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Court : Karnataka

Decided On : Feb-12-1959

Reported in : AIR1960Kant83; AIR1960Mys83

Judge : S.S. Malimath, J.

Acts : Limitation Act - Schedule - Articles 3, 142 and 144; Specific Relief Act - Sections 9; Madras Forest Act, 1882

Appeal No. : Second Appeal (B) No. 91 of 1956

Appellant : Baswanneppa Yellappa and anr.

Respondent : Basavannappa and ors.

Judgement :

(1) One important point of limitation arises in this Second Appeal and that is as to whether the Article applicable is 142 or 144 of the Limitation Act. According to the plaintiffs the property in suit which is a house together with an open site, originally belonged to one Bhimappa Hadapad. After his death it came to his son, who was originally defendant 2 in this case and who has been later on transposed as plaintiff No. 3. The plaintiff's claim to have purchased the suit property from that person on 14-5-1948 for Rs. 200/-. Plaintiffs 1 and 2 entered into possession and made wahivat of it. In June 1948, defendant 1 caused obstruction to the wahivat. Plaintiffs therefore filed a suit in L. C. No. 90/1949 against the defendants. In the meantime, the defendants managed to dispossess plaintiffs 1 and 2 and they

entered into possession. Hence this suit was filed for pos-possession against defendants 1 and 2. The defendants denied plaintiff's title to the property and also their possession at any time.

They denied the sale by Bhimappa's son as well including his title to the property. According to the defendants, they maintained and treated well the said Bhimappa during his old age and illness by giving him medicinal aid also at a cost of Rs. 150/-. Bhimappa who spent his last days with the defendants and who was their relative gave over the suit property to them on the only condition that they should get it repaired and pay the Municipal taxes and enjoy to property permanently. Accordingly they claim to have spent Rs. 300/- over the repairs of the house and to have been enjoying that property since the time of Bhimappa. They further allege that thereby they have become owners of the property by adverse possession. The lower court accepted the plaintiffs' case and decreed the suit. The same was reversed in appeal, and the suit was dismissed. The plaintiffs 1 and 2 have come up in Second Appeal.

(2) The main point urged by the learned Advocate for the Appellants is that the plaintiffs have made two alternative pleas. Firstly, their case is that they have become owners by purchase of the property and entered into its possession but were subsequently dispossessed by defendants 1 and 2. So far as this part of their claim is concerned, the learned advocate concedes that Art. 142 of the Limitation Act is applicable since both the lower courts have held that the plaintiffs 1 and 2 have established their title, but that they have failed to establish their title, but that they have failed to establish their possession within 12 years next before suit; he cannot agitate the question of fact in respect of possession in Second Appeal. He contends that their was an alternate case made out by the plaintiffs in para 5 of the plaint.

There it is specifically stated that in case the plaintiffs fail to establish possession within 12 years, their alternate case is that in view of their being owners of the property by reason of the sale, their title should be held established and a decree for possession should follow on the basis of title. It is further urged that since the defendants clearly set up adverse possession, the burden is on them to establish

the same under Art. 144 of the Limitation Act, and since they have not discharged this burden, it is urged that there ought to be a decree for the plaintiffs. As against this, the learned Advocate for the respondents contends that the Article applicable to this case is Art 142. Since the plaintiffs have failed to establish their possession within 12 years next before suit, it is rightly dismissed. Hence, it is necessary to consider which of the two is the proper Article that is applicable to the facts of this case.

(3) The wording of the two Article is not happy. It lends itself to different constructions. That is how there have been numerous divergent decisions of the various High Courts. In this case, each side cites certain rulings as supporting its own version. On the face of it Article 142 is applicable to suit for possession of immovable property, when the plaintiff contends that he has been dispossessed or that he has discontinued possession while he was in possession of the property. In such case the plaintiff has to prove that within 12 years prior to suit he was dispossessed or that he has discontinued possession. This Article implies that the plaintiff must have been in possession some time within 12 years next before suit. If not the suit will be barred by limitation. He will, therefore, necessarily have to prove that he was so dispossessed (if there was such a dispossession) within the said period.

