

MALLIKARJUNAIAH

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v.

NANJAIAH & ORS.

(Civil Appeal No.7768 of 2011)

APRIL 26, 2019

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**[ABHAY MANOHAR SAPRE AND
DINESH MAHESHWARI, JJ.]**

Suit – Declaration of title – According to the appellant-plaintiff, the suit land fell to his share after the death of his father by a partition amongst his brothers – In 1983, appellant noticed that the suit land i.e. 1 Gunta in Sy. No. 17/3 was encroached upon by the respondents-defendants – In 1992, appellant filed suit against the respondents for declaration of his ownership over the entire land including the suit land – Trial court and the First Appellate Court held that respondents had perfected their title by adverse possession – In the second appeal, the High Court declared respondents to be the owner of the suit land by virtue of their adverse possession – On appeal, held: Respondents had admitted the ownership of the appellant over the entire land including the suit land by setting up the plea of adverse possession over it – Respondents failed to prove their adverse possession as there was no element of either adversity or/and hostility between two co-owners/brothers because in a dispute of this nature where both the parties are related, possession of one is regarded as possession of other unless the facts show otherwise – Also, there was no knowledge of actual measurements of the suit land prior to the year 1983 – Plea of adverse possession was also not available to the respondents as suit was filed well within 12 years from the date of knowledge of adverse possession and 12 years had not completed by then – The Courts below were not justified in declaring the respondents to be the owner of the encroached portion of the suit land by virtue of adverse possession – Judgment of the High Court set aside – Thus, appellant-plaintiff’s suit decreed in its entirety against the respondents-defendants – Respondents to vacate the encroached portion (1 Gunta in Sy.No. 17/3) and hand over its possession to the appellant.

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A **Allowing the appeal, the Court**

HELD: 1. Keeping in view the law relating to the adverse possession, when the facts of the instant case are examined, there is no hesitation in holding that the Courts below were not justified in holding that the defendants have perfected their title over the suit land *qua* the plaintiff by virtue of their adverse possession over the suit land. This is said for the following reasons. [Para 21][1079-C-D]

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2. First, it is not in dispute that the appellant(plaintiff) was the owner of the entire land including the suit land, i.e., encroached portion, which was alleged to be in possession of the respondents(defendants). In other words, the respondents(defendants) have admitted the ownership of the appellant(plaintiff) over the entire land including the suit land by setting up the plea of adverse possession over it; Second, the burden to prove the adverse possession was on the respondents(defendants) because it was they who had set up this plea; Third, the respondents(defendants), failed to discharge this burden; Fourth, there was no element of either adversity or/and hostility between two co-owners/brothers because in a dispute of this nature where both the parties are related to each other, the possession of one is regarded to be the possession of other unless the facts show otherwise; Fifth, the respondents(defendants) failed to adduce any evidence to prove that they were asserting their right of ownership over the entire land or the suit land or its part openly and to the knowledge of the appellant(plaintiff) continuously for a period of more than 12 years; Sixth, it is a settled principle of law that mere continuous possession howsoever long it may have been *qua* its true owner is not enough to sustain the plea of adverse possession unless it is further proved that such possession was open, hostile, exclusive and with the assertion of ownership right over the property to the knowledge of its true owner. Such is not the case here. Seventh, this was a case where both the parties were not aware as to how much land was in exclusive possession of each. In other words, here is a case where both the parties to the suit

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did not know as to how much land was in the exclusive possession of the appellant (plaintiff) and how much land was in possession of the respondents(defendants). It was only when the appellant(plaintiff) got the suit land measured through the revenue department in the year 1983, he came to know that some portion of the land, which had fallen to his share was in possession of the respondents(defendants). [Para 22][1079-E-H; 1080-A-C]

3. The appellant(plaintiff) having come to know that the respondents(defendants) had encroached upon his land in the year 1983 and he rightly filed the suit within 12 years from the date of knowledge, a plea of adverse possession was not available to the respondents(defendants) against the appellant(plaintiff) because 12 years had not been completed by then. In this view of the matter, the question of respondents(defendants) perfecting their title by adverse possession over the suit land did not arise. As mentioned, even if the respondents(defendants) claimed to be in possession over the suit land prior to the year 1983, the same was of no consequence for the simple reason that such possession was neither exclusive nor hostile and nor it was to the knowledge of the parties for want of actual measurements. [Paras 24, 25][1080-E-G]

4. It is for all these reasons, this Court is of the considered view that the Courts below were not justified in declaring the respondents(defendants) to be the owner of the encroached portion of the suit land by virtue of adverse possession. This finding being against the settled principle of law deserves to be set aside. [Para 26][1080-H; 1082-A]

T. Anjanappa & Ors. v. Somalingappa & Anr.
(2006) 7 SCC 570 : [2006] 5 Suppl. SCR 200 ; *Chatti Konati Rao & Ors. v. Palle Venkata Subba Rao*, (2010) 14 SCC 316 : [2010] 15 SCR 923 – relied on.

