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Thimaiah Vs. Madegowda

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Court : Karnataka

Decided On : Nov-13-1987

Reported in : AIR1989Kant83

Judge : P.K. Shyamasundar, J.

Acts : Code of Civil Procedure (CPC), 1908 - Order 6, Rule 2; Limitation Act, 1963 - Schedule - Articles 64 and 65

Appeal No. : Regular Second Appeal No. 645 of 1978

Appellant : Thimaiah

Respondent : Madegowda

Advocate for Def. : C.N. Ramaswamy Sastry, Adv.

Advocate for Pet/Ap. : N.C. Biligiri Rangaiah, Adv.

Judgement :

1. This second appeal is at the instance of the plaintiffs in O.S. No. 178 of 1971 and is directed against the differing judgments of the two courts below.

2. This case with a very long and checkered career has brought little solace to the plaintiffs who by themselves and through their predecessor-in-interest have been batting for possession of two small bits of lands one measuring 12 guntas and another measuring 1 acre 20 guntas situate in the village Begur at Channapatna

taluk within the rural district of Bangalore, from the year 1951-52 but have not been able to call it a day even after 35 years of incessant litigation carried on from the portals of the Munsiff's court at Ramanagaram to this Court, where it is making its appearance for the third time.

3. This ill-fated litigation began with the purchase of these two lands in survey No. 8/1 by one Thimmaiah, maternal-grand- father of the plaintiffs, (parties will be referred to as plaintiffs and defendant in the course of this judgment in a court auction sale, pursuant to which he obtained possession of the same on 22-6-1942.

It is common ground that thereafter Thimmaiah leased the suit properties to one Karigowda under a registered sale (Sic) deed dt.10-2-1943 for a period of five years. 'It transpired subsequently that Madegowda, the husband of the defendant Smt. Ningamma, took possession of the properties from Karigowda by colluding with him an d thereafter refused to give it up on a demand made by Thimmaiah and, therefore, Thimmaiah had to file a suit in O.S. No. 583/51-52 in the court of the Munsiff at Ramanagaram seeking declaration of his title to the properties and for possession thereof, both from Madegowda and the lessee Karigowda.

4. In the suit, Karigowda, having remained ex parte, the same was contested only by Madegowda who lost it before the Munsiff, in that the suit stood decreed by the judgment of the Court made on 30-7-1953.

5. From that judgment and decree of the Munsiff, Madegowda, preferred an appeal to the Court of the subordinate Judge at Bangalore in R.A. No. 260/1952 without any success. The appeal having stood dismissed by the subordinate Judge on 21-6-1954, the said Madegowda, preferred a second appeal to this Court in R.S.A. 122 of 1955 which was dismissed by this Court by order dt.9-4-1958.

6. Following the dismissal of the second appeal as aforesaid the decree-holder Thimmaiah sued out execution for recovery of possession of the suit properties by making as, many as four execution applications in Ex.Nos.372/57, 646/1960, 765/1962 and 259/1963. In the last of the execution cases to wit - Ex.No.259/1963 there was a change in the array of parties because by then the decree-holder

Thimmaiah, who perhaps had got tired of the confrontation with the judgment debtor Madaiah, Gowda had assigned the decree in favour of Boraiah, stated to be his son-in-law and during the pendency of the execution case 259 of 1963 the Court ordered the bringing on record the assignee-decree holder with a direction to him to continue the execution proceedings.

