

(2017) 03 KL CK 0015
In the High Court Of Kerala
Case No : RSA.No. 1501 of 2013

Treesa Mohanan

APPELLANT

Vs

O.V Alexander

RESPONDENT

Date of Decision : 29-03-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Limitation Act, 1963 — Article 64, Article 65, Section 27
Specific Relief Act, 1963 — Section 38

Citation : (2017) AIR(Kerala) 128 : (2017) 2 KLT 430

Hon'ble Judges : B.Kemal Pasha, J.

Bench : Single Bench

Advocate : Sri S. Gopa Kumar, Advocate, for the Appellant; Sri K.N. Sivasankaran, Sri Sunil Shanker, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

B.Kemal Pasha, J.—Does the term "right" used in Section 27 of the Limitation Act, 1963 denote "the right to recover possession" of the immovable property, in a suit under Article 65?

2. Whether the "right" used in Section 27 of the Limitation Act, 1963, includes "title" also?

3. Can the extinguishment of the "right" under Section 27 of the Limitation Act, 1963, confer title on the person in adverse possession of the immovable property?

4. Can adverse possession be used as a "sword" or as a "shield" only?

2. Challenging the concurrent findings entered by the Munsiff's Court, Kochi in O.S. No.414/2010 followed by those of the Subordinate Judge's Court, Kochi in A.S. No.18/2013, the plaintiffs have come up in Second Appeal.

3. The suit is one for declaration that the plaintiffs have perfected their title over

plaint B schedule property by virtue of their exclusive, open, continuous and uninterrupted possession and occupation as of right for more than 15 years against the lawful title of the defendants, and also for a perpetual injunction. The plaintiffs have also claimed for a declaration that Ext.B10 partition deed is not binding on the exclusive possession, ownership and enjoyment of the plaintiffs over plaint B schedule property.

4. Plaint A schedule item is 5.250 cents in survey No.259/1 of the Fort Kochi village. Plaint B schedule item is the northern room occupied by the plaintiffs and the property having an extent of one cent in which the said room is situated.

5. The 2nd plaintiff is the daughter of the 1st plaintiff. Late Simon Vincent is the father of the 1st plaintiff. He has altogether 7 children including the 1st plaintiff, the 1st defendant and the 2nd defendant.

6. Late Simon Vincent along with his wife had executed Ext.B8 gift deed dated 16.02.1993 in respect of the plaint A schedule property in favour of defendants 1 and 2, whereby he gifted plaint A schedule property and the building thereon to defendants 1 and 2. According to the plaintiffs, they were not aware of the execution of the gift deed till 17.07.1994. Simon Vincent died on 15.06.1994. After the rituals in connection with the death, defendants 1 and 2 propounded Ext.B8 gift deed on 17.07.1994, claimed absolute title over plaint A schedule property and the building thereon and demanded the plaintiffs to vacate the portion of the building and the property occupied by the plaintiffs.

7. On such demand, the plaintiffs were not willing to vacate the building and property and at the same time, they moved to the plaint B schedule item and started residing there. Still, the plaintiffs are occupying plaint B schedule item. According to the plaintiffs, they have perfected their title through adverse possession and limitation over plaint B schedule property and thereby they have sought for a decree for declaration. It has also been pleaded that defendants 1 and 2, without the knowledge and consent of the plaintiffs, had executed Ext.B10 partition deed dated 08.07.2008, thereby partitioning the building and property into two halves and allotting one such share each to defendants 1 and 2. The plaint B schedule item being occupied by the plaintiffs comes within the portion allotted to the 1st defendant through Ext.B10.

8. The defendants filed a joint written statement contending, inter alia, as follows:- The first plaintiff was given in marriage in the year 1964 to one Joselin Kunnel and after marriage, they were permitted to reside in one room of the family house situated in plaint A schedule. Subsequently, the husband of the first plaintiff died and within no time, she married another man named Mohanan. The second plaintiff is born to the first plaintiff through the said Mohanan. On humanitarian consideration, the plaintiffs were permitted to occupy one room in the building. It is admitted that still one room in the building is being occupied by the plaintiffs. According to the defendants, they are taking steps to evict the plaintiffs from the plaint schedule properties. The adverse possession claimed by

the plaintiffs is denied. According to the defendants, the occupation of the plaintiffs over that portion of the building is merely permissive. It is contended that there is no such B schedule item in existence. It has been admitted that one room occupied by the plaintiffs is coming within the portion allotted to the 1st defendant through Ext.B10 partition deed. According to the defendants, the plaintiffs are not entitled to any decree as prayed for.

