

KERALA HIGH COURT

Kuttan Narayanan

Vs

Thommsan Mathayi

Second Appeal No. 901 of 1961, in A. S. No. 104 of 1959

(Velu Pillai and T.S. Krishnamoorthy Iyer, JJ.)

29.10.1965

JUDGMENT

T. S. Krishnamoorthy Iyer, J.

1. The second appeal which is filed by the defendant has been referred to the Division Bench by Madhavan Nair J. in view of the conflict of decisions on the question of law to be decided.

2. The suit is filed by the respondent for declaration of title and recovery of possession of the plaint items on the ground that he was dispossessed by the appellant on 26-12-1955. Item No. 1 covers an extent of 7 cents and item No. 2 is a hut standing in item No. 1. The appellant contended that item No. 1 is a poromboke land belonging to the State and since the respondent has no title he is not competent to recover possession of the items from the appellant. The courts below found that item No. 1 is a poromboke land, but the respondent was in possession of the property until he was dispossessed by the appellant on 26-12-1955. The trial Court dismissed the suit holding that the suit is not maintainable as the respondent has no title to the property and his only remedy was to have filed a suit under Section 9 of the Specific Relief Act, 1877, hereinafter referred to as the 'Act'. The Subordinate Judge took the view that the respondent on the basis of his prior possession is entitled to recover possession of the property from the appellant who has no title and who is only a trespasser even apart from Section 9 of the Act and thus decreed the suit.

3. The sole question for decision in the appeal is whether in a suit for declaration of title and recovery of possession filed beyond six months from the date of dispossession, the respondent can merely on the strength of his prior possession which has not extended for the full statutory period and ripened into an absolute title, recover possession from the appellant who is a mere trespasser and who has no title.

4. If the person is dispossessed of immovable property otherwise than in due course of law, he has a summary remedy under Section 9 of the Act for recovery of possession notwithstanding any title. The sole point which has to be determined in such a suit is whether the plaintiff was in possession within six months prior to the suit and whether he was dispossessed

by the defendant otherwise than in due course of law. Title is no defence in such a suit. When a person dispossessed of immovable property by a person who has no title and who is a trespasser does not sue within six months. For recovery of possession under Section 9 of the Act, can he bring a suit for recovery of his possession relying on his prior possession ? On this point the authorities are not uniform.

5. The statement of law is thus summed up in Pollock and Mulla, Indian Contract and Specific Relief Act, 8th edition, page 753. :

"If a suit is brought under this section within six months from the date of dispossession, all that the plaintiff has to prove to entitle him to a decree is previous possession; he has neither to allege nor prove title. If the suit is not brought until after six months from the date of dispossession, the plaintiff cannot recover on the strength merely of his previous possession; he can recover only if he proves his title to the land. But what if the suit is one for possession against a trespasser, land is, one who has no title to the land ? Is it necessary in such a case for the plaintiff to succeed that he should prove his title, or is it sufficient if he proves his previous possession ? On this point there is a conflict of decisions between the High Courts of Bombay, Allahabad Madras and Patna on the one hand, and the High Court of Calcutta on the other hand. According to the Bombay, Allahabad, Madras and Patna High Courts the plaintiff is entitled to succeed if he proves his previous possession; it is not necessary for him either to allege or prove his title. According to the Calcutta decisions, the plaintiff is not entitled to succeed if he merely proves his previous possession, for the plaintiff to succeed he should allege and prove his title, at the least possessors title, i.e., possession for twelve years. The distinction between the two conflicting views may be explained by an illustration; alleging that he had been in quiet and undisturbed possession of certain land for eleven years and six months and that he was forcibly ousted from possession by B, who never had the title to the land at all, sues B. 8 months after the date of dispossession for possession. A has no title to the land at all, but it is proved that he had been in possession as alleged B also has no title of any kind to the land. Is A, entitled to a decree ? According to the Bombay, Allahabad, Madras and Patna decisions, he is. These Courts proceed upon the principle of English Law, also recognized in India, that possession is a good title against all but the true owner and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses, and they hold that this principle is not in any way affected by the provisions of the present section (Section 9 of the Act). According to the Calcutta High Court, A's possession being for a period less than 12 years, he is not entitled to possession, though B has no title. According to that Court the only case in which a plaintiff having no title can succeed against a trespasser on the strength of his previous title is that provided for by the present section, and that unless the suit is brought within 6 months from the date of dispossession, he is not entitled to any relief."

