Mohd. Ibrahim and Another Vs The Secretary to the Government of India, Ministry of Defence and Others

Court: Andhra Pradesh High Court

Date of Decision: Nov. 24, 1995

Acts Referred: Evidence Act, 1872 â€" Section 114
Limitation Act, 1963 â€" Article 65

Citation: (1996) 2 ALT 950

Hon'ble Judges: S. Dasaradharama Reddy, J; Lingaraja Rath, J

Bench: Division Bench

Advocate: K. Subrahmanya Reddy, for R. Subhash Reddy, in LPA No. 205/91 and A. Pulla Reddy, in LPA No. 211/91, for the Appellant; K. Subrahmanya Reddy, for R. Subhash Reddy, in LPA No. 211/91, A. Pulla Reddy, in LPA No. 205/91 and P. Innayya Reddy for Respondents 1 to 4 in LPA No. 205/91 and for Respondent Nos. 1 to 3 in LPA No. 211/91, for the Respondent

Final Decision: Allowed

Judgement

Lingaraja Rath, J.
These appeals arise out of a reversing judgment of a learned single Judge of this court dismissing the suit brought by the

two appellants for recovery of possession and eviction of respondents from the suit land and for mesne profits.

2. The Original Suit, O.S. No. 1569 of 1981 had been brought by Mohammed Ishaque as the plaintiff but he having died during the pendency of

the suit his son plaintiff No. 2 and nephew P.W. 3 respectively appellants in LPA Nos. 205 and 211 of 1991 were substituted.

3. The case of the plaintiffs was that plaintiff No. 1 had purchased the disputed land, Act. 3-677 sq.yards, now it is in the AOC Centre,

Secunderabad, by registered sale deed dated 23-1-1946 and was possessing and cultivating the land but that the land was encircled by the AOC

Centre for which a notice was issued to the Comandant, AOC Centre on 2-11-1953 seeking eviction of the land. A reply was sent by the

Commander, Ex.A-16 on 1-12-1953 stating that Ac. 4-00 of land which was within the AOC Centre perimeter around which a fencing was

erected more erroneously than intentionally, was ploughed and crops were grown by the Unit and that on the complainant representing the matter,

he had been requested that if he had no objection, the fencing would be removed after the crop was ready for cutting and that the complaint had

agreed to this request. Even so the plaintiff No. 1 was not put in possession of the property and at the instance of the parties a joint survey was

conducted on 6-4-1978 and a panchanama was prepared showing the plaintiffs'' land to have been encircled by the AOC Centre but that the

panchanama was not signed by the Commander. A notice was issued by the AOC on 20-8-1981 asking the 1st plaintiff to remove the mulgies

erected by him upon the land on which a notice was given u/s 80 CPC by the 1st plaintiff on 11-10-1981 claiming the reliefs in the suit. The suit

registered as O.S. No. 1569 of 1981 was thereafter instituted for the reliefs claimed. Contesting the suit the only defence taken was that the land

was shown as being within Ac.118-15 cents in the General Land Register, a statutory register, as belonging to AOC. The trial Court found the

plaintiffs to have title to the land and decreed the suit. But on appeal the learned single Judge held the suit to be barred by limitation holding the

respondents to have perfected title against the appellants by adverse possession and that the suit for the purpose was barred by limitation as the

respondents were possessing the land adversely to the appellants for more than twelve years from the date of the institution of the suit.

4. Urging the appeal Mr. Subrahmanya Reddy, learned counsel for the appellants urges the single question of the judgment of the learned single

Judge being vulnerable in law as the respondents never raised the question of adverse possession in the defence, no issue was struck on the

question, no evidence was led in the matter and hence it being not case of the parties, it is not open to the Court to have made out a third case. It is

his submission that the specific case of the respondents was not perfection of title by adverse possession but on the contrary asserting a title in

themselves, on the basis of the inclusion of the land in the General Land Register and denying the title of the plaintiffs to the land.

5. The suit was clearly one brought by the plaintiff on the basis of their title. The suit is clearly under Article 65 of the Limitation Act. In such a suit,

it is the well settled position of law, that the plaintiff has only to establish his title in respect of the land and if the title is established he is entitled to

the decree unless the defendant sets up a plea of adverse possession and establishes to have perfected an adverse title, thereby destroying the title

of the plaintiff in the land.

6. Once the initial title of the plaintiff is established the onus is upon the defendant to establish the plea of adverse possession. It is equally well

settled that when the suit is based upon title and the title is denied on the basis of adverse possession, such plea has to be specifically raised and

established through evidence. Unless the plea is raised, even leading of evidence on such issue is barred as no evidence can be adduced which is

not in consonance with the pleadings. It is conceded that the respondents did not raise the plea of adverse possession. As has been rightly

submitted, the very case of the respondents was asserting title in themselves and the appellants as not having title to the land. On the contrary,

when a plea of adverse possession is raised it is basically first of all admission of the antecedent title of the plaintiff and then thereafter destruction

of the same through adverse possession. But this is a case where the respondents did not admit the prior title of the appellants.

7. The requirement that specific plea regarding adverse possession is to be raised and evidence to be led is a requirement in law since all

possessions are not adverse possessions. ""Adverse possession"", to satisfy the tests, must be with hostile animus against the real owner. The three

ingredients to be satisfied are, as is commonly known on the nec vi, nec clam and nec precario. A mere permissive possession is not adverse. All

the ingredients and particularly possession with hostile animus are questions of fact for which evidence has to be led with opportunity to the parties

to cross-examine the witnesses. We are fortified with this view by the decision in Vidya Devi alias Vidya Vati (Dead by L.R"s) Vs. Prem Prakash

and others, wherein the apex Court observed in paragraph 34 as under :

What, however, emerges from a perusal of the pleadings contained in the written statement filed on behalf of the respondent is that the plea of

adverse possession had not been specifically raised by setting out all the requisite ingredients which had necessarily to be pleaded in order to

constitute the case of acquisition of title by adverse possession. Unless, the pleadings are complete and all the necessary ingredients to constitute

ouster by adverse possession are set out in the written statement, the plea relating to the title of the property in question cannot be said to have

been raised and, therefore, there was no occasion to frame any issue on the question of the or to refer it to the civil court. The judgment passed by

the Delhi High Court cannot be sustained and must, as proposed by esteemed brother Venkatachala, J. be set aside, though for different reasons,

set out above.