9. The defendants have set up a counter claim. In the counter claim, it has been clearly stated that permission was granted to the 1st plaintiff for her occupation when her first husband died and by virtue of remarriage, she lost that permission. Through the counter claim, the defendants have sought for a decree directing the plaintiffs to surrender vacant possession of plaint B schedule property with damages.

10. On the side of the plaintiffs, PW1 was examined and Exts.A1 to A8 were marked. On the side of the defendants, DW1 was examined and Exts.B1 to B10 were marked. The Commissioner was examined as CW1 and Ext.C1 was marked.

11. The trial court was not impressed with the claim of adverse possession forwarded by the plaintiffs and has chosen to dismiss the suit. The counter claim was decreed in part by directing the plaintiffs to surrender vacant possession of plaint B schedule property within one month. Aggrieved by the said decree and judgment, the plaintiffs filed A.S. No.18/2013 before the Subordinate Judge's Court, Kochi. The lower appellate court also concurred with the findings entered by the trial court, and dismissed the appeal.

12. This Court has admitted the Second Appeal on the following substantial questions of law raised in the Appeal Memorandum:

"(1) Have not the courts below gone wrong in proceeding with the evidence when respondents have categorically admitted the case of appellants in the proof affidavit and in cross examination that they have been asked to vacate the premises occupied by them after the 30th day death ceremonies of their father.

(2) Have not the courts below gone wrong in dismissing the suit and allowing the counter claim when as per the scheme of the Code of Civil Procedure in case of admission of contentions there does not arise any scope for evidence and the courts can pass an order based on the admission alone.

(3) Have not the courts below gone wrong in allowing the counter claim of respondents especially in view of Section 9 of the Limitation Act which clearly mandates that once the limitation started no subsequent event stops it.

13. Heard learned counsel for the appellants and learned counsel for the respondents. Both the learned counsel have led this Court through the evidence adduced by the parties.

14. The first plaintiff was examined as PW1. She has filed a detailed affidavit in lieu of chief examination. According to her, their possession of plaint B schedule

item became adverse to the defendants right from 17.07.1994. The suit was filed in the year 2010. The fact that the plaintiffs are occupying plaint B schedule item is admitted by the defendants. According to the defendants, it is only permissive occupation and the same will not invite adverse possession. Even though the existence of plaint B schedule item is denied at first in the written statement, the said denial has been given a go by through the counter claim in the written statement. Through the counter claim, the defendants have sought for a decree directing the plaintiffs to surrender vacant possession of plaint B schedule item. Therefore, the plaintiffs cannot be heard to say that plaint B schedule item is not in existence. A Commission was also appointed. CW1 Commissioner has identified the room in the building being occupied by the plaintiffs and also another portion of the varanda wherein the plaintiffs have been cooking food for them.

15. The question to be considered is whether the occupation of plaint B schedule item by the plaintiffs constitutes adverse possession. It has been admitted in the written statement that the first plaintiff was given in marriage in the year 1964 to Joselin Kunnel. The fact that they were permitted to occupy the building in the plaint A schedule property along with others has not been denied in the written statement. It is the admitted case of the defendants that the first plaintiff was occupying a room in the building as a widow and thereafter, she married one Mohanan. It is the further admitted case that the first plaintiff continued to reside in the building even after the second marriage. According to the defendants, such residence was permissive. At the same time, the case of the defendants in the counter claim is that permission was granted to the first plaintiff to her occupation in the building when her first husband died, and by virtue of remarriage, she lost that permission. The learned counsel for the appellants has pointed out that either in the year 1964 or in the year 1986, the defendants had no right or authority to grant such a permission and therefore, the contention resorted to by the defendants regarding permissive occupation is not correct or believable.

16. It is true that Ext.B8 gift deed was executed on 16.02.1993 only. Even on the date of execution, Ext.B8 gift deed was not taken out. According to the plaintiffs, the defendants propounded Ext.B8 for the first time on 17.07.1994 only, that too, after the death of Simon Vincent. Simon Vincent died on 15.06.1994 only. Therefore, the case forwarded by the defendants that the occupation of the first plaintiff as well as the second plaintiff in the plaint B schedule item is on the basis of permission granted by the defendants, is not correct. The defendants had no right or authority to grant any such permission prior to the execution of Ext.B8. The said fact itself militates against the case of permissive occupation.