Case Law Reference

[2006] 5 Suppl. SCR 200	relied on	Para 19
[2010] 15 SCR 923	relied on	Para 19

A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7768 of 2011

From the Judgment and Order dated 14.11.2007 of the High Court of Karnataka at Bangalore in RSA No. 23 of 2005.

B Rajesh Mahale, Krutin R. Joshi, Advs. for the Appellant.

The Judgment of the Court was delivered by

ABHAY MANOHAR SAPRE, J.

C 1. This appeal is directed against the final judgment and order dated 14.11.2007 passed by the High Court of Karnataka at Bangalore in RSA No. 23 of 2005 whereby the High Court partly allowed the appeal filed by the appellant herein.

2. A few facts need mention hereinbelow for the disposal of this appeal.

D 3. The appellant is the plaintiff and the respondents are the defendants of the civil suit out of which this appeal arises.

E 4. The civil suit leading to this appeal was filed by the appellant(plaintiff) seeking declaration of his title in relation to the properties described in Schedule ‘A’ attached to the plaint, being the land admeasuring 20 Guntas in Sy. No.17/3; western portion of 32 ½ Guntas in Sy.No.29/1; and 11 Guntas in Sy. No.34/3, all situated at Karagund Village, Javagal Hobli, Arasikere Taluk, Hassan District, Karnataka. Out of the aforesaid land, 1 Gunta of land in Sy. No.17/3 and a portion of Sy. No.29/1 were mentioned in Schedule ‘B’ to the plaint and perpetual injunction was sought in that regard.

F 5. The other particulars of the property described in the plaint need not be elaborated for the reason that now the dispute in these proceedings is confined to the part of the aforementioned land admeasuring 1 Gunta in Sy. No.17/3 (hereinafter referred to as “the suit land”).

G 6. According to the appellant (plaintiff), the entire land mentioned above, which also included the suit land, fell to his share in the year 1980 after the death of his father by a partition amongst his brothers. However, in 1983, the appellant noticed that the suit land, i.e., 1 Gunta in Sy. No. 17/3, was encroached upon by the defendants.

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7. The appellant, therefore, made an application to the survey department to get the land measured. On measurement, it was noticed that the defendants had encroached upon the portion of the appellant's share to the extent of 1 Gunta of Sy. No. 17/3. A

8. The matter was accordingly resolved with the intervention of local Panchayat and pursuant thereto, the defendants restored the possession of the encroached portion of the suit land to the appellant. B

9. Thereafter the appellant filed a civil suit in the year 1992 against the respondents for declaration of his ownership right over the entire land including the suit land and for grant of permanent injunction in relation to the suit land. In the alternative, the appellant also sought the relief of possession of the suit land in case, he is held to be not in possession of the suit land. C

10. The respondents, in substance, defended their possession over the suit land and alleged that they have perfected their ownership title over the suit land on the basis of their adverse possession over the suit land for a long period of time. D

11. The Trial Court, while partly decreeing the suit, by judgment and decree dated 14.01.1999, declared the appellant(plaintiff) as the owner of larger part of Schedule 'A' property but observed that the defendants had perfected their title by adverse possession over 1 Gunta of land in Sy. No.17/3 and, therefore, the prayer seeking permanent injunction against the defendants as regards Schedule 'B' property was rejected. E

12. The appellant (plaintiff) felt aggrieved and filed first appeal before the first Appellate Court. The respondents (defendants) filed their cross objections. By order dated 10.09.2004 in R.A. No.11 of 1999, the first Appellate Court, in substance, upheld all the findings of the Trial Court but modified the decree to some extent regarding the measurement of the suit land. F

13. The appellant (plaintiff) felt aggrieved and filed second appeal in the High Court of Karnataka. By impugned judgment, the High Court partly allowed the appeal and declared the appellant (plaintiff) to be the owner in respect of the land admeasuring 19 Guntas in Sy. No. 17/3 and 11 Guntas in Sy. No. 34/3 but dismissed his claim as being the owner of the suit land admeasuring 1 Gunta in Sy. No. 17/3 and instead declared G

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- A the defendants to be its owner by virtue of their adverse possession over the suit land.

14. It is against this order of the High Court, the appellant(plaintiff) has felt aggrieved and filed the present appeal by way of special leave in this Court

- B 15. So, the short question, which arises for consideration in this appeal, is whether the High Court was justified in holding that the defendants (respondents) have become the owner of the suit land to the extent of 1 Gunta in Sy. No. 17/3 by virtue of their adverse possession over it.