6. Possession by itself is a substantive right recognized by law and has legal incidents attached to

it apart from ownership. Even before the acquisition of statutory title by adverse possession for the requisite period under the Limitation Act, the possessory owner has well defined rights in property. It is now settled beyond all dispute that this interest is heritable, devisable and transferable. This interest is referred to as possessory title as distinct from proprietary title. A person having such interest must be allowed to enforce those rights against all the world except those who have a better title or better right than himself. Salmond on Jurisprudence. Eleventh edition, observes at page 345.

"In English law possession is a good title of right against any one who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself " and at pages 473 and 474 it is observed :

"On the other hand, the thing of which possession is taken may already be the property of some one else. In this case the title acquired by possession is good, indeed, against all third persons, but is of no validity at all against the true owner. Possession, even when consciously wrongful, is allowed as a title of right against all persons who cannot show a better, because a prior title in themselves. Save with respect to the rights of the original proprietor, my rights to the watch in my pocket are much the same, whether I bought it honestly, or found it or abstracted it from the pocket of some one else. If it is stolen from me, the law will help me to the recovery of it. I can effectually sell it, lend it, give it away or bequeath it, and it will go on my death intestate to my next of kin. Whoever acquires it from me, however, acquires in general nothing save my limited and imperfect title to it, and holds it, as I do, subject to the superior claims of the original owner.

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If a possessory owner is wrongfully deprived of the thing by a person other than the true owner he can recover it. For the defendant cannot set up as a defense his own possessory title since it is later than and consequently inferior to, the possessory title of the plaintiff. Nor can he set up as a defense the title of the true owner - the *jus tertii* as it is called; the plaintiff has a better, because an earlier, title than the defendant, and it is irrelevant that the title of some other person, not a party to the suit, is better still. The expediency of this doctrine of possessory ownership is clear. Were it not for such a rule, force and fraud would be left to determine all disputes as to possession, between persons of whom neither could show an unimpeachable title to the thing as the true owner of it." Pollock and Wright in their book 'Possession in the Common Law' expressed themselves thus at page 91 :

"Existing possession, however acquired, is protected against any interference by a mere wrongdoer; and the wrongdoer cannot defend himself by showing a better title than the plaintiff's in some third person though or under whom he does not himself claim or justify. 'Any possession is a legal possession'- i.e. lawful and maintainable - against a wrong doer." and at page 95 :

"It would be possible at first sight to suppose that, as between a succession of independent occupiers who were all wrongdoers as against the true owner, the law must be indifferent,

with the result of conferring an absolute title upon the person who happens to be in possession when the time of limitation expires. Reflection, however, shows this to be contrary to the reason and principles of the law. Possession being once admitted to be a root of title, every possession must create a title which, as against all subsequent intruder has all the incidents and advantages of a true title. In the language of the modern authorities. 'Possession is good title' - nothing less - 'against all but the true owner'."

7. The English doctrine of possessory title is expressed in the following terms by *Cockburn. C.J., in Asher v. Whitelock*¹.

"I take it to be established by authority that possession is good against all the world except the person who can show a better title than the one in possession *Doe d Hughes v. Dyeball*². shows that possession, even for a year, is sufficient against a mere subsequent possession. The whole law of disseisin was founded upon the principle that the disseisin gives title to the disseisor against all the world but the disseisee."

8. Their Lordships of the Judicial Committee of the Privy Council in *Perry v. Clissold*³, decided :

"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title."