7. By the date of that order made on the 26th August, 1967 Madegowda Judgment Debtor, having died, his wife Ningamma the defendant herein came on record and the first thing she did was to challenge the order of the Munsiff, made on the 26th August, 1967 permitting the assignee decree-holder to come on record with leave to prosecute the execution case further. That challenge by Ningamma was in Execution R. A. 146 of 1967 before the Civil Judge and was eventually dismissed on 29-2-1968. Notwithstanding the said dismissal Ningamma brought it up to this, Court in Ex. S.A.80 of 1968 which resulted in A r emit of the case back to the Munsiff. After remit of the case, the judgment debtor Ningamma raised a further objection asserting that possession of the properties cannot be delivered without a partition of the suit properties. The learned Munsiff, who considered that objection passed an order on 26-8-1967 holding that the decree-holder should deposit Rs. 346.50 and obtain possession of suit item No. 2, but for obtaining suit item No. 1, the decree-holder must secure a further decree for partition and possession in a separate proceeding. From that order there was an appeal to the Civil Judge, which resulted again in a remand and after the subsequent remand the learned Munsiff made a further order in Ex. No. 259 of 1963 on 6-81971, holding that item No. 2 not being well defined property of which delivery could be ordered in the execution case, therefore, the decree-holder should seek partition and possession of the same by institution of, an appropriate proceeding. The result was that under the advise of the Court the decree-holder was constrained to seek partition and possession of both the suit items in other proceedings. Therefore, it is the plaintiffs, herein filed O.S.No.178 of 1971 before the Court of the Munsiff at Ramanagaram for partition and possession of the suit schedule properties. The suit came to be instituted on 8-9-1971 and was duly opposed by the defendant amongst others on the ground that the plaintiffs' title if any to the suit property had been extinguished by her adverse possession over the statutory period. The trial Court framed a number of issues. After recording of evidence and accepting the

documents tendered as well, eventually disposed of the suit by granting a decree for partition and possession to the plaintiffs as prayed for.

8. The aggrieved defendant preferred an appeal to the Civil Judge, Bangalore in R.A. No. 73 of 1977. The learned Civil Judge by his judgment dt.20-2-1978 allowed the appeal and reversed the judgment and decree of the Munsiff resulting in the dismissal of the plaintiffs' suit. The Civil Judge in main held against the plaintiffs on the ground of the defendant having perfected her title to the suit property by adverse possession for over the prescriptive period. Hence this second appeal.

9. In this Court Dr. Biligiri Rangaiah, who appeared in support of the appeal on behalf of the vanquished plaintiffs sought to challenge the judgment and decree of the Civil Judge on the following grounds:

1) That the Court below had erred in holding the plaintiffs title to be non est because defendant had acquired title by adverse possession to the suit properties.

2) The defendant having urged during the earlier bouts of litigation that plaintiffs could not take possession without seeking for partition had possession by metes and bounds could not now be heard to contend that plaintiffs' right to possession was barred by her own adverse possession.

10. Mr. C. N. Ramaswamy Sastry, who appeared for the successful defendant in this Court sought to support the decree of the learned Civil Judge, pointing out inter alia that the plaintiffs having never been in possession since the inception of the litigation in the year 1952 by Lingaiah, the predecessor-in-interest of the plaintiffs and both Lingaiah and plaintiffs having had to fight the defendant and her husband for possession and to contend against hostile claims put forward by the defendant and her husband, had allowed grass to grow under their feet while engaged in this lengthy running feud with the defendant, with the result the defendant and her husband who were admittedly in possession of the suit property for over twelve years had now perfected their title by adverse possession and had in the bargain extinguished the plaintiffs' title to the suit properties, thus disabling them from claiming either title or possession.

Mr. Sastry, maintained that the contention put forward by the defendant and her husband on the earlier occasion urging that the plaintiffs relief was for seeking partition and possession did not mean that they were either precluded or deterred from taking up such other pleas as may be open to them, in order to sustain their possession and entitlement to the suit properties. Learned Counsel therefore submits that the plaintiffs can no longer take exception to the stand taken by the defendant on the basis of her adverse possession.

11. The points arising for consideration herein are the following :

(i) Whether the defendant was not entitled to raise the plea of adverse possession having earlier contended that the plaintiffs should seek relief of partition and possession of the suit properties.

(ii) Whether the finding recorded by the Civil Judge that the defendant had established her adverse possession is legally unsustainable in view of the decree in the earlier suit declaring the plaintiffs title to the suit property and claiming possession thereof.

12. Re. Point (i): Dr. Biligiri Rangaiah, strongly remonstrated against the attitude of the defendant in seeking to urge a new plea in the second round of this litigation, after having forced the plaintiffs to adopt the same

by incessantly harping on the choice of the remedy open to the plaintiffs being only of seeking partition and possession of the suit properties. Learned Counsel says that the defendant could not now seek to change front and baulk the plaintiffs of the fruits of the earlier decree for possession by raising a plea of adverse possession, which was not even hinted at during the previous bouts of litigation.