17. In cross examination, PW1 has admitted that in the year 1994, she came to know that her father had gifted the plaint A schedule property to the defendants. Further, she has admitted that during the period from 1994 to 2008, she had not forwarded any claim or right over the plaint A schedule property. Learned counsel

for the respondents has pointed out that PW1 has admitted in her cross examination that she has been residing in the building as permitted by the first defendant. The said statement was made along with the statement that she has a claim over the building because of her long possession. It is by highlighting the said admission in the cross examination of PW1, that both the courts below have non-suited the plaintiffs. At the same time, it seems that both the courts below have forgotten to consider the evidence of the first defendant, who was examined as DW1. In cross examination, DW1 has stated that he did not remember whether the first plaintiff was residing in the building even after her first marriage. It has been further admitted that a daughter was born in the first marriage and the husband of the first plaintiff deserted her. Thereafter, the first plaintiff along with her daughter were occupying the family house. DW1 has further admitted that the second marriage of the first plaintiff was in the year 1986 and that the second husband along with the first plaintiff was residing in the family house. For some period, they had resided at the place called Muppathadam.

18. In the affidavit in lieu of chief examination, it has been specifically affirmed that their father died on 15.06.1994 and on the 30th day of the death of the father, the defendants forwarded their claim of title over the plaint A schedule property and demanded the first plaintiff to vacate the building. The said fact has been admitted to be correct in cross-examination also. According to him, even though such a demand was made, the first plaintiff was not ready and willing to vacate the building and she did not vacate the building. She has been residing in the northern room of the building. He has further admitted that, so far no steps have been taken to evict her from the building or to recover possession of plaint B schedule property from her. In cross-examination, he has further admitted that after the year 1994, it was through Ext.B5, the defendants forwarded the demand to the plaintiffs to vacate the building. Ext.B5 is dated 02.10.2008. Therefore, from his own admission, it is evident that at first, the demand to vacate the building was forwarded by the defendants to the plaintiffs on the 30th day of the death of their father, who died on 15.06.1994. It is the admitted case of DW1 that the plaintiffs were not ready and willing to vacate the premises and they did not vacate the premises. Again, such demand was forwarded through Ext.B5 on 02.10.2008 only. Therefore, the case of the plaintiffs that their possession of plaint B schedule item has become adverse to the defendants from 17.07.1994 onwards, is correct even from the specific admissions of DW1. It is the further admitted case of DW1 that there was refusal from the part of the first plaintiff and she continued to occupy plaint B schedule item. Admittedly, the said demand was again forwarded on 02.10.2008 only. In such case, it seems that Section 27 of the Limitation Act, 1963 comes into play. DW1 has clearly admitted in his deposition that Ext.B10 partition deed will not in any way bind the right of the plaintiffs over the plaint B schedule property.

19. In re-examination, an attempt was made to make it appear that the occupation of the plaintiffs in plaint B schedule item was permissive. In re-

examination, he has stated that in the year 1994, when the demand was forwarded, the plaintiffs sought for time till completion of the education of the children since the children are studying in school. It has been pointed out by both the learned counsel that the second plaintiff is the only child of the first plaintiff. Therefore, apparently, the said statement in re-examination is false. Apart from that, such a fact has not been pleaded in the written statement. Further, such a fact has not been affirmed in the affidavit in lieu of chief examination of DW1.

20. From the evidence discussed above, it has clearly come out that this is a case covered by Section 27 of the Limitation Act, 1963. Section 27 deals with extinguishment of right to property. It says:

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

21. The plaintiffs were asked to vacate the building in the year 1994 by the defendants on the strength of Ext.B8 gift deed. But, the plaintiffs refused to heed to the demand, and continued to occupy the plaint B schedule property. When a period of 12 years has elapsed from the specific refusal of the plaintiffs to vacate the building from the year 1994 onwards, the right of the defendants to get recovery of possession from the plaintiffs has become extinguished under Section 27 of the Limitation Act.

22. Apart from the above, in the counter claim also, it was specifically admitted that there was no permission for the first plaintiff to reside in the building from her second marriage onwards and that, on account of the second marriage, the permission was lost. In such case, it has to be considered that even from the year 1986 onwards, her occupation in the building and possession of that part of plaint B schedule item was adverse to all and the same was not permissive. From the specific admissions of DW1, it has clearly come out that the occupation of the plaintiffs in the building and their possession over plaint B schedule item is adverse to the defendants from 17.07.1994 onwards and, therefore, the defendants are not entitled to have the counter claim decreed. In view of Section 27 of the Limitation Act, the defendants are not entitled to recover possession of plaint B schedule item from the plaintiffs.

23. Regarding the decree sought for by the plaintiffs, this Court is of the view that the claim for decree of declaration of title by the plaintiffs on account of the adverse possession and limitation is not legally sustainable in view of the decision in *Gurdwara Sahib v. Gram Panchayat Village Sirthala and another* [(2014) 1 SCC 669].

24. It is the fundamental principle that the claim of adverse possession can be used as a shield and not as a sword. The said aspect is clearly discernible from Section 27 of the Limitation Act itself. As per Section 27, at the determination of the period limited in the Limitation Act to any person for instituting a suit for

possession of any property, his right to such property shall be extinguished. The terms used are "his right to such property". The term "title" has not been incorporated therein. What is intended to be extinguished is his right to such property. Then, what is the right? Whether it denotes title? The Section deals with the period limited to any person for instituting the suit for possession. Evidently, the said suits are suits contemplated under Articles 61 to 67 of the Limitation Act.

25. It is discernible from Article 65 that the persons entitled to seek such possession of immovable property or any interest based on title, have the right to institute such a suit for possession, within the period of 12 years from the date on which the possession of the defendant becomes adverse to the plaintiff. Therefore, such persons shall have the right to institute such suits only within the period of 12 years mentioned therein. Matters being so, it is evident that the "right" mentioned in Section 27 is the right to recover possession and nothing more. What is being extinguished under Section 27 is the right to recover possession. Nowhere it is mentioned that the title of such person will be extinguished. The extinguishment of right to property mentioned in Section 27 of the Limitation Act in a suit like this, is the extinguishment of the right to recover possession under Article 65 of the Limitation Act and nothing more.

26. When there is no extinguishment of title, the extinguishment of the right of the title holder to recover possession of such an immovable property, will not confer title on the person, who is in adverse possession of such property. That is the reason why it has been said that such adverse possession can be used as a "shield and not as a sword". The person, who is in adverse possession, can defend the claim of dispossession by making use of such adverse possession as a shield. At the same time, he cannot forward a claim that he has title over the property and he can get it declared through a court. Therefore, in this particular case also, the plaintiffs are not entitled to get a decree declaring their title over plaint B schedule item.

27. Regarding the decree of perpetual injunction sought for, the plaintiffs are entitled to maintain a suit for perpetual injunction against persons other than rightful owners. At the same time, the defendants are not entitled to dispossess the plaintiffs from plaint B schedule item since their right to recover possession of plaint B schedule item under Article 65 has become extinguished within the meaning of Section 27 of the Limitation Act. In such case, the defendants cannot be styled as rightful owners of plaint B schedule item when their right to sue under Article 65 has become extinguished. Therefore, a decree of perpetual injunction can be passed restraining the defendants from interfering with the peaceful possession of the plaintiffs over the plaint B schedule item and from dispossessing the plaintiffs from plaint B schedule item, otherwise than through due process of law. Similarly, the right to continued possession and enjoyment of the plaintiffs over plaint B schedule item is quite unaffected by Ext.B10 partition deed. Ext.B10 is not binding on the plaintiffs and their right over plaint B

schedule item. In the result, this Regular Second Appeal is allowed in part, and the judgments and decrees passed by both the courts below are set aside. The suit is decreed in part by declaring that Ext.B10 is not binding on the plaintiffs and their right over plaint B schedule item. Further, the defendants and persons claiming under them are restrained by a decree of perpetual injunction from interfering with the peaceful possession and enjoyment of the plaintiffs over plaint B schedule item and from dispossessing the plaintiffs otherwise than through due process of law. The relief of declaration of title sought for by the plaintiffs is denied. The counter claim stands dismissed. In the nature of this appeal, the parties shall bear their respective costs. All pending interlocutory applications in this appeal will stand closed.