9. The above is certainly the doctrine of English Law. The rule of English Law that possession is good title against all but the true owner has been adopted by the decisions of the Indian High Courts and also by the decisions of the Judicial Committee of the Privy Council in the Indian cases. In *Khajah Enactoollah Chowdhry v. Kishen Soondui Surma*⁴, Dwarkanath Mitter, J. posed the question thus :

"Can the Civil Courts give a decree for immovable property on the bare ground of illegal dispossession in a suit brought after six months from the date of such dispossession, it being borne in mind, however, that the defendant has failed to prove his own title to the same ?" and answered the same in the following terms :

"But we do not see any reason why a mere wrongful dispossession should require proof from his adversary of anything beyond the illegal dispossession complained of. He himself has not got and never had any title to the land. The act of dispossession committed by him has been entirely without any sanction from law. Justice and equity require that he should be compelled to restore the party wronged by him to the same position which the latter enjoyed before the

¹(1865) 85 LJQB 17

³1907 AC 73 at p. 79

²(1829 Moo and M 346)

⁴(1867) 8 Suth WR 386 at pp. 387 and 388

date of the illegal ejection. To adopt the contrary view appears to us to be tantamount to holding out a premium in favour of wrong and violence" and in *Hari v. Dhondi*⁵, Sir Lawrence Jenkins, C.J. said :

"Possession is evidence of ownership, and is itself the foundation of a right to possession." and Subramania Ayyar, J. in *Mustapha Saheb v. Santha Pillai*⁶, said :

"that the rule of law that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that "possession was without any title" is so firmly established as to render a lengthened discussion about it quite superfluous."

10. In *Sundar v. Parbati*⁷, decided by their Lordships of the Judicial Committee of the Privy Council, the suit was for partition and recovery of possession filed by the junior widow of a deceased Hindu against the senior widow who denied the junior widow's right to separate possession and contended that she was entitled to manage the whole estate. The Subordinate Judge decreed the plaintiff's suit. A Bench of the Allahabad High Court reversed the decree of the Subordinate Judge and dismissed the suit. Lord Watson delivering the Judgment of the board, observed at page 57 :

"If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahman cannot lawfully adopt his own sister's son. But apart from that question, and also from any question touching the legal effect of Baldeo Sahai's will the fact of joint possession by the two widows of the estates which belonged to the testator, ever since the death of Premsookh in 1879, appears to them to be sufficient for disposing of this suit in favour of the appellant. Their Lordships are at a loss to understand, at all event to appreciate, the grounds upon which the Chief Justice endeavours to differentiate between the authorities which he cites, the import of which he correctly states, and the position of the parties to this action. Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances, it does not admit of doubt that they were entitled to maintain their possession against all comers except the heirs of Premsookh or of Baldeo Sahai, one or other of whom it is unnecessary to say which is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them. It is impossible to hold that a joint estate is not also partible; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be reversed, and that of the Subordinate Judge restored.

The above principle was reiterated by their Lordships of the Judicial Committee in *Ismail Ariff v. Mahomed Ghous*⁸, At page 843 their Lordships observed :

⁵(1906) 8 Bom LR 96

⁷(1890) ILR 12 All 51 (PC)

⁶(1900) ILR 23 Mad 179 at p. 182

⁸(1893) ILR 20 Cal 834 (PC)

"It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By Section 9 of the Specific Relief Act (Act 1 of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession. The Appellate Court, in accordance with the judgment above quoted, has dismissed the suit. Consequently, the defendant may continue to wilfully, improperly and illegally interfere with the plaintiff's possession, as the learned Judge' say he has done, and the plaintiff has no remedy. Their Lordships are of opinion of it, the suit should not have been dismissed; and that the plaintiff was entitled in it to a declaration of his title to the land."

The principle underlying the rule that possession is a good title against all the world except the person who can show a better title is stated thus in *Narayana Row v. Dharmachar*⁹,

"The principle underlying the rule of law in question seems to be that acquisition of title by operation of the law of limitation being a lawful mode of acquiring title, the person in peaceable possession is entitled to maintain such possession against all but the true owner and that therefore a third party who has no better title than the person in possession has no right to invade upon the possession of the latter and interrupt or arrest his lawful acquisition of title by his continuing to remain in possession for the statutory period, it is the true owner alone that is entitled to assert his title as against the person wrongfully in possession, and prevent such wrongful possession ripening into prescriptive title. But a third party who without deriving title under the true owner and without his authority, interrupts such possession before it has ripened into prescriptive title, is a trespasser, not only against the true owner, but also against the party actually in possession; and, subject to the law of limitation, either of them is entitled to maintain a suit in ejectment against such in under as a trespasser."

