

SUPREME COURT OF INDIA

M.Durai

Vs

Madhu & Anr.

(S.B.Sinha and Markandeya Katju, JJ.)

11.01.2007

JUDGMENT

S.B. Sinha, J.

1. The Plaintiff is in appeal before us from a judgment and decree dated 16.2.1999 passed by the High Court of Judicature at Madras in Second Appeal No. 671/87 whereby and whereunder the appeal preferred by the respondents herein from a judgment and order dated 25.11.1986 of the Subordinate Judge, Tiruvallur, Tamil Nadu which in turn reversed the judgment and decree dated 10.9.1984 dismissing the Suit of the appellant was allowed. The plaintiff claimed title over the suit property by reason of a deed of sale dated 19.8.1978. The respondents, admittedly, are in possession of the said property. As the respondents refused to vacate the suit land, the aforementioned suit was filed. The respondents in their written statement, inter alia, contended as follows:

"...The Plaintiff is not the owner of the suit items. These defendants are living in the Cherinatham and the defendants are in continuous, open and uninterrupted possession of the house site and the backyard, in the backyard, there are very huge Othia trees, date trees, Portia trees and other trees which are there for generations. They were planted by the defendants' ancestors. These defendants have also perfected title to the said portions in their occupation for more than the statutory period."

2. The learned trial Judge framed several issues; one of them being "Whether the defendants perfected title to the suit property by adverse possession?"

3. As indicated hereinbefore, the learned trial Judge dismissed the suit of the appellant holding that the defendants have perfected their title by remaining in possession of the suit land for a period of more than twelve years. In the appeal preferred thereagainst by the appellant, the Subordinate Judge, Tiruvallur reversed the said findings of the learned trial Judge holding as follows:

"There is no proof to the order to say that the vendor of the suit property who sold the same to the plaintiff in 1969 had the knowledge of the Defendant's possession over the property, that though he sold the land to the extent of 1.59 acres in Survey No. 83,

the possession was obtained only after deducting the 5 cents of the land under the possession and the defendants and that the same was the intention of the plaintiff and further as pointed out by the learned counsel for Appellant that the order of the Lower Court that it is the intention of the plaintiff is only the Lower Court's assumption.”

4. A Second Appeal there against was filed by the respondents. The High Court framed the following substantial question of law:

"Whether the Lower Appellate Court is correct in having reversed the judgment of the trial court without even adverting its attention to important question like adverse possession and without even considering the evidence available on record, but misguiding itself by a strange proposition that the burden lies on the defendants in this case whereas the onus is entirely on the plaintiff to prove the case put forward by him?"

5. The High Court sought to appreciate the entire evidence and came to the following conclusion:

".....The trial Court on a careful analysis of the entire evidence has considered that the physical possession of the plaintiff excludes the defendants' possession and actually the extent to the west of the suit property alone was in the physical possession and enjoyment of the plaintiff, which extent was alone in the possession and enjoyment of the vendor. Even though an extent of 1.59 cents was conveyed to the plaintiff under Ex.A.1, the evidence adduced proves that only the defendants are in possession and enjoyment of the suit property for over the statutory period. So the judgment and decree passed by the first Appellate Court has to necessarily be interfered with. It is for the plaintiff to establish his title over the suit property. Even though the judgment and decree of the first Appellate Court being based on facts, cannot be interfered with in this Second Appeal, the first appellate court has not considered the evidence adduced in coming to such conclusion and this has necessitated this Court to interfere with the finding of the first Appellate Court in the Second Appeal."

6. Learned counsel appearing on behalf of the appellant inter-alia submitted that the purported substantial question of law formulated by the High Court was mis-conceived inasmuch as in terms of Article 64 and 65 of the Limitation Act, 1963, the burden of proof to establish that they had perfected their title by remaining in possession would be on the defendants. We see force in the submissions of the learned counsel.

7. The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act 1908 vis-À-vis Limitation Act, 1963 is evident. Whereas in terms of Article 142 and 144 of the old Limitation Act, the Plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession.

8. The High Court, therefore, evidently formulated a wrong question.

9. This aspect of the matter has since been considered by this Court in *Saroop Singh Vs. Banto & Ors*¹. wherein it was held thus:

"28. The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the Schedule appended to the Limitation Act, 1908, in terms whereof it was imperative upon the plaintiff not only to prove his title but also to prove his possession within twelve years, preceding the date of institution of the suit. However, a change in legal position has been effected in view of Articles 64 and 65 of the Limitation Act, 1963. In the instant case, the plaintiff respondents have proved their title and thus, it was for the first defendant to prove acquisition of title by adverse possession. As noticed hereinbefore, the first defendant-appellant did not raise any plea of adverse possession. In that view of the matter the suit was not barred.

29. 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 ommences From The Date The Defendant's Possession Becomes Adverse. (See Vasantiben *Prahladji Nayak Vs. Somnath Muljibhai Nayak*².)

30. "Animus Possidendi" is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita SCC para 21.)"10. Yet again in *T. Anjanappa & Ors. vs. Somalingappa & An*³. this Court opined as under:

"Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. The person setting up adverse possession may have been holding under the rightful owner's title e.g. trustees, guardians, bailiffs or agents....."

11. It was further more held as under:

"It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being

known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

12. In view of the aforementioned authoritative pronouncements of this Court, we are of the opinion that the impugned judgment cannot be sustained and this should be set aside and the matter be remitted to the High Court for consideration of the Second Appeal afresh after formulating an appropriate substantial question of law arising, if any. The appeal is allowed. No costs.

Judgment Referred.

¹(2005) 4 Suppl. SCR 0253

²(2006) 7 SCC 0570