

Joseph Vs. John

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Court : Kerala

Decided On : Jun-01-1959

Reported in : AIR1960Ker27

Judge : Velu Pillai, J.

Acts : Limitation Act, 1908 - Article 144

Appeal No. : Second Appeal No. 256 of 1956

Appellant : Joseph;john

Respondent : John;joseph

Advocate for Def. : A.V. Moothedan, Adv.

Advocate for Pet/Ap. : M.K. Narayana Menon and; C.S. Narayanan, Advs.

Disposition : Appeal allowed

Judgement :

Velu Pillai, J.

1. The suit out of which this Second Appeal arises, was instituted by two plaintiffs, for a partition of their two-third share of the suit property, which is a leasehold and belonged to Thomman. After his death, the suit property came into the possession of his widow Eliswa, and his children, the plaintiffs, defendants 2 to 6 and

deceased Joseph. In execution of a decree against Eliswa and Joseph, the 1st defendant purchased the suit property, and obtained possession of it, on the 3rd Kanni 1112 and he has been in possession ever since.

The suit was resisted by the 1st defendant, and the chief question to be decided in this appeal is, whether the plaintiffs' right in the suit property has been extinguished by reason of the 1st defendant's adverse possession. The suit was instituted on the 14th May 1952, corresponding to the 1st Edavam 1127. The court of first instance held in favour of the 1st defendant; but on appeal, the District Judge held against him and he has therefore preferred this appeal.

2. It was not disputed, that the widow and children of Thomman were co-owners of the suit property. Though it is 30 cents in extent and the sale record and the delivery list in the 1st defendant's favour have this as 13 cents, it may now be taken as concluded, by the decree of the courts below, that the entire property of 30 cents came into the possession of the 1st defendant, as a result of the execution proceedings.

The case of the plaintiffs, that Joseph, having been in sole possession of the suit property, fraudulently and in collusion with the 1st defendant, transferred it to him in order to defeat the other co-owners, has not been substantiated. It may also be stated, that the decree and execution proceedings, pursuant to which the 1st defendant obtained title, were not binding on the plaintiffs and defendants 2 to 6. The question of adverse possession has to be decided on these premises.

3. The learned District Judge relied on *Siddiah v. Rankadas*, 4 D. L. R; Mys. 140, in support of his view, that the transferee from a co-owner of the whole of the joint property stands in the same position as the transferor himself as against the other co-owners, and cannot prescribe against them in the absence of ouster. There are also a few cases, to be mentioned later, which have taken the same view, but there are weighty pronouncements by Full Benches in the Madras and Bombay High Courts, and by division benches in the Calcutta and Patna High Courts, to the contrary.

4. The principle underlying the rule of adverse possession as between co-owners was stated by Lord Buckmaster in *Harjit Singh v. Gurumukh Singh*, AIR 1918 P. C. 1 in these terms:--

'Uninterrupted possession of such property (joint property), without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members. If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former.'

The sole possession of a co-owner, though of the whole property, is therefore referable to his lawful title as co-owner, in the absence of evidence to the contrary. But in my view, this principle has no application to the sole possession of one, who is not in fact a co-owner, but who has obtained possession of the whole property from one who was a co-owner, by virtue of a transfer or otherwise; for this purpose, he must, as he really is, be treated to be a stranger to the other co-owners.

Adverse possession as between strangers, has only to be in the language of the Privy Council in *Radhamoni Debi v. Collector of Khulna*, ILR 27 Cal. 943 'adequate in continuity, in publicity and in extent, to show that it is adverse to the competitor'; it is sufficient, that such 'possession was overt, and without any attempt at concealment, so that, the person against whom time was running ought, if he exercised due vigilance, to be aware of what was happening.' The possession of a stranger, of joint property is prima facie adverse, and satisfies these elements of adverse possession and I see no valid reason, to deny him the benefit of such possession, as against those who claim to be co-owners of the property,

5. But the Assam High Court in *Sarju Kairi v. Panchananda Sarma*, AIR 1959 Assam 15, applied the rule as between co-owners, also to a transferee from one of them against the other co-owners stating one of the reasons to be, that

'there is no duty cast upon the co-owner to watch the conduct of another co-owner, and be on a look out to find out the extent of the share purported to be transferred,

and to intervene, if more than the real share has been transferred. He is entitled to assume, that the permissive nature of the possession has passed on to his co-sharer's transferee who has now become the co-owner in place of the original co-owner.'