11. We are therefore of the view that a person in juridical possession, if dispossessed by a trespasser without title, can recover possession on the sole ground of his prior possession even beyond six months from the date of dispossession and this is enough to dispose of the second appeal.

12. But the learned advocate for the appellant relying on the decision in *Nisa Chand Gaita v. Kanchiram Bagani*¹⁰, submitted that mere previous possession for any period

⁹(1903) ILR 26 Mad 514 at p. 518

¹⁰(1899) ILR 26 Cal 579

short of the statutory period of twelve years will not entitle a plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession, even if the defendant could not establish any title to the disputed land. The point which arose for decision in (1899) ILR 26 Cal 579 was whether the plaintiff is entitled to a decree merely upon proof of previous possession for a period less than twelve years, on the ground that the defendant has established no title, the suit having been brought more than six months after the date of dispossession. (1893) ILR 20 Cal 834 (PC) was distinguished thus :

"There (in 1893) ILR 20 Cal 834 (PC) the plaintiff was in possession when he brought his suit, whereas in the present case the plaintiff is out of possession. What the plaintiff asked for in the case of *Ismail Ariff v. Mahomed Ghous*¹¹ was a decree declaring his right, and an injunction restraining the defendant from disturbing his possession; what the plaintiff asks for in this case is only recovery of possession; and what was said by their Lordships of the Judicial Committee with reference to the plaintiff's right to obtain this relief is to be found in the following passage of their judgment :

"It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By Section 9 of the Specific Relief Act (1 of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession." This shows, as we understand the judgment, that the reason for their Lordships' decision was this' that as the plaintiff, had his position been rendered somewhat worse by his being dispossessed, could, by instituting a suit within six months for recovery of possession under Section 9 of the Specific Relief Act, have recovered possession even as against a person who might establish a better title, it was only right and just that if he brought his suit before he was dispossessed he could be declared entitled to retain possession as against a mere wrongdoer, and should obtain an injunction restraining the wrong-doer from interfering with his possession. But, though that was so in the case of a plaintiff who was in possession, and had, therefore, a possibility open to him of being restored to possession upon mere proof of possession, by instituting a suit under Section 9 of the Specific Relief Act upon being dispossessed, it does not follow that it should be so in the case of a plaintiff who had been in possession, and allowed more than six months to elapse after his dispossession, and therefore, lost the possibility of recovering possession, by a suit under Section 9 of the Specific Relief Act, upon mere proof of previous possession."

13. Distinguishing (1893) ILR 20 Cal 834 (PC) in the above manner, the Calcutta
¹¹(1893-20 Cal 834 PC)

High Court in (1899) ILR 26 Cal 579 sought support for the dictum in the following observations of the Privy Council in *J. P. Wise v. Ameerunnissa Khatoon*¹²,

"It is quite clear that the plaintiffs have failed to make out a title. The Defendants were put into possession by the Government, who were entitled to the lands, and they were ordered by the Magistrate under the Code of Criminal Procedure to be retained in possession. If the Plaintiffs had wished to contend that the Defendants had been wrongfully put into possession and that the Plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months under Section 15 of Act 14 of 1859; but they did not do so. The High Court, with reference to this point say (and, in their Lordships' opinion, correctly say) : 'Further, de facto possession having been given to the Defendants under Section 318 of the Code of Criminal Procedure, in accordance with the Deputy Collector's award, the plaintiff will not be entitled to a decree until and unless he can show a better title to these lands than the Defendants. The fact that the Plaintiffs' possession as regards B, C and D was confirmed under Act 4 of 1840, and that the defendants Nos. 2 and 3 unsuccessfully endeavoured to disturb them by regular suit, does not bar the right of Government. Section 2 of Act 4 of 1840 only affects persons concerned in the dispute. If Kalkini had belonged to a private individual he might have reduced into his own possession lands which had accreted to the estate and which undoubtedly were his. But lands to which he is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under Section 15 of Act 14 of 1859, which must be brought within six months from the time of that dispossession."