It is contended by the learned Advocate for the appellants that the provisions of the Article are to be applied only in respect of cases where the suit is based on proprietary title. Although it cannot be denied that the previous possession within 12 years next before suit is the necessary ingredient for the application of this Article, it would too much to say that the Article is intended for cases of possessory title only or even to say that it does not imply that the plaintiff has to prove his ownership also. To my mind, the cases that are based on possessory title alone are those contemplated by S. 9 of the Specific Relief Act.

There, a person can claim that he should be put in possession of the property on the mere ground that he was in peaceful possession of the property and that he was dispossessed by another person. To such a suit Art. 3 of the Limitation Act applies, the limitation being six months from the date when the dispossession

occurs. In respect of suits under that Article, the plaintiff is under no obligation with reference to any title to the property, he will get the relief even if he proves mere peaceful possession of the property ending within the period of limitation. The same cannot be said of Art. 142. If the obligations were the same, it is possible to accept that there would have been another Article of limitation and that prescribing a much longer period. It cannot be doubted that what the plaintiff has to prove under Art. 142 is not only that he has a title to the property but also that he was dispossessed or that he discontinued possession within 12 years next before suit.

(4) Turning to Art. 144 it is clear that it is a residuary article in that it is applicable to cases which are not otherwise provided for by the First Schedule of the Limitation Act. There are many Article applicable to suits for possession of immovable property. It is only when it is found that none of these Articles are applicable to a case that the provisions of Art. 144 are invoked. Hence, before applying this Article, it is always necessary to find out if no other Article can be applied to the facts of that particular case. If for instance the provisions of Art. 142 can be applied to a particular case, the provisions of Art. 144 are not called for.

The third column of Art. 144 shows that time begins to run 'when the possession of the defendant becomes adverse to the plaintiff.' Hence, it cannot be mistaken as mentioning the type of cases to which this Article applies. That is given in col. 1 which I have discussed above. It is not in every case where the defendant pleads that he holds the property adversely that Art. 144 should be applied. It is only when Art. 144 is applicable that it should be considered to fix the date from which the limitation is to start as laid down in Col. 3.

(5) Before applying the above tests of the facts of this case, it would be useful to consider the rulings relied on by either side. *Mohima Chunder v. Mohesh Chunder*, ILR 16 Cal 473 (PC), appears to be the earliest decision of the Privy Council on this point. It was clearly a suit for possession on the allegation of dispossession within 12 years next before suit. Their Lordships observed:

'This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendant are admittedly in possession, and a fortiori where, as in this particular case, they had been in possession for a great

number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit.'

It must, however, be noted that their Lordships disapproved the observations of the lower court which held that when the plaintiffs are rightful owners of the disputed land, it was for the defendants to show that they were entitled to retain possession of the lands. The next case on the point is reported in *Mahammud Amanulla Khan v. Badan Singh*, ILR 17 Cal. 137 (PC). That was also a suit for possession on the basis of title. According to the plaintiffs, their ancestors owned some mafi plots. Their Lordships of the Privy Council observed:

'There has been no possession of any description in the plaintiffs or their ancestors since the period of engagement with the defendants; and whether any proprietary right may have existed is not the question; it is whether there has been a dispossession or discontinuance, which there clearly was. No doubt the property right would continue to exist until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applies; it appears to be clear that it comes within the terms of the Article 142, and if there has been any doubt in the minds of the Courts in the Punjab as to what was the effect of the law of limitation in cases of this description, it seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that inquiry. Art. 144, as to adverse possession, only applies where there is no other article which specially provides for the case. In this case their Lordships think Article 142 does provide for the case, and that the suit is barred by the law of limitation.'

This case clearly establishes that Art. 144 cannot be applied to any case to which Art. 142 is applicable.