In my view, this reasoning is more than sufficiently met by the following observations of Leach, C. J., in *Palania Pillai v. Amjath Ibrahim Rowther*, AIR 1942 Mad 622 decided by a Full Bench, to which no reference was made in *Sarju Kairi's* case, AIR 1959 Assam 15.

'Where one of several co-sharers lets into possession a stranger, who proceeds to cultivate the land for his own benefit, the other co-sharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests, they must take the consequences. Where a person who is in possession under a usufructuary mortgage granted by one of several co-parceners remains in possession of the land, and cultivates it for years, a position which we have here, there can be no doubt, that the requirements of continuity, publicity, and extent, for adverse possession are fully complied with.'

The Full Bench followed earlier cases of the same court, *Secretary of State v. Virarayan*, ILR 9 Mad 175, decided by Turner, C. J. and Muthuswamy Iyer, J. and *Muthuswamy v. Ramakrishnan*, ILR 12 Mad 292, decided by Muthuswamy Iyer and Wilkinson, JJ., the Full Bench case of the Bombay High Court *Bhavrao v. Rakhmin*, ILR 23 Bom 137 and also *Jogendra Nat Roy v. Baladeb Das*, ILR 35 Cal 961 and over-ruled a few cases to the contrary, decided by the same High Court. It decided, that the possession of the transferee of a property from one co-owner is adverse to the other co-owners from the moment of his taking possession. In ILR 23 Bom 137 (FB) the principle was stated in these terms :--

'As he (the transferee) enters as owner and in right of his conveyance, his possession is adverse to them (the co-owners)It may be, and indeed is the case, that such purchaser by his purchase does not get a good title to the land conveyed to him, by a single coparcener . . . Nevertheless, his exclusive possession does not on that account cease to be adverse. He, entering as owner his possession must, we think, necessarily be adverse to the true owners. Adverse

possession depends upon the claim or title under which the possessor holds, and not upon a consideration of the question, in whom the true ownership is vested -- whether in a single person or in many jointly.' AS already indicated, this was also the view held in Jogendra Nath Rai's case, ILR 35 Cal 961 referred to, It was so decided in Rajinder Lal v. Kuer Rai, AIR 1934 Pat 502. Krishna Iyer v. Muthukumar Pillai, 29 Tray L J 647 decided by the former Travancore High Court, in effect came to same conclusion following ILR 23 Bom 137 (F B) and other cases, but on the reasoning, that the entry of the purchaser in the property operated as an ouster of the co-owners, though an observation was also made, that the same principle as between co-owners would perhaps apply in the case of an alienee from one of them as well. It may be mentioned, that in the case decided by the Assam High Court, Sarjoo Prosad, C. J. limited the rule, that there is no distinction in this respect between the possession of a co-owner and of a transferee from him, laid down in the leading judgment, observing, that 'in certain cases, a transfer by a co-owner of the entire property on the footing that it belongs to him alone to the detriment of the interest of his co-owner, might in itself amount to an act of ouster so as to convey an independent right to the purchaser, and enable the purchaser to start prescribing against the co-owner of his transferor from the very date of the transfer'; but it was also added, that the other co-owners must have knowledge of the transfer constituting the act of Ouster, and that in the absence of such knowledge the possession of the transferee, cannot be held to be adverse to the true owners. With great respect, I cannot agree; the possession of a stranger on the land must import such knowledge.

6. The cases which have held the contrary view may now be mentioned. Siddiah v. Rengadas relied on by the learned District Judge, held, that the delivery of possession of the entire property is nothing more than of the right, title, and interest, which the judgment-debtor held in the property and therefore the purchaser in execution of such interest, can only step into the shoes of the judgment-debtor who was only a co-owner of the property; this may be a valid reasoning as to his title, but not, as to his possession. The observations of the Patna High Court in Bibi Rafiquan v. Najibkhan, AIR 1958 Pat 530 that there is no distinction in this respect between a co-owner's possession and a transferee's possession were obiter and the decision itself turned on the applicability of Article

142 of the Limitation Act. But in Dip Narain Rai v. Pundeo Rai, AIR 1947 Pat 99 which followed Subbah Lal v. Fateh Mohammed, ILR 54 All 628: (AIR 1932 All 393), also held the same view. This case did not advert to the Full Bench decisions of the Madras and Bombay High Courts. The observations in Sivasankaran v. State, 1952 Ker L. T. 195: (AIR 1952 Trav Co 208) relied on for the respondent, were made in relation to the execution proceeding which led to the transