
(1955) 12 KL CK 0016
In the High Court Of Kerala
Case No : Second Appeal No. 411 of 1954

Venkiteswara Iyer

APPELLANT

Vs

Cheriyathu Mathen and Another

RESPONDENT

Date of Decision : 08-12-1955

Acts Referred:

Limitation Act, 1963 — Article 142

Citation : (1955) 12 KL CK 0016

Hon'ble Judges : Varadaraja Iyengar, J

Bench : Single Bench

Advocate : T.K. Kurien, for the Appellant; N.K. Job, for the Respondent

Judgement

Varadaraja Iyengar, J.—This second appeal arises out of a suit for eviction on the basis of title which has-been concurrently dismissed by both the courts below.

2. The Plaintiff's father purchased the disputed property in court-sale held on 14-10-1107 in, execution of the decree in O.S. No. 1179 of 1101 which had been passed against the father of Defendants 1 and 2 on foot of a hypothecation bond executed by him. Ext. A is the sale sannad. There was obstruction by the 1st Defendant at the time of delivery in execution. Overruling this obstruction the Plaintiff's father obtained delivery on 2-8-1108-under Ext. C delivery kychit.

The Plaintiff's case was that an oral lease of the property was given to the 1st Defendant in 1115 and rents were paid regularly till 1118, but the judgment of the High Court dated 19-11-1114 %| were thereafter defaulted. The suit was filed on 30-6-1121. It was in the first instance based upon the alleged oral lease but subsequently it was demanded into one on title.

3. The 1st Defendant denied the Plaintiff's. title and also the oral lease set up by the Plaintiff. He claimed that there was no actual delivery of possession under the sale sannad in favour of the Plaintiff's father. The possession of the property was on, the other hand continuously with his father until his death and thereafter with him. He also pleaded adverse possession and limitation.

4. The courts below concurrently found that the title was with the Plaintiff but that the oral lease was not true. They further held that the Plaintiff, had failed to prove possession within 12 years of the suit and therefore the suit was barred and accordingly "dismissed the suit. Hence this second Appeal by the Plaintiff.

5. The only question arising for determination in this second appeal is whether the Plaintiff has proved subsisting title in respect of the property. There can be no doubt that Article 142 of the Limitation Act applies to the case. When the Plaintiff alleged an oral lease of 1115 but the lease set up was found to be false the case was one of admitted discontinuance of possession, while the Plaintiff was in possession on the strength of title. The necessary averments to attract Article 142 were therefore already in the plaint and as such it was for the Plaintiff to prove that he had a subsisting title to the property on the date of the suit. In cases of this nature the Defendant in admitted possession of the property is not obliged to lead evidence to prove that his possession has been hostile for the statutory period. (See *Official Receiver of The Official Receiver of East Godavari Vs. Chava Govindaraju and Another*, *Sangam Lal Vs. Ganga Din and Others*, ; *Krishna Pillai v. Kumara Mlai*, AIR 1954 Ker 449 (C).

6. It may be taken that the Plaintiffs' father obtained actual physical, delivery as against the judgment-debtor, viz., the 1st Defendant's father as per Ext. C delivery kychit on 2-8-1108 but possession with the Defendants had admittedly commenced in any event from 1115 i.e., about six years before suit and continued right along till date of suit. The - station therefore is when exactly between 1107 and 1115 the Plaintiff was dispossessed or discontinued from possession.

Learned Counsel for Plaintiff depended upon certain records in O.S. No. 559 of 1107 which was a suit filed by Plaintiff's father against the 1st Defendant's father for enforcement of another hypothecation bond to prove the possession of the Plaintiff's father within this critical period 1107 to 1115. That suit was resisted by the first Defendant's father on the footing that the hypothecation bond in suit was only in the nature of collateral security for the effective execution of the decree in O.S. No. 1179 of 1101 which had led to the Court sale Ext. A ; and the delivery following it under Ext. C herein.