(6) The third Privy Council case on the point is that of *Secretary of State of India v. Chellikani Rama Rao*, AIR 1916, P.C. 21 and also in ILR 39 Mad 617. That was a case in respect of possession of lands which were islands formed in the bed of the

sea near the mouth of the Godavari river. According to the law in Madras, such lands become Government properties. Before constituting them into a reserved forest, the Madras Forest Act V of 1882 requires that the Forest Settlement Officer should give a notice to the persons who claim any right or title to those properties. In pursuance of such a notice the respondents put in their objections contending that the lands had been possessed by them from time immemorial and that on that account they had become owners. This assertion was denied for the Crown.

The Forest Settlement Officer who decided this question gave a judgment in favour of the Crown. In appeal the District Court confirmed the decision of the District Court. Against that decision an appeal was preferred by the Secretary of State to the Privy Council. In the first para of the judgment of the Privy Council it gives a finding that the Crown is the owner of islands formed in the sea, which is in the territorial limits of the Indian Empire. In the case under question the claimant had no title to the property as such. All that he pleaded was that by the long user he had become owner of the property; in other words he had set up adverse possession. Dealing with this aspect of the case, their Lordships observed:--

'In these circumstances the question before the Board would appear to be extremely simple. Under the Indian Limitation Act no adverse possession can be effectively pleaded against the Crown for a period of less than sixty years. The question simply is: Do the claimants establish such adverse possession? If they do not, the basis of their claim falls.?

Thus, the case considered by the Privy Council was one clearly covered by Art. 144. It was in that connection that their Lordships have also observed:

'Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the country of this proposition. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.'

These observations have, therefore, to be read with reference to the context of the facts in that case. They cannot be extended to mean that in every case where the

plaintiff proves his title, the defendant is bound to prove adverse possession for a statutory period.

(7) As already mentioned, there are divergent views taken by various Courts. Without referring to all those case, it would be useful to discuss merely the Full Bench rulings of some of the High Courts. In *Official Receiver of East Godavari v. Chava Govindarajy* AIR 1940 Mad 798 the suit was one for possession based on title. The plaintiff claimed to be an assignee of a mortgage decree. Respondent No. 2 and his sons were said to be the mortgagors. The plaintiff filed execution proceedings for sale and in Court auction he himself purchased the properties.

When the plaintiff sought to obtain possession, respondent No. 1 objected to it alleging that it was his ancestral property. It was after this that the plaintiff filed a suit praying for a declaration of title and for ejectment of respondent No. 1. The latter pleaded his title alleging that it was his ancestral property. He also pleaded adverse possession. The question before the Full Bench was whether, in these circumstances Art. 142 or 144 should be applied to the case. The Full Bench answered that Art. 142 applied. According to their view:

'It is wrong to say that a person who proves title in a suit for ejectment has the right to the decree sought unless the defendant proves adverse possession for 12 years. The plaintiff is not entitled to succeed unless he shows in addition to title, that he has been in possession of the property within 12 years of the suit. The burden lies upon the plaintiff to prove that he was in possession within 12 years to of the suit. The onus is not upon the defendant to prove adverse possession for a period of 12 years.'

A similar question arose before the Full Bench of the Lahore High Court in the case of *Behari Lal v. Narain Das*, AIR 1935 Lah 475. That was a suit for possession of a house. The plaintiffs leased it to defendant 2. Their contention was that the defendant 2 sub-leased it to defendant 1. In an earlier suit they got a decree for rent against defendant 2 alone, but the suit was dismissed against defendant 1. They, therefore, filed the present suit for recovery of possession. Applying Art. 142, the trial Court dismissed the plaintiffs suit. The appellate Court confirmed the decree. According to the Full Bench, it was held:

'Where in a suit for possession, the plaintiff pleads possession and dispossession, the suit is governed by Art. 142, it cannot be said that in all cases Art. 144 is to govern the case once the plaintiff has proved a title to the property.'