12A. Mr. Sastry joins in and submits merely because defendant had on the earlier occasion resisted the endeavour made in taking possession from her, by pleading that possession cannot be taken except after partition, it did not mean any other defence open to the defendant was barred or could not be availed of.

13. It seems to me there is substance in this contention of Mr. Sastry. A party litigant cannot be tied down to any particular stand except in case of waiver. The

fact that on an earlier occasion the plea now put forward had not been urged and on the contrary some other plea was urged is not an indication or conduct suggestive of waiver of the plea advanced subsequently. But, it may be that a plea advanced earlier and the one advanced later may be wholly incongruent and totally incompatible resulting in mutual annihilation, in which event different results would follow. But herein such a case does not arise as there is nothing inconsistent between a plea urging the plaintiff to seek partition and possession and a plea of adverse possession contending that whatever rights the plaintiff had in the suit property stood extinguished by the defendant's adverse possession. Therefore the argument that the plaintiff was led to file the second suit for partition and possession because of the objection raised by the defendant on the earlier occasion, needs little attention and is easily explained away as just a strategy open to be adopted by a litigant and nothing more. For these reasons, I see little force in the submission of Dr. Biligiri Rangaiah, in support of the first point which is hence rejected.

14. Re. Point (ii): The question herein is whether the plaintiffs title had been extinguished with the defendant being in adverse possession of the suit properties. It is common ground that, either the plaintiffs or their predecessor- in-interest had ever been in possession for more than two decades and that the first of the suits filed by Lingaiah was for recovering possession of the suit properties from Ningamma's husband Madaiah and his lessee Karigowda. Right through there was opposition against the demand for recovery of possession from Madegowda and later by his wife Mingamma, the defendant in the second suit.

15. There is little gainsay in denying that possession of the suit properties by Ningamma and earlier by her husband Madegowda was adverse to the plaintiffs and their predecessor-in-interest. The fact that being unable to obtain possession a suit had to be filed for recovering possession from the defendant, it is needless to add, only emphasises the adverse nature of possession of the properties by the defendant.

16. As already mentioned there is no dispute that ever since the filing of the suit by Lingaiah in O.S.No. 583/51-52 and even prior thereto Lingaiah was not in

possession of the suit properties and neither he nor his successors-in-interest i.e., plaintiffs in these proceedings had at any time been in possession and enjoyment of the suit properties physically. In fact it turns out that at no time had they succeeded in securing even symbolic possession of the suit properties despite two decrees in their favour upholding their entitlement to the properties and for possession thereof, followed by a series of above execution cases, all of which had been successfully resisted by the defendant judgment-debtor.

17. While on this point I may notice that in all probability there was little need for the plaintiff to file a further suit seeking partition and possession of the suit properties because if there was any difficulty encountered in acquiring physical possession, the same could have been solved by getting a surveyor appointed in the execution proceedings as Commissioner, who could have then measured the properties, identified them and thus facilitated acquisition of possession by the plaintiffs of the suit properties.

18. But then whatever may have been the difficulty in taking delivery of item No. 1, of the suit schedule, being a small bit of land no difficulty at all in regard to item No. 2, which measured a compact bit of 1 acre 20 guntas, but, then in the latest execution 259 of 1963 the decree-holder having claimed 1 acre 22 guntas under the decree and upon the discrepancy between the decree as granted by the Court and as sought to be executed by the decree-holder, being pointed out and a clarification sought for by the Court, the decree-holder instead of amending the execution petition to bring it in conformity with the actual decree of the Court appears to have kept aloof, with the result the executing Court found it difficult to grant any relief to the decree-holder and instead ordered that he might seek for partition and possession of that property as well, in separate proceedings. Probably if the decree-holder had simply amended his execution petition restricting the claim to 1 acre 20 guntas in suit item No. 2, he would have got possession of the same and would not have been in this plight of having to hunt after it over these years.