8. Dealing with the question, a Full Bench of the Punjab High Court in Ganda Singh and Others Vs. Ram Narain Singh, observed:

The plea of adverse possession is not always a legal plea. Indeed, it is always based on facts which must be asserted and proved. A person who

claims adverse possession must show on what date he came into possession, what was the nature of his possession, whether the factum of his

possession, was known to the legal claimants and how long his possession continued. He must also show whether his possession was open and

undisturbed. These are all questions of fact and unless they are asserted and proved, a lea of adverse possession cannot be inferred from them.

Therefore, in normal cases an appellate Court will not allow the plea of adverse possession to be raised before it. There are no doubt some cases

in which the plea will be allowed because in some form the allegation upon which it can be raised was made at the time and the facts necessary to

prove the plea were brought before the Court and proved.

9. As regards the ingredients to be proved to establish adverse possession it was stated in Makina Atchayya Patrudu Vs. Jalaluddin Sahib and

Others, as under:

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 properly 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. Possession cannot be adverse unless the owner is in denial of his title excluded from enjoyment. 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.

10. In the decision in The State Bank of Travancore Vs. Aravindan Kunju Panicker and Others, it was held that in the absence of evidence to

show that the person or his successor in interest asserted any hostile title to the suit property to the knowledge of the true owners at any time

before the suit, their possession cannot be said to be adverse possession.

11. Discussing the question ""Whether the suit is in time, it was observed in the judgment under appeal as follows:

The plaint allegations do not reveal that the suit is based on previous possession and not on title on the allegation that the original plaintiff while in

possession of the property has been dispossessed. So, Article 64 of the Limitation Act (hereinafter referred to as ""the Act"") has no application. On

the other hand, the original plaintiff sought the relief of possession of the suit property based on title. Hence Article 65 of the Act applies and the

starting point of limitation is when the possession of the defendants became adverse to that of the original plaintiff.

With respect we are to observe the approach being not legally sound as the enquiry was not to be, when a suit is under Article 65 of the Limitation

Act to infer that the starting point of Limitation is when the possession of the defendant becomes adverse unless such a plea has been raised at all.

On the contrary if a suit is brought on title, the suit has to be ipso facto decreed for possession if the title is established and the question of limitation

for the suit would arise only when a plea of adverse possession is set up and it is then for the defendant to establish that the plaintiff has not been in

possession of the suit land within twelve years of the suit. The judgment proceeds on the footing as if the respondents were possessing the land by

way of adverse possession and went on to decide as to whether the possession was not adverse but was permissible at the instance of the

appellants. Such question does not arise for consideration.

12. Mr. P. Innayya Reddy, learned standing counsel for the Central Government while fairly conceding this position of law yet raises the question

15 that the appellants cannot succeed without first of all establishing the title to the land and it is his submission, that there is no proof of title of the

appellants to the land. It is argued that the entire title to the land is deduced from Ex. A-16, the communication from the Commandant,

Headquarters AOC Centre on 1-12-1953 saying that the land of the appellants had been fenced more erroneously than intentionally but that by

itself would not amount to establishment of title by the appellants and hence the suit cannot be one for possession based on title. The issue of title of

the appellants was specifically framed as issue No. 1 by the trail Court. Issue Nos. 1 and 2 are as follows:

(1) Whether the plaintiff is the owner and pattedar of the suit schedule land?

(2) Whether the possession of the defendants on the suit schedule land is illegal and unauthorised?

Both the issues are taken up together and on an analysis of the evidence on 30 record including the deed of purchase the appellants were found to

have title to the land. Ex. A-16 is not the only document for the purpose. Of course, the appellants in their pleadings did not refer to the date of

purchase of the land in 1946 and it was only mentioned that the land has been purchased through registered sale deed in 1946. An application has

been made under Order 41 Rule 27 CPC to accept the sale deed as additional evidence. The application has been registered as CMP No. 15551

of 1995 in LPA No. 205 of 1991. It is submitted that the sale deed could not be traced earlier. We are not prepared to introduce additional

evidence at this stage and we accordingly reject the application. However we do not think that on that count there is any difference so far as

appreciation of the question is concerned. The respondent never denied the purchase in 1948. Ex. A-14 is the pahani relating to the land in the

year 1977-78. Ex. B-8 is the pahani relating to the land in the year 1980-81. Both the pahards show the plaintiff No. 1 as pattedar of the land. Ex.

B-8 is the document filed by the respondents and hence they would be bound by the entry therein. That apart, the pahanis are prepared in the

usual course of official business of preparation of Records of Rights and hence there is a due presumption that the entries made therein have been

made in due performance of official duties. They are hence to receive weightage in evidence particularly when there is no other rebutting evidence

to the contrary. The learned single Judge also proceeded on the same footing of the appellants having title and that is why the question of perfection

of title by the respondents by adverse possession arose. There being thus consistent findings on such a question of fact there is nothing to disturb

that finding now particularly when we are not convinced on merits of the findings to have been reached without evidentiary support.

13. In that view of the matter we do not find the judgment under appeal to be sustainable under la w which is set aside and that of the trial Court is

restored. The appeals are allowed with costs.