IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 18TH AUGUST 2005 / 27TH SRAVANA 1927

RSA.No. 263 of 2005()

AS.179/2002 of VI ADDL.DISTRICT COURT, ERNAKULAM
OS.45/2000 OF MUNSIFF'S COURT., ERNAKULAM

APPELLANTS: APPELLANTS: DEFENDANTS:

1. KODIYAN, S/O.VALAVAN,
RESIDING AT VELIKKAKATH PARAMBIL,
NO.T.P.1/171, IRIMPANAM P.O., TRIPUNITHURA.

2. MR.RAJU S/O.KODIYAN, RESIDING AT
VELIKKAKATH PARAMBIL, NO.T.P.1/171,
IRIMPANAM P.O., TRIPUNITHURA.

3. SHYLA RAJU, W/O.RAJU, RESIDING AT DO. DO.

BY ADV. SRI.S.KRISHNAMOORTHY

RESPONDENT: RESPONDENT: PLAINTIFF:

KARAMBI, D/O.LATE SMT.KALI,
RESIDING AT CHAKKAPARAMBIL,
IRIMPANAM, TRIPUNITHURA.

BY ADV. SRI.M.K.CHETTIAR
SRI.K.MOHAN

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 18/08/2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

R.S.A. NO. 263 OF 2005

Dated this the 18th day of August, 2005

JUDGMENT

The defendants in the suit filed by the respondent for recovery of possession are the appellants. The plaintiff is the sister of the first defendant. Defendant No.2 is the son of the first defendant and defendant No.3 is the wife of defendant No.2. The trial court decreed the suit, which was confirmed in appeal. The only contention raised by the appellants is that they have perfected title by adverse possession and limitation and, therefore, the suit is liable to be dismissed.

2. The plaint schedule property is having an extent of 3 cents. An extent of 6 cents of land including the plaint schedule property jointly belonged to Karambi (the plaintiff) and her brother Ayyer, as per Ext.A1 assignment deed of the year 1963. In 1998, as per Ext.A2, Ayyer, the brother of the plaintiff, relinquished his half right in

respect of the plaint schedule property in favour of the plaintiff. In Ext.A2 it is recited that out of the total extent of six cents, an extent of three cents of land was transferred in favour of the daughter of Ayyer by the plaintiff and Ayyer and that by that assignment deed half right of Ayyer in the six cents of land was really satisfied. However, since technically Ayyer would have half right in the plaint schedule property, he relinquished his right in the plaint schedule property in favour of the plaintiff. Thus the plaintiff claimed title to the plaint `A' schedule property.

3. The contention of the plaintiff in the plaint is that the first defendant requested the plaintiff to permit the former to reside in the building situated in the plaint schedule property and permission was granted. It is also stated that there was an oral undertaking that the first defendant would vacate the building within a short time and that at best, he would remain there only till he constructs

a building in another property. It is stated that even though the first defendant constructed a building in his own property he did not vacate the house in the plaint schedule property. A notice was issued to the first defendant to vacate the house, but he refused. In the written statement filed by the defendants, they denied that they are residing in the house as permitted by the plaintiff. It is stated that the first defendant constructed the house and has been residing in that house for more than thirty years. The further statement in the written statement is thus:

> " Actually the defendants have been in possession of the plaint schedule property continuously, peaceably, openly without any interruption for more than 30 years. The building in the plaint schedule property was constructed by the first defendant and he has been paying the tax of the building also. So the plaintiff has no right over the plaint schedule property."

4. Counsel for the appellants contended that Ext.A1 does not disclose that the house was available

at the time when the transfer was made in favour of the plaintiff and Ayyer and that would lead to the inference that the house was constructed by the first defendant. If immovable property is transferred, all improvements attached to the earth would also stand transferred to the assignee. It is not necessary to mention each and every item of improvements in the schedule of the assignment deed. Even if the existence of a house is not mentioned in Ext.A1, it cannot be said that the plaintiff has no title to the house in the plaint schedule property. As per Section 3 of the Transfer of Property Act, the expression "attached to the earth" means rooted in the earth, as in the case of trees and shrubs; imbedded in the earth, as in the case of walls or buildings; or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Section 8 of the Transfer of Property Act provides that:

> "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which

> the transferor is then capable of passing in the property and in the legal incidents thereof.
>
> Such incidents include, when the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth."

In view of the definition of the term "attached to earth" in Section 3 read with Section 8 of the Transfer of Property Act, even if the title deed or the schedule of property attached thereto does not mention that the house in the property which is the subject of transfer is also transferred, the transferee would get title to the house situated in the property, unless the house is specifically excluded from the transfer.