19. Be that as it may the question is whether acquisition of title by adverse possession can be complete when such possession is litigious in character. It is

needless to reiterate the plaintiff and their predecessor-in-interest had been lighting incessantly the right of the defendant to be in possession of the properties, in relation to which there was already a decree by the Court made in O.S. No. 583/51-52, and subsequently affirmed by the High Court in a second appeal. Ever since then, the plaintiff had been making an all out effort to execute that decree and to recover possession of the properties from the defendant, only to be foiled by the defendant who had managed to hold on to the properties by raising one or the other objection. All kinds of adroit manoeuvres adopted had ultimately resulted in plaintiff-decree-holders being successfully kept away from the property for over the prescriptive period of 12 years. Actually the possession of the defendant has lasted for more than 12 years; and it has been right through hostile to the plaintiffs is an aspect which even they do not deny.

20. What now arises for consideration is, whether in those circumstances the title of the plaintiff is extinguished on the strength of the adverse possession of the properties for over 12 years by the defendant who was all along fighting the plaintiffs in one Court or the other in order to block the plaintiffs access to the suit properties.

21. It is on this aspect of the case Dr. Biligiri Rangaiah, places great emphasis in pointing out that the defendant could not be stated to have acquired title by adverse possession at a time when her right to remain in possession was the subject matter of litigation and in other words where possession was litigious in nature can it found title by adverse possession is the question asked.

22. The learned Civil Judge has after a meticulous consideration of the facts and the law obtaining on the point held that notwithstanding the litigation possession of the defendant not having been interrupted at any stage at all and having continued without disruption over the prescriptive period, had resulted in acquisition of title by possession. At one time there appeared to be some difference of opinion on this point amongst the Courts in this country. But it has now been set at rest by a decision of the Supreme Court reported in Soni Lalji Jetha (deceased) Through His L. Rs. v. Soni Kalidas Devechand : [1967]1SCR873 . Before I advert to the said decision I may make a brief reference to the line up of authorities both against

and f or the proposition involved. The Calcutta High Court in Achhiman Bibi v. Abdur Rahim Naskar : AIR1958 Cal437 held that a suit for declaration coupled with a claim for possession ends in a decree in the presence of a person in wrongful possession, the decree arrests running of time against the true owner and if the person in wrongful possession continues even thereafter, such wrongful possession does not ripen into prescriptive title.

This decision was followed by a Bench of the Madhya Pradesh High Court in Sultan Jahen Begum v. Gul Mohd : AIR 1973 MP72 . As against these cases, the Andhra Pradesh High Court in Maidi Bhikashmiah v. Venugopalrao : AIR 1959 AP146 takes the view, that a decree for possession without actual interference with possession did not interrupt running of adverse possession. In this case the decision of the Calcutta High Court in : AIR1958 Cal437 was dissented from.

23. In Line with the view of the Andhra Pradesh High Court, there are two other decisions, one of the Privy Council in Subbaiya Pandaram v. Mohamed Mustapha Maracayar, AIR 1923 PC 175 and the decision of the Bombay High Court in Dagadabai v. Sakharam, AIR 948 Bom 149 pronouncement of a Bench holding that a decree for possession which does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, cannot be said to have interrupted possession; nor can it in law affect the nature of possession unless it does so in fact.

24. In the Privy Council case supra that happened was during the pendency of a suit for declaration that a certain property was subject to a trust, the property was sold in execution of another decree and the auction purchaser was put in possession of the same. Subsequently the suit ended in a declaration that the property was trust property and such a declaration was made with the auction purchaser on record. All the same no steps were taken to disturb his possession and he continued to be in possession for more than 12 years. When the second suit was instituted by the trustee for recovery of possession of the property the auction-purchaser contended that on account of adverse possession and limitation he had perfected title to the property. The plaintiff answered that the auction purchaser's plea was unsustainable in view of the declaration in the earlier suit

that the property was trust property. Their Lordships of the Privy Council upheld the plea of limitation and observed that the declaratory decree had no effect on the nature and quality of the auction-purchaser's possession. In considering the effect of that decree their Lordships observed as fallows.

'At the moment when it was passed, the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition and therefore ought not to have been seized, did not disturb or affect the quality of his possession; it merely emphasised the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late.'

