could be referred, had since ceased to be enforceable and there was no representation of fact giving rise to an estoppel by Section 115 of the Evidence Act. In the course of the judgment, their Lordships drew pointed attention to the fact that the right of the respondent depended on a verbal agreement for the grant of a perpetual lease. There was no representation by the appellant as would give rise to a plea of estoppel.

At page 1243 of the report, (of ILR Cal.) : (at P.81 of AIR), their Lordships observed:

This is no case of money being expended by the respondent in any mistaken belief as to his legal rights, or of the appellant knowing of the existence of any such mistaken belief, or encouraging the respondent by abstaining from asserting a right inconsistent with the acts of the respondent. Observe the true facts. In 1913, the respondent obtained a verbal agreement for the grant of a perpetual lease, under which agreement he could have sued for and obtained and registered an instrument creating his title to enjoy the property in perpetuity. That agreement continued to be enforceable against the appellant until the month of December 1921. The structures were erected on the land many years before the date, and they were erected not in any mistaken belief by the respondent of his rights in regard to the land, but in assertion of rights which he correctly believed to be his, not by reason of any encouragement or abstention on the part of the appellant, but by reason of the agreement which he was then entitled to enforce against the appellant.

(15) At p.1246 (of ILR Cal): (at pp.82-83 of AIR) their Lordships referred to the well known dictum of Lord Kingsdown in *Ramsden v. Dyson* (1866) 1 HL 129 at pp. 170, 171;

If a man, under a verbal agreement with a landlord for a certain interest in land, or , what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord, to give effect to such promise or expectation.

Their Lordships proceeded to observe with reference to the above passage, thus:

Even if Lord Kingsdown's language was intended to cover something beyond the equitable doctrine of part performance in relation to the Statute of Frauds, and was intended to refer to the circumstances in which a court of equity will enforce a title to land against the person who at law is the owner thereof, the title must, nevertheless, in their Lordships' view, be based either upon contract express or implied, or upon some statement of fact grounding an estoppel.

Then the judgment proceeds to apply the above principles to the acts of that case:

Their Lordships have already indicated their opinion that no act was done by the respondent otherwise than under the verbal contract which was then enforceable at this suit. No circumstances exist from which any other contract by the appellant can be implied; and as to estoppel there is no trace of any statement by him upon which any estoppel can be grounded.

In truth, this case, when the true facts are appreciated, is simple enough. The

acts of the respondent are all referable to a verbal contract, which was enforceable against the appellant at the time when the respondent's expenditure was incurred, and for long afterwards. Unfortunately, for the respondent, he allowed his right to enforce his contract to become barred, with the result that he can only resist the appellant's claim to possession by seeking to establish a title, the acquisition of which is forbidden by the statute. The statute disables him from contesting the appellant's right to possession. Then their Lordships at p.1249 of the report (of ILR Cal.) (at p.84 of AIR) concluded:

Their Lordships cannot find that the facts of this case raise any equity in favour of the respondent. Even if any such equity was established, their Lordships are of opinion that it could not operate to nullify the provisions of the Indian code relating to property and transfer of property.

(16) It will be seen that the reasoning of their Lordships in the above case cannot apply to the facts as found by the lower appellate court in the present case. Here there is no question of any oral contract which was enforceable by the first defendant. The lower appellate Court has found that the site belonged to Rao, the husband of the first plaintiff, and that he had, by encouragement and abstention, induced the first defendant to construct the house. For a considerable time thereafter, no one ever questioned the right of the first defendant to the suit. Subsequently, after the death of her husband, the first plaintiff, actuated by motives which are easily discernible, came forward with a false claim not only to the site but also to the superstructure. The conduct which would equally occasion estoppel against the first plaintiff, as she is a representative-in-estate of her deceased husband.

33. In N.E. Vedammal Vs. S.R. Krishnamoorthy Iyer, , the learned Single Judge of this Court held as under:

12. A Bench of the Allahabad High Court in Lala Nand Lal v. Sundar Lal and Ors. pointed out:

The effect of the institution of a suit within limitation is to destroy previously existing adverse possession with effect from the date of institution or at any rate to suspend it from that date until the suit is finally decided one way or the other.

I have already pointed out that the adverse possession, if any, of the appellant herein commenced only on or after 2nd March, 1950, when she purported to purchase the property from one Rajagopal Pillai under Exhibits B-1 and C.S. No. 56 of 1951 (which was later transferred to the City Civil Court, Madras and numbered as O.S. No. 1162 of 1955) was instituted the very next year and the judgment in that suit was pronounced on 26th July, 1966 as evidenced by Exhibit A-2. Consequently, the period from the institution of the suit upto the date of the judgment and decree has necessarily to be ignored in the language of this Court in Ratna Bai alias Hira Bai and Ors. v. The Official Assignee of Madras and Anr., referred to above or the institution of the suit has destroyed the previously existing adverse possession or suspended it from that date; in the language of

the Allahabad High Court in *Lala Nand Lal v. Sunder Lal and Ors.*, referred to already, and as possession was taken by the Government pursuant to the acquisition of the land under the provisions of the Land Acquisition Act only in 1966, the appellant cannot be held to have prescribed title to the property by adverse possession.