5. Counsel for the appellant relied on Ext.X1 series Property Tax Assessment Registers to show that the building stood in the name of the first defendant for the periods from 1963 to 1968 and from 1973 to 1978 and in the name of Chandra Bose, who is said to be the son of first defendant,for the period from 1988 to 2000. The Secretary of the Panchayat was examined as DW1. His evidence would indicate that the

entries in the Building Tax Assessment Register were made on the information supplied by the person who was found in the house. Simply because the name of first defendant is shown in the Building Tax Assessment Register, it cannot be concluded that the house belongs to him. The relationship between the plaintiff and the first defendant also cannot be ignored. There is nothing unusual if the name of the brother who is residing in the house is shown in the Building Tax Register while really the house belongs to the sister. When the brother admittedly resides in the house, the entry of his name in the Assessment Register cannot be given much importance.

6. The question which actually arises for consideration is whether the first defendant was permitted by the plaintiff to reside in the house or whether the possession of the first defendant is attributable to adverse possession. On this aspect, pleadings of the parties are highly relevant. The defendants have not stated

that they have perfected their title by adverse possession. It is true that some of the ingredients of adverse possession are casually mentioned in the written statement. It is not clear from the written statement as to how the first defendant got possession of the property for the purpose of constructing a house. The first defendant could construct the house in the plaint schedule property either as permitted by the plaintiff or as a trespasser. It could also be that the first defendant gained possession and the plaintiff discontinued possession and the plaintiff perfected his title by adverse possession. The first defendant has no case in the written statement that he trespassed upon the property. On the other hand, the evidence in the case would indicate that the first defendant was permitted by the plaintiff to reside in the property when first defendant got employment in the nearby Traco Cable Company. It has come out in evidence that the second wife of the first defendant was

residing at Brahmapuram, about 10 kms. away. The names of the defendants are not shown in the ration card or in the voters' list with reference to their residence in the plaint schedule property. Ext.A12 voters' list would show that the first defendant, his wife and children are voters at Brahmapuram.

7. Adverse possession is commenced in wrong and is aimed against the right. A person is said to hold the property adversely to the real owner, when that person in denial of the owner's right excluded him from the enjoyment of the property. The requirement of adverse possession is nec vi nec clam nec precario, ie. the possession required must be adequate in continuity, in publicity and in extent. Where the possession is referable to a permissive possession, it cannot be said that the person in possession has perfected title by adverse possession, even if he continued in possession for a long period. Mere continuance of

possession for twelve years or more is not enough to defeat the title of the real owner and to claim title by operation of Section 27 of the Limitation Act. The exception to the General Rule that the limitation bars only the remedy and not the right is contained in Section 27 of the Limitation Act, which reads as follows:

> "27. Extinguishment of right to property-- At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

By the expiry of the period for instituting a suit for possession, the right of the owner of the property shall stand extinguished and the person in adverse possession would get a legal right to be in possession. A person who has perfected title by adverse possession could even maintain a suit on the basis of the prescriptive title he has acquired. Section 27 operates as an extinguishment of the right of the real owner and a vesting of the right in the trespasser or a person in unlawful

possession. Article 65 of the Limitation Act provides for a period of limitation of twelve years for filing a suit for possession of immovable property; and the time from which the period begins to run is provided as "when the possession of the defendant becomes adverse to the plaintiff". Therefore, the starting point of the period of limitation is the point at which the possession of the defendant becomes adverse to the plaintiff. That is a question of fact and it is to be pleaded and proved by the person who claims adverse possession. A person in permissive possession can claim that his possession was adverse to the real owner only if he proves that he had shed his character as the permissive occupier and started his possession adverse to the real owner. The animus possendenti is the important aspect to be proved to claim adverse possession. A secret hostile animus is not sufficient to constitute adverse possession. In the case of permissive possession, the possession by itself is not material or relevant, since

the person who was permitted could possess the property on the basis of such permission. The nature of the possession is attributable to the permission in such cases. The possession becomes adverse only when it becomes irreconcilable or contrary to the permission granted. Such intention should be made known or at least manifested in the acts of the person who claims adverse possession.

8. In **The State Bank of Travancore** v. **Arvindan Kunju Panicker and others** (AIR 1971 SC 996), the Supreme Court held that a permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of the true owners for a period of twelve years or more. In **Kunhammed Kutty** v. **Avokker and others** (1984 KLT 716), it was held that the necessary animus to possess a property adverse to the real owner, would be non-existent if the possession is permissive. Similar would be the case, if the existence of other factors, extinguishes the requisite animus to possess adversely. In **Gaya Parshad Dikshit** v. **Dr.Nirmal Chander and another** (AIR 1984 SC 930), it was held that mere termination of the licence of a licensee

does not enable the licensee to claim adverse possession, unless and until he sets up a title hostile to that of the licensor after termination of his licence. It is not merely unauthorized possession on termination of his licence that enables the licensee to claim title by adverse possession but there must be some overt act on the part of the licensee to show that he is claiming adverse title. In **Achal Reddi** v. **Ramakrishna Reddiar and others** (AIR 1990 SC 553), it was held that the purchaser who got into possession under an executory contract of sale in a permissible character cannot be heard to contend that his possession was adverse. It was held thus:

