(1963) 05 AHC CK 0007

Allahabad High Court

Case No: Second Appeal No. 4186 of 1959

Lachhimi Nath Pathak and Another		APPELLANT
	Vs	
Bholanath Pathak and Others		RESPONDENT

Date of Decision: May 7, 1963

Acts Referred:

- Limitation Act, 1908 - Article 142, 144
- Specific Relief Act, 1877 - Section 42

Citation: AIR 1964 All 383

Hon'ble Judges: Mithan Lal, J

Bench: Single Bench

Advocate: A.P. Pandey, for the Appellant; G.N. Kunjru, for the Respondent

Final Decision: Allowed

Judgement

Mithan Lal, J.
This second appeal filed by of the defendants is directed against the judgment of Hari Har Sharan, Civil Judge, Allahabad, reversing the decree of the trial Court and decreeing the plaintiff''s suit.

2. The dispute related to a piece of land which was said to be part of No. 192 and which was in the form of an akhara. The plaintiff alleged that he had been in adverse proprietary possession of this land for more than twelve years but defendants Nos. 2 to 5 in collusion with defendant No. 1 started proceedings u/s 145, Cr.P.C. and obtained delivery of possession from the Court of the Magistrate. The plaintiff alleged that neither defendant No. 1 not any other defendant remained in possession of the land in dispute and consequently the present suit was filed for a mere declaration and injunction restraining the defendants not to take possession over the land in dispute. The relief for possession is conspicuously absent from the plaint.

3. The defence was that the land in dispute was not part of No. 192 and that the plaintiff had nothing to do with the land in dispute. It was said to belong to one Shiv Sahai alias Sahai who was the predecessor of defendants Nos. 2 to 6. It was further alleged that one Sita Ram started an akhara on the land in dispute sometime in the year 1931 and executed a sharkhat in favour of Lakshmi Nath defendant and the predecessor in interest of the other defendants and so Sita "Ram and after him defendant No. 1 remained in possession of the akhara on behalf of defendants Nos. 2 to 6. Plaintiff''s possession was denied.

4. The trial Court held that the plaintiff was not the owner of the land in suit nor had he acquired any title by adverse possession. The suit was accordingly dismissed. The lower appellate Court held that the land in dispute was part of No. 41/A which later on formed part of plot No. 192 and that it belonged to Shiv Sahai alias Sahai who was admittedly the predecessor in interest of the defendants. The earned Judge, however, came to the conclusion that the akhara existed in the land in suit and that the plaintiff having remained in possession his possession was adverse to the real owners. It was on this basis that the learned Civil Judge set aside the decree of the trial Court and granted the plaintiff a declaration and also a decree for injunction. Feeling aggrieved two of the defendants have filed this appeal.

5. Sri A.P. Pandey learned counsel for the appellant has raised two arguments in the case. The first is that the lower appellate Court gave an erroneous finding about plaintiff''s possession and in any case mere existence of an akhara on the land in dispute could not be deemed to be sufficient in law to prescribe a title by adverse possession in favour of the plaintiff particularly when the evidence did not prove any exclusive possession nor any hostile possession to the defendants who were the real owners. His second contention is, that after an order of delivery of possession in favour of the defendants in proceedings u/s 145, Cr.P.C., a mere suit for declaration and injunction was not maintainable.

Sri G.N. Kunzru learned counsel for the respondent while supporting the judgment of the lower appellate Court has contended that the finding of fact given by the lower appellate court is final and when that Court has found that the possession of the plaintiff was adverse this has to be accepted by this Court. According to him the possession of the plaintiff was adverse and the Court below was right in granting the plaintiff a decree. It is also his submission that when the plaintiff was already in possession despite the order of the criminal Court it was not at all necessary for him to claim the relief for possession.