13. The learned Counsel for the appellant placed great reliance on a judgment of the Bombay High Court in *Dagadabai Fakirmahamad v. Sakham Gavaji and Ors.* The head-note of the decision state:

Whether a decree for possession in favour of the plaintiff does or does not interrupt adverse possession is purely a question of fact to be decided on the circumstances of each case. If the decree, does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, it cannot be said that it has interrupted possession, nor can it in law affect the nature of the possession, unless it does so in fact; A decree for possession followed by an unsuccessful execution cannot be deemed as a matter of law to have the effect of either interrupting possession or altering its character.

With regard to the facts, the head-note itself points out:

The plaintiff mortgaged certain lands and the mortgage obtained a decree which provided that the mortgagee should have possession of the lands for two years and the possession should thereafter go to the plaintiff. The mortgagee attempted to execute the decree but could not get possession from the defendants who were in possession as heirs of the husband of the plaintiff. The possession was never in fact obtained by anybody. The plaintiff then brought a suit against the defendants claiming as an heir of her husband to eject the defendants. The defendants set up adverse possession. The question was whether possession was interrupted by the mortgage decree:

Held, that the possession of the defendant must, on the facts, be deemed to have been adverse throughout and could not be said to have been interrupted by the mortgage decree.

I am of the opinion that on the facts this case is distinguishable. Apart from that, the High Court of Bombay did not consider the distinction between a suit for declaration coupled with a prayer for recovery of possession, which was subsequently decreed, but instituted at the time when the defendant in possession had not perfected his title by adverse possession. In view of this, I am unable to hold that the said decision is helpful to the appellant in the present case. In any event on the basis of the decisions referred to above, if the time during which the suit instituted by the first respondent herein for declaration of title and recovery of possession was pending is excluded, the question of the appellant acquiring title by adverse possession does not arise.

34. In *Thakur Kishan Singh (dead) Vs. Arvind Kumar*, , the Hon"ble Supreme

Court held as under:

5. As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick-kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession. Apart from it, the appellate court has gone into detail and after considering the evidence on record found it as a fact that the possession of the appellant was not adverse. The learned Counsel, despite strenuous argument, could not demolish the finding of adverse possession. Attempt was made to rely on the evidence led on behalf of the parties and the evidence of the Commissioner who prepared the map. We are afraid that such an exercise is not permissible even in second appeal, what to say of the jurisdiction exercised by this Court under Article 136 of the Constitution. Further, we do not find that the appellant has suffered any injustice which requires to be remedied by this Court.

35. In *Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc.*, , the Hon"ble Supreme Court observed as under:

12. Article 65 of the Schedule to the Limitation Act, 1963 prescribes that for possession of immovable property or any interest therein based on title, the limitation of 12 years begins to run from the date the defendant's interest becomes adverse to the plaintiff. Adverse possession means a hostile assertion i.e. a possession which is expressly or impliedly in denial of title of the true owner. Under Article 65, burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed.

13. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into

possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.

14. In the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenary property. The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members. The possession of one, therefore, is the possession of all. The burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmatively that to the knowledge of other member he asserted his exclusive title and the other members were completely excluded from enjoying the property and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other. The right of the plaintiff to file suit for partition had arisen after the Act has come into force and re-grant was made by the Collector under Sub-section (1) of Section 5. The defendant, therefore, must plead and prove that after the re-grant, he asserted his own exclusive right, title and interest to the plaint schedule property to the knowledge of the plaintiff and the latter acquiesced to such a hostile exercise of the right and allowed the defendant to remain in continuous possession and enjoyment of the property in assertion of that hostile title during the entire statutory period of 12 years without any let and hindrance and the plaintiff stood thereby.

36. In AIR 1980 Gau 70 (cited supra), a Division Bench of the Gujarat High Court observed as under:

10. In our view, on the basis of the facts found by the Court below, which we accept, we have no hesitation in coming to the conclusion that the conduct of late Thangphunga was such that he acquiesced in the ownership of late R.D. Leta in the suit premises. Though various notorious acts were done in the suit premises between the plaintiff and the near relatives of late R.D. Leta, as discussed above, while Thangphunga was alive, Thangphunga remained stood by. In such a case, the doctrine of estoppel by acquiescence comes into play. The proper sense of the word "acquiescence" is that if a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and takes no objection while the act is in progress, he cannot afterwards complain.

37. Citing the above judgments, the learned Senior Counsel for the respondents submits that the plea of adverse possession has been adequately proved by the defendants and therefore, the well considered judgment of the trial court need not be interfered with.

38. After going through the entire evidence and the pleadings of the present case, I am of the considered view that the defendants have miserably failed to prove their case of perfection of their title to the suit property by adverse possession.