- C 16. Heard Mr. Rajesh Mahale, learned counsel for the appellant. Despite notice, no one entered appearance on behalf of the respondents.

- D 17. Having heard the learned counsel for the appellant and on perusal of the record of the case, we are constrained to allow this appeal and set aside the impugned judgment to the extent it declares the defendants (respondents) as being the owner of the suit land admeasuring 1 Gunta in Sy. No. 17/3 and, in consequence, decreeing the plaintiff's suit in relation to the suit land against the defendants.

- E 18. What is "adverse possession" and on whom the burden of proof lies and what should be the approach of the Courts while dealing with such plea have been the subject-matter of a large number of cases of this Court.

- F 19. In **T. Anjanappa & Ors. vs. Somalingappa & Anr.**, (2006) 7 SCC 570, this Court held that mere possession, howsoever long it may be, does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owners' title.

20. Relying upon the aforesaid decision, this Court again in **Chatti Konati Rao & Ors. vs. Palle Venkata Subba Rao**, (2010) 14 SCC 316 in para 14 held as under:

- G **"14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said is that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the**

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title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within twelve years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of twelve years thereafter.”

21. Keeping in view the law relating to the adverse possession quoted above, when we examine the case at hand, we have no hesitation in holding that the Courts below were not justified in holding that the defendants have perfected their title over the suit land *qua* the plaintiff by virtue of their adverse possession over the suit land. This we say for the following reasons.

22. First, it is not in dispute that the appellant(plaintiff) was the owner of the entire land including the suit land, i.e., encroached portion, which was alleged to be in possession of the respondents(defendants). In other words, the respondents(defendants) have admitted the ownership of the appellant(plaintiff) over the entire land including the suit land by setting up the plea of adverse possession over it; Second, the burden to prove the adverse possession was on the respondents(defendants) because it was they who had set up this plea; Third, the respondents(defendants), in our view, failed to discharge this burden; Fourth, there was no element of either adversity or/and hostility between two co-owners/brothers because in a dispute of this nature where both the parties are related to each other, the possession of one is regarded to be the possession of other unless the facts show otherwise; Fifth, the respondents(defendants) failed to adduce any evidence to prove that they were asserting their right of ownership over the entire land or the suit land or its part openly and to the knowledge of the appellant(plaintiff) continuously for a period of more than 12 years; Sixth, it is a settled principle of law that mere continuous possession howsoever long it may have been *qua* its true owner is not enough to sustain the plea of adverse

- A possession unless it is further proved that such possession was open, hostile, exclusive and with the assertion of ownership right over the property to the knowledge of its true owner. Such is not the case here. Seventh, this was a case where both the parties were not aware as to how much land was in exclusive possession of each. In other words, here is a case where both the parties to the suit did not know as to how much land was in the exclusive possession of the appellant (plaintiff) and how much land was in possession of the respondents(defendants). It was only when the appellant(plaintiff) got the suit land measured through the revenue department in the year 1983, he came to know that some portion of the land, which had fallen to his share was in possession of the respondents(defendants).

23. Thereafter the appellant(plaintiff) filed a suit in the year 1992 against the respondents(defendants) for declaration and injunction and in the alternative also claimed possession of the suit land. The suit was, therefore, filed well within the period of 12 years from the date of knowledge, i.e., in the year 1983. During this period also, there was no evidence adduced by the defendants to prove that they ever asserted their right of ownership over the specific portion of the suit land as belonging to them openly and with assertion of hostility to the knowledge of appellant(plaintiff).

24. In our view, the appellant(plaintiff) having come to know that the respondents(defendants) had encroached upon his land in the year 1983 and he rightly filed the suit within 12 years from the date of knowledge, a plea of adverse possession was not available to the respondents(defendants) against the appellant(plaintiff) because 12 years had not been completed by then.

25. In this view of the matter, the question of respondents(defendants) perfecting their title by adverse possession over the suit land did not arise. As mentioned above, even if the respondents(defendants) claimed to be in possession over the suit land prior to the year 1983, the same was of no consequence for the simple reason that such possession was neither exclusive nor hostile and nor it was to the knowledge of the parties for want of actual measurements.

26. It is for all these reasons, we are of the considered view that the Courts below were not justified in declaring the respondents(defendants) to be the owner of the encroached portion of

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the suit land by virtue of adverse possession. This finding, in our view, A
being against the settled principle of law deserves to be set aside.

27. In view of the foregoing discussion, the appeal succeeds and
is accordingly allowed. The impugned judgment is set aside. As a
consequence thereof, the plaintiff's (appellant's) suit is decreed in its
entirety against the defendants. The defendants (respondents) are granted B
three months' time to vacate the encroached portion (1 Gunta in Sy. No.
17/3) and hand over its possession to the appellant/plaintiff.

Ankit Gyan

Appeal allowed.