Ext. T. duled 8-4-1108 is the written statement "filed by the 1st Defendant's father in that case. Ext. F dated 30-2-1109 is the judgment of the trhl Court, Ext. K dated 17-2-1112 is the judgment of the District Court in the first appeal and Ext. B is the judgment of the High Court dated 19-11-1114 in the second appeal in that case. Learned Counsel says firstly that the statetnent in Ext. J that delivery has been given as per Exts. A and C amounted to an admission by the Defendants' father that possession following delivery continued right along at least till Ext. J. date viz., 8-4-1108.

It is doubtful whether the admission amounted to anything more than saying that the Court sale was followed by delivery. But even so the suit herein was filed

more than 12 years after Ext. J date and so Ext. J by itself cannot solve the difficulty for the Plaintiff. Plaintiff's learned Counsel then said that Exts. F, K and B judgments by the trial, appeal and second appeal Courts to the extent that they upheld Ext. J contention as to satisfaction by Court sale and delivery of possession must be taken to imply that possession continued with the Plaintiff's father on foot of the delivery till the respective dates of the judgments concerned.

It is impossible to accept this contention. For the onus which is thrown upon the Plaintiff to prove possession prior to the time when he was admittedly dispossessed and at some time within 12 years before the commencement of the suit can be said to be discharged only by proving such acts of ownership as are natural under the existing conditions of the property. The kind and the nature of possession that would suffice in any particular case would depend largely upon the character of the land, the locality and the use to which it can ordinarily be put. See *The Lord Advocate v. Lord Lovat*, (1880) 5 ACC 273 at 288 (D).

So it was held in *R.M.C.T. Ramanathan Chettiar (dead) and Another Vs. P.L.C. Lakshmanan Chettiar and Others*, , that possession to be proved must be such possession as the property is capable of or such as has been the normal methods of user usually and that when each party who claims possession is unable to prove any sort of effective possession and therefore the normal method of possession is not referable to any such act, possession must follow title since the Defendants are no more able than the Plaintiff to claim effective possession for 12 years before suit.

7. The question therefore is, has the Plaintiff been able to prove the requisite possession during this critical period? It is significant in this connection to notice that the Plaintiff has not even formally sworn to his possession and enjoyment. The property was without doubt capable of physical enjoyment and yielding profits. The Plaintiff himself had alleged that a sum of Rs. 60 had been fixed as the rent under the oral lease. If so there is certainly evidence lacking that the Plaintiff has had possession of property at any time within 12 years of the Suit.

It is not for the Defendant to prove that he had been in possession during this interval. References may in this connection be made to a case reported in *Karuthavva Thevar v. Karuthavva Thevar*. 1954 I Mad LJ 675: (AIR 1954 Mad 797)(F) where it was held that even though the Defendant could not show continuous enjoyment throughout 12 years still that fact will not absolve the Plaintiff of his obligation to show his own acts of enjoyment if the property was capable of enjoyment in a particular manner. The Suit in that case was in 1946. The Evidence showed that for some time prior to 1934 there was no exercise of any act of possession of the plaintiff.

8. In this case, we have got the further fact that the Defendant has let in evidence as to his continuous possession. Apart from oral evidence of D. Ws. 1 to 4 the 1st Defendant has proved Ext. I series evidencing allotment in his favour of export quota right issued from the Rubber Controllers Office from 1935

September till 1941 October i.e., the years between 1111 to 1117. The concurrent finding of the Courts below that the Plaintiff has been unable to prove subsisting title is therefore right.

9. In the result, the second appeal fails and is therefore dismissed with costs.

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10. The question therefore is, has the Plaintiff been able to prove the requisite possession during this critical period? It is significant in this connection to notice that the Plaintiff has not even formally sworn to his possession and enjoyment. The property was without doubt capable of physical enjoyment and yielding profits. The Plaintiff himself had; . alleged that a sum of Rs. 60 had been fixed as thftj rent under the oral lease. If so there is certainly?, evidence lacking that the Plaintiff has had posses. on of property at any time within 12 years of tht suit.

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