39. It is necessary to refer to the pleadings and the evidence with regard to their claim of adverse possession. A perusal of the entire written statement filed on behalf of the third defendant, which was adopted by the defendants 2 and 4 to 7 would only show that the necessary and vital pleadings are obviously missing in the written statement with regard to their claim of perfecting their title by adverse possession. It is useful to extract the following portion in the written statement wherein the plea of adverse possession was raised by the defendants:

5. The allegation in para 6 is not correct. The first defendant was born and brought up and lived in the suit house as owner. He had sold the property under a registered sale deed dated 5.7.1969 to his wife Sundarammal. She had constructed house in the said portion. Ever since then she was alone in possession and enjoyment of the suit house and after her death her legal heirs are in possession and enjoyment of the suit property in their own rights. By reason of her open, long, continuous, uninterrupted and exclusive possession in her own right for over the statutory period she had perfected her title by adverse possession in any event.

40. From the above, it is very clear that the necessary pleadings like on what date the first defendant's wife came into possession, when possession became adverse, when she perfected her title by adverse possession, when she pleaded hostile title to the knowledge of the true owner, etc. were not at all pleaded in the written statement and in such circumstances, this court will not accept the case of the defendants that they became the owners of the suit schedule properties by way of adverse possession.

41. That apart, D.W.1 in his evidence has clearly stated that they are in possession and enjoyment of the suit property as owners and in fact, he accepted in the cross examination that the property is a hereditary property and they are not claiming any possessory right over the suit schedule property. If that being so, as rightly pointed out by the learned Senior Counsel for the appellants, the defendants are blowing hot and cold in their plea of adverse possession and they have not properly pleaded the plea of adverse possession which was not backed by strong and unimpeachable evidence. Therefore, I am of the considered view that the trial court has committed an error of law in holding that the defendants proved their case of adverse possession.

42. To come to the conclusion that the defendants proved their case of adverse possession, the trial court has only adverted to the fact that the defendants are in occupation of the suit schedule property for more than 30 years. The trial court mainly relied on the property tax receipt filed by the defendants to prove that they only paid the tax from 1941 to 1957. The trial court was also carried

away by the fact that there were enough evidence to prove the defendants have been in occupation of the suit schedule house for more than 30 years and therefore, it came to the conclusion that the defendants perfected their title by way of adverse possession. As held by the Hon'ble Supreme Court, it is not enough if it is proved that a person pleading adverse possession has been in continuous possession for a number of years without any interruption. What is to be proved is on what date he came into possession, whether the factum of possession was known to the other party, what was the nature of his possession and when his possession became adverse to the true owners and to their full knowledge. Animous possidendi is one of the ingredients of the adverse possession and unless the person possessing the property has a requisite Animous, the period of prescription does not commence. Therefore, I am not in consonance with the findings of the trial court that the defendants have proved their plea of adverse possession. Merely paying the Property Tax in their names, the defendants could not establish that their possession has become adverse to the plaintiffs. Hence, the first issue is answered in favour of the appellants and against the respondents by holding that the defendants have miserably failed to prove their case of adverse possession by pleading properly and letting in cogent and unimpeachable evidence.

43. Issues No. 2 & 3:

I have already observed that Exhibits A3 and A4 have proved the case of the plaintiffs beyond doubt that they are the owners of the suit schedule property. In fact, the trial court itself has accepted this fact on the basis of Ex.A3 and A4. Once Exhibits A3 and A4 proved the title of the plaintiffs to the suit schedule property and once the plea of adverse possession put up by the defendants is rejected, then the plaintiffs are definitely entitled to the decree of declaration with regard to the entire suit schedule property. Therefore, the suit is to be decreed in entirety in favour of the plaintiffs with regard to the declaratory relief.

44. While considering the next question i.e. Whether the plaintiffs are entitled to the relief of delivery of possession, in the light of the facts and circumstances of the case, I am of the considered view that the plaintiffs are also entitled to this relief. The trial court refused to grant the relief of delivery of possession on the ground that the plaintiffs did not prove their case that the first defendant was permitted to occupy the property out of brotherly love and affection. The trial court adverted to the fact that as none of the plaintiffs came forward to enter the witness box to contend that they have only permitted their brother to occupy the suit property, the trial court drew an adverse inference against the plaintiffs.

45. It is true that when the parties are not entering into the witness box to speak about the pleadings they have made, it will give rise to the inference adverse against them 2007 (3) C.T.C. 59 (cited supra) and 1999 AIR SCW 1129 (cited supra)). But in this case, once the title of the plaintiffs are established, on the basis of exhibits A3 and A4 and once the plea of adverse possession put up by the defendants is rejected, the only possible conclusion that could be arrived at

is that the defendants are residing in the property as permissive occupants or trespassers. In any event, in the facts and circumstances of the case, the plaintiffs are entitled to the relief of delivery of possession and therefore, the failure of the plaintiffs to enter into the witness box need not be held against them. Therefore, Issues No. 2 and 3 are also answered in favour of the plaintiffs.

46. In so far as Issue No. 4 is concerned, i.e. damages for use and occupation, it is for the plaintiffs to make necessary application under Order 20 Rule 12 C.P.C. before the court below.

47. In the result, the Appeal is allowed and the judgment and decree of the trial court is set aside. Considering the relationship of the parties, there is no order as to cost.