6. In the instant case the plaintiff did not claim any title or ownership in the land in dispute other than the right by adverse possession. There was, therefore, no question of presumption of possession in plaintiff''s favour nor could the Court act upon the axiom ''possession follows title''. It has to be seen whether the plaintiff succeeded in proving such acts of possession as to constitute his adverse possession for more than twelve years. Mere possession on a vacant piece of land or

sharing of possession with others without any exclusive possession or without any hostile assertion against the real owner would not constitute adverse possession as has been recognised by all the High Courts. The person claiming right by adverse possession must show such possession as was exclusive besides being adequate in continuity, publicity and extent. This has not at all been proved nor the nature of possession which has been proved and accepted by the lower appellate Court is such as to make the plaintiff''s possession exclusive or adequate or even hostile.

7. According to the allegations in the plaint the only possession which was alleged was that the land in dispute was being used as akhara. Though it was stated in para 1 of the plaint that there was also a saiban on a portion of the disputed land yet no such saiban was shown in the site plan attached to the plaint. That site plan only shows an open piece of land with an akhara in the middle without any sort of constructions. In his statement, too, the plaintiff did not state anything more than his mere possession by the existence of an akhara for the last 28 or 30 years. He did not state a word that he had the exclusive control of the akhara or that he was managing the same or incurring any expenditure over the maintenance of the akhara or that the persons who went to the akhara went with his permission or consent.

The lower appellate court also placed reliance upon the statement of Sri Devi Shankar D.W.3 to support of the plaintiff''s case but that, court again erred in thinking that the statement of this witness in any way helped the plaintiff. According to the lower appellate court what this witness stated was that the akhara was got constructed toy the mohalla walas and Sita Ram Pahalwan (admittedly the brother of defendant No. 1) was the ustad of the akhara. In 1934 Sita Sam ustad used to conduct the kustis and after him perhaps his brother conducted the kustis and that Bhola Nath plaintiff also used to get this akhara opened and closed. It passes ones comprehension how this statement shows any sort of adverse possession. If it shows anything it shows that the akhara was not exclusive of the plaintiff nor was in his exclusive possession. The akhara having been constructed by mohalla walas in which Sita Ram Pahalwan was the first ustad and thereafter his brother and now the plaintiff it could not be treated to be in the exclusive possession of the plaintiff.

The lower appellate court further committed an error in placing reliance upon the statements of Munna P. W. 3 and Shiam Babu P. W. 4 who according to the lower appellate court itself, had no knowledge of plaintiff''s possession prior to twelve years. Even accepting that the plaintiff had some sort of control for a few years past over the akhara in dispute such a control did not at all go to the extent of acquiring any title by adverse possession. The lower appellate court appears to have been labouring under the impression that mere proof of possession was enough but that court forgot that any sort of temporary possession of vacant piece of land used as an akhara by the plaintiff and others could not amount to plaintiff''s adverse possession unless such possession was notorious, exclusive and hostile. To

constitute adverse possession it is further necessary that there must be animus possidendi and the possession which was claimed was irreconcilable with the right of the true owner. "This again was not shown.

8. The parties'' learned counsel have made a reference to a number of authorities. On behalf of the appellant the first authority referred to is the case of B. Budhram Rai Vs. Benarsi Rai and Others, . The learned single Judge who decided that case observed:

"There can be no adverse possession without an animus or intention. The question of animus is a question of personal equation and all depends upon the will of the person in possession. So long as the intention to prescribe is lacking there can be no question of adverse possession."

The learned Judge who decided that case relied upon certain observations in the case of Lalit Kishore Vs. Ram Prasad, . With respect I agree with the learned single Judge that acts of possession must be accompanied by requisite animus or intention. A reference was also made to two Privy Council cases of the Secy. of State for India v, Chelikani Rama Rao 43 Ind App 192: (AIR 1916 PC 21) and the well known Bhowal Sanyasi''s case, AIR 1947 19 (Privy Council) In the first case the Privy Council recognised the established principle of law by stating:

"Nothing is better settled than that the onus of establishing property, by reason of possession for a certain requisite period lies upon the person asserting possession .... It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession."

In the second of these cases their Lordships held that there can be no intention of adverse possession when it was said that the person who claimed title was dead. Their Lordships observed that possession in order to be adverse must be against a living person.