The Calcutta High Court on an interpretation of (1893) ILR 20 Cal 834 (PC) and (1879 80) 7 Ind App 73 (PC) has therefore taken the view that Section 9 of the Act operates as a bar to the institution of suits in which the claim for possession of any immovable property is based on anything but proprietary title.

14. On the other hand, the decision in (1893) ILR 20 Cal 834 (PC) was relied on by the other High Courts for the position that possessory title can be made the foundation for suits in ejectment filed after six months from the date of dispossession against trespassers who have no title.

15. The effective answer to the basis of the decision of the Calcutta High Court in (1899) ILR 26 Cal 579 has been furnished by Subramania Ayyar and O' Farrell JJ. in (1900) ILR 23 Mad 179 at p. 183. Subramania Ayyar, J. at page 183 observed :

"And with reference to the grounds on which decision in (1899) ILR 26 Cal 579 seems to rest, it is necessary to make but two observations. The first is that Section 9 of the Specific Relief Act cannot possibly be held to take away any remedy available with reference to the well-recognised doctrine expressed in Pollock and

¹²(1879-80) 7 Ind App 73 at p. 80 (PC)

Wright on Possession thus : - Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owners title, (at page 19). The second observation is that in (1879-80) 7 Ind App 73 (PC) relied on in (1899) ILR 26 Cal 679 the defendant had a better right than the plaintiff, since the possession of the former was authorised by the Government whose properly the land in dispute was and consequently nothing said by their Lordships in a case wherein such were the facts can rightly be construed as intended to lay down the law differently from what it had been all along understood to be." and O' Farrell, J. Observed :

"All the dictum of the Privy Council in (1879-80) 7 Ind App 73 (PC) appears to amount to is this, that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only do so under the provisions of Section 9 of the Specific Relief Act and not otherwise."

16. The Madras High Court again in (1903) ILR 26 Mad 514 relying on (1893) ILR 20 Cal 834 (PC) look the view that Section 9 of the Act is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff in an action of ejectment is sufficient title, even if a suit is brought more than six months after the date of dispossession and the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person, and a plea of jus tertii is no defense unless the defendant can show that the act complained of was done by authority of the true owner and it is immaterial however short or recent the plaintiff's possession was. The only effect of Section 9 of the Act is that if a summary suit be brought within the time prescribed by that Section, the plaintiff therein who was dispossessed otherwise than in due course of law will be entitled to be reinstated even if the defendant who thus dispossessed him be the true owner or a person authorized by or claiming under him, but a decree in such a suit will not have the force of res judicata on the question of title.

17. We are in respectful agreement with this observations in (1900) ILR 23 Mad 179 and hold that the decision in (1899) ILR 26 Cal 679 has proceeded on an incorrect interpretation of the decisions in (1893) ILR 20 Cal 834 (PC) and (1879-80) 7 Ind App 73 (PC)

18. There remains only to consider file decision of Mr. Justice Raman Nayar in *Vasudeva Kurup v. Ammini Amma*¹³ where it was held that a person in possession without title is entitled to remain in possession even as against the lawful owner until evicted in due course of law and is therefore entitled to get an order of injunction restraining the true owner from disturbing his possession. The right of a person in possession without title to get an injunction on the basis of possessory title against the true owner is not a point arising in the second appeal and we are not expressing any opinion on that aspect The point decided in 1964 Ker L. T. 468 has no direct bearing on the question to be decided in the second appeal except that possessory title is recognized as the foundation of a claim for maintaining one's possession. This only supports the view we are taking in this appeal.

¹³31964 Ker LT 468

19. We therefore fall in line with the decisions of the Allahabad, Madras, Bombay and Patna

High Courts and hold that possessory title can be made the foundation for a suit in ejectment filed even after the expiry of six months from the date of possession against a trespasser who has no title.

20. In the result, the second appeal fails and is dismissed with costs.
Appeal dismissed.