The principle underlying this decision has been accepted and followed widely by the Courts in this country, suffice in this context to refer to the ruling of the Division Bench of the Bombay High Court in Dagadabai v. Sakharam, AIR 1948 Born 149. Therein it was held:

'that even a decree for possession on the strength of title will not interrupt the adverse possession of the defendant unless his possession is disturbed as a matter of fact in pursuance of such a decree. The position was explained as follows:

'Whether a decree for possession in favour of the plaintiff does or does not interrupt adverse possession is purely a question of fact to be decided, on the circumstances of each case. if the decree does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, it cannot be said that it has interrupted possession; nor can it in law affect the nature of the possession, unless it does so in fact. A decree for possession followed by an unsuccessful execution cannot be deemed as a matter of law to have the effect of either interrupting possession or altering its character'.

25. The above decisions have been followed with approval by a Full Bench of the Travancore- Cochin High Court in Padmanabha v Velayudha Nair AIR 1957 Trav. Co. 32. Suffice it to make a reference to Head Note 'A' as follows: -

'A decree merely declaring the plaintiffs title to the property involved in the suit will not interrupt the defendant's adverse possession of that property and if such possession is allowed to continue undisturbed for a period of 12 years or more from the commencement of such possession, the defendant will acquire a title by prescription. The original owner's cause of action for a suit to recover possession of the property will arise on the date of the commencement of the defendant's adverse possession, and not from the date of the decree declaring the plaintiffs title as against the defendant,'

26. The principle that adverse possession continues and fructifies into title by prescription, if it is uninterrupted, has been accepted by the Supreme Court fully in Lalji Jetha's case : [1967]1SCR873 supra. Therein the Supreme Court has followed with approval the Privy Council decision in AIR 1923 PC 175 and. of the Bombay High Court in AIR 1948 Bom 149 The following enunciation appearing at head note 'A' brings to the fore the aforesaid principle :

(A) Limitation Act (1963), Arts. 61 and 65 - Mortgagor and Mortgagee - Adverse possession -- Sale of mortgaged property by mortgagor to mortgagee - Sale is valid Even though sale is held to be voidable character of possession by mortgagee as absolute owner remains unaffected and can ripen into title to property by prescription. Civ. App. No. 2 of 1956, D/- 9-12-1957 (Bom), Reversed.

A mortgagee in possession under the terms of mortgage cannot, by merely asserting rights of ownership in the mortgaged property, convert his possession as mortgagee into possession hostile to the mortgagor. But the mortgagor can sell the mortgaged property to his mortgagee and thus put the mortgagee's estate to an end and thereafter all the right, title and interest in the property would vest in the morgagee. Such a sale would be valid and binding as between them and henceforth the character of possession as a mortgagee would be converted into possession as an absolute owner. Even if such a sale is held to be voidable and not binding on a subsequent purchaser the character of possession based on assertion of absolute ownership by the mortgagee does not alter, and if that possession continues throughout the statutory period it ripens into title to the property, AIR 1923 PC 175 and AIR 1948 Bom 149'

27. The foregoing decision of the Supreme Court gives a quietus to this controversy and sets at rest all conflict surrounding the abstract proposition of law that a person in adverse possession acquires title by prescription despite a decree against him both in regard to title and possession. The pronouncement of the Supreme Court referred to supra clears the ground of this controversy leading to a settled principle to be treated as prevalent i.e., if physical possession was with the judgment debtor, who with hostile animus and continuous possession throughout the period of prescription sustains such possession without being interrupted either by removal or otherwise, then notwithstanding a galore of decrees against that person, at the end of the 12th year, plaintiff's title gets extinguished in virtue of adverse possession by a hostile possessor.

28. In the light of the pronouncement of the Supreme court supra, decisions of the Calcutta High Court in : AIR1958 Cal437 , and of the Madhya Pradesh : AIR 1973 MP72 , cannot be good law any longer. The other decisions relied On by Shri Biligiri Rangaiah being in line with them are in the circumstances of little value and assistance. The result therefore is that the defendant having successfully baulked the plaintiffs and their predecessor-in-interest of possession of the suit property for over two decades and having all the while remained in adverse possession thereof, must be held to have acquired title by prescription, resulting in title of the plaintiffs to the suit properties being completely extinguished. This would be my finding on point (ii).

29. In virtue of the foregoing findings, this appeal fails and is dismissed but in the circumstances of the case, the parties will bear their own costs in this Court.

30. Appeal dismissed.

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