9. Sufficiently direct case on the point is the Division Bench authority of the Madras High Court in Makina Atchayya Patrudu Vs. Jalaluddin Sahib and Others, . In that case an Arabic school was conducted on a vacant piece of land. There was also a thatched shed constructed for conducting the lectures and meetings. It was held by the learned Judges with whose view I respectfully agree that:

"The possession of the wrong doer 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. There ought to be nothing equivocal in a possession which is relied upon as a bar. ..... 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."

After applying these principles it was held that the possession of the Arabic school was not adverse.

10. The Patna High Court in the case of Dipnarain Rai and Others Vs. Pundeo Rai and Others, discussed the requirements of adverse possession and held:

"The classical requirements of adverse possession are that the possession must be adequate in continuity, in publicity and in extent. The mere exercise of possession exclusively and continuously would not be enough in all cases to show that the true owner, if vigilant, would be aware of what was happening,"

It is not necessary to describe the facts of that case but the view of that Court was that mere exercise of possession is not always enough. It should further be shown that the true owner was aware of the hostile acts. The Patna High Court while laying down the above dictum of law considered a number of authorities including Privy Council Cases and the cases of this Court and laid down the above proposition. One thing which may further be stated is that ail the ingredients of adverse possession may not be present in every case. The requirements to make possession adverse may vary according to the facts and circumstances of a particular case or the relationship between the parties. Under certain circumstances particular acts may amount to ouster of others but if there is certain relationship between the parties such acts may not in other cases amount to dispossession or ouster. In determining the question of adverse possession the Court has to take into consideration the facts of each case and the circumstances under which the right by adverse possession is claimed. As stated earlier the plaintiff claimed right in the disputed land by adverse possession only on account of the existence of an akhara but the facts of the case as stated earlier would go to show that the plaintiff''s possession was neither exclusive nor could it be treated to be hostile nor adequate to the extent as is contemplated by law.

11. Learned counsel for the respondent made a reference to the case of Laxmi Narain v. Mohd. Shafi AIR 1949 EP 141 but the learned Judges who decided that case did not lay down any different dictum of law. That case related to wakf property and what the Division Bench has held is that the Limitation Act also applied to wakf property as much as to private property and a person could by adverse possession acquire a title against the wakf. This case is based upon the observations of the Privy Council in the case of AIR 1940 116 (Privy Council) In this case their Lordships of the Privy Council observed that right by adverse possession can be acquired against wakf property because it was impossible to read into the Indian Limitation Act any exception for property made wakf for purposes of a mosque. Their Lordships upheld the findings of the Punjab High Court that the Muslims having been denied all rights and the mosque not having been used as a place of worship by the Muslims since it came into Sikh''s possession and control the possession of the Sikhs

was adverse. There is nothing in this case which detracts from the dictum of law enunciated earlier.

12. It has already been stated earlier that the sort of possession the plaintiff alleged or claimed in the disputed land was neither exclusive nor was it hostile to the title of the defendants nor could it be treated to be notorious or adequate in its extent. The learned Civil Judge was wrong in upsetting the decree of the trial Court and upholding the plaintiff''s claim of adverse possession.

13. The second argument put forward by the learned counsel for the appellants relating to the defective nature of the reliefs claimed, has also to be accepted. In this case an order had been passed in proceedings u/s 145 Cr. P. C. delivering possession of the property to the defendants. Consequently a mere suit for declaration, and injunction was not maintainable. In such a case the finding of the criminal court that the defendants were in possession has to be accepted. In this case the possession having been delivered to the defendant it must be held that they continued in possession of the property until they were evicted in due course of law. Mere allegation in the plaint that the plaintiff was in possession of the property on the date of the suit or that the order u/s 145. Cr. P. C. was wrong could not entitle the plaintiff to claim a mere relief of declaration and injunction. He should have claimed a relief for possession. A similar view was taken by the Lahore High Court in the case of Sewa Das v. Ram Parkash AIR 1947 Lah 173. The learned counsel for the respondent has not been able to cite any authority expressing a different view. The suit was also bad for this reason. The appeal must succeed.

14. The appeal is allowed with costs; the judgment and decree of the lower appellate court are set aside while that of the trial court are restored. The plaintiff''s suit is hereby dismissed with costs throughout.