> "... The well-settled rule of law is that if a person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regarded as adverse in law, even though he claims under another title having regard to the well-recognised policy of law that possession is never considered adverse if it is referable to a lawful title... "

In **Virendranath** v. **Mohd. Jamil and others** ((2004) 6 SCC 140), the Supreme Court held that if one's entry on the land was as a mortgage, the nature of his possession

would continue to be as a mortgagee unless there is evidence to show that at any point of time, he asserted his adverse title, by repudiating his possession as mortgagee and continued in adverse possession for the prescribed period of more than 12 years to the knowledge of the mortgagor. The plaintiff contended that the first defendant was permitted to occupy the house and though the first defendant denied this in the written statement, there is no plea as to how the first defendant got possession of the property or constructed the house. Apart from the fact that there is no material to show that the first defendant had constructed the house, there is no pleading at all that the house was constructed either as permitted by the plaintiff to do so or by an overt act which would otherwise be unlawful.

9. Going by the pleadings and evidence, it can only be held that possession of the defendants is referable only to a permission granted by the plaintiff. The plaintiff being the sister of the

first defendant, there is nothing unusual in the first defendant residing in the property for long even after construction of another house by him. Possession by the first defendant cannot be attributed to any possession other than permissive possession.

10. In **Abubakar Abdul Inamdar (dead) by Lrs. and others** v. **Harun Abdul Inamdar and others** (AIR 1996 SC 112), it was held thus:

> "... There he has pleaded a duration of his having remained in exclusive possession of the house, but nowhere has he pleaded a single overt act on the basis of which it could be inferred or ascertained that from a particular point of time his possession became hostile and notorious to the complete exclusion of other heirs, and his being in possession openly and hostilely. It is true that some evidence, basically of Municipal register entries, were inducted to prove the point but no amount of proof can substitute pleadings which are the foundation of the claim of a litigating party. ...."

In **Karnataka Board of Wakf** v. **Government of India** ((2004) 10 SCC 779), the Supreme Court categorically stated the ingredients to be proved, in order to

substantiate the plea of adverse possession. It was held:

> "Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, © whether the factum of possession was known to the other party, (d) how long his possession has continued and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

The importance of the pleadings and the necessity to plead a fact inorder to enable the party to prove it, is stated in **Siddik Mohammed Shah** v. **Mt.Saran and others**(AIR 1930 PC 57), wherein it is held that no amount of proof would be sufficient if there is no supporting pleading. This decision of the Privy Council was followed in several decisions including the decisions of this Court in **Elizabeth** v. **Saramma** (1984 KLT 606) and in **Mohammede Sageer** v. **Prakash Thomas** (2005 (2) KLT 400). By the pleading, the opposite party is put to notice as to the facts which the party is likely to prove in the case.

The opposite party would get an opportunity either to rebut such evidence or to disprove that fact, only if he knows from the pleadings what fact the other party proposes to prove. Astuteness in drafting of pleadings should not deprive the opposite party to know what facts he has to prove or disprove or what evidence he should adduce to prove that the case pleaded by his opponent is improbable. True, drafting of pleading is an art. But, it is not for the sake of art the pleading is intended. It is intended to facilitate a complete and effective adjudication of the disputes between the parties. For that purpose, the opposite party must know what his opponent has in mind. The Court also must be aware of the facts which are sought to be proved by each party. Art of drafting of pleading which deprives the opposite party from understanding what really the other party meant should not be encouraged. The defendants in the present case very cleverly put forth their pleadings in such a way virtually depriving the plaintiff from understanding what the

defendants really contended. The court below rightly rejected the contention put forward by the first defendant that he has perfected title by adverse possession. The first defendant being the brother of the plaintiff was not expected to keep his hostile animus a secret. The first defendant withheld relevant facts even at the time of putting forth his plea in the written statement. The opposite party as well as the court was put in the dark as to what the defendants would prove at the time of trial. In spite of all his astuteness in pleadings, in the chief examination itself, the first defendant stated in answer to a leading question that possession of the property was with the plaintiff all through out. Later he sought to withdraw that admission and stated that recently the first defendant started to possess the property. The defendants failed to plead and prove the necessary ingredients to constitute adverse possession and the suit was rightly decreed by the courts below.

11. There is no merit in the Second Appeal and no substantial question of law as raised arises for consideration in the facts of the case. The Second Appeal is liable to be dismissed and I do so.

Counsel for the appellants submitted that appellant No.1 is aged more than 79 years and he requires a reasonable time to vacate the plaint schedule property and the house therein. Taking into account the relationship between the parties and other facts and circumstances of the case, six months' time is granted to the defendants to vacate the plaint schedule property and the house therein.

(K.T.SANKARAN)
Judge

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K.T.SANKARAN, J.

R.S.A.NO. 263 OF 2005 F

JUDGMENT

18th August, 2005