Similar was the conclusion of the Full Bench of the Patna High Court in Shiva Prasad Singh v. Hira Singh, AIR 1921, Par 237:

'The plaintiff in a suit for ejectment must prove not only his antecedent title but also his possession within 12 years of the suit. In the absence of any credible evidence on either side as to possession, the plaintiff must fall and the presumption arising from title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given, and the plaintiff cannot succeed merely by proving a title and possession at some antecedent period.'

(8) The same question came to be considered by the Full Bench of the Allahabad High Court in the case of Bhindhyachal Chand v. Ram Gharib Chand in AIR 1934 All 993. The question referred to the Full Bench was

'Where a plaintiff who was a co-sharer with some of the defendants who transferred a part of the property to third parties, admits in the plaint that he was dispossessed by the transferees some time prior to the institution of the suit, whether Art. 142, Limitation Act, or Art. 144 applies.'

The answer given by the Full Bench was that Art. 142 of the Limitation Act applied. Another case of the same High Court reported in Kanhaiya Lal v. Girwar, : AIR1929 All753 has been relied on by the Full Bench above referred to and the Full Bench above referred to and the Full Bench declined to accept it as good law. I need not, therefore, discuss that case any further.

(9) Another case of the Patna High Court relied upon is Kanchan Teli v. Moga Mahton, AIR 1934 Pat 593. The plaintiff in that case claimed that he was put in possession by the landlord as a ryot as long ago as in 1920. According to him the previous tenant on the land abandoned his tenancy and tht is how he was taken as a tenant. The plaintiff further alleged that at that time there was an under-raiyat who was in possession and that was the defendant. The plaintiff alleges that the

defendant became his sub-tenant. It is on these allegations that he sued for possession. The defendant denied the plaintiff's under-tenancy and asserted adverse possession. Discussing the question whether Art. 142 or 144 Limitation Act is applicable to the facts of this case, Wort J. Observed:

'The question of whether Art. 142 or Art. 144 applies has to some extent to be judged by the allegations in the plaint, as was the case in AIR 1921 Pat 237 where the plaintiff asserted that he had been dispossessed. But that does not necessarily conclude the matter, because the question of the onus (with which this matter is most particularly concerned) is to be determined upon the allegations of the plaintiff and the defendant. If the defendant admitted that he had dispossessed the plaintiff, then quite clearly Art. 142 would apply; but if he asserted that the plaintiff had never been in possession, that he (defendant) had been there and had been prescribing against him (plaintiff) the case does not come under any of the authorities holding on the facts of particular cases that Art. 142 applies. It is case which is otherwise provided for by the Limitation Act and therefore Art. 144 applies.'

(10) In view of the foregoing, it cannot be doubted that where the plaintiff comes to court seeking possession on the allegation that he was dispossessed or that he had discontinued possession, it is his duty not only to prove his title but also the dispossession or discontinuance of possession within 12 years next before suit. In the present case the plaintiff does come to court with such allegations and he has failed to prove his possession within 12 years as found by both the lower courts. Simply because he seeks to base his claim alternately on title also he cannot escape from the responsibility of proving his possession within the statutory of proving his possession within the statutory period and he cannot by such a trick throw the burden on the defendant to prove adverse possession. The plaintiff's appeal will therefore fail, on the ground of limitation.

(11) The learned Advocate for the appellant argued that the lower appellate court came to the conclusion that the defendant was a permanent tenant. His contention is firstly that such a case is not made out by the defendant in his written statement. He next contends that if he is held to be a permanent tenant, even then the plaintiff

was entitled to claim possession and he further urges that the defendant cannot prescribe any title more than that of a permanent tenant. On looking into the written statement. I do not find that any such case has been made out by the defendant. The finding of the lower, court that the defendant was a permanent tenant is therefore clearly wrong. In to discuss the facts that flow from his being a permanent tenant. The appeal is dismissed with costs.

(12) Appeal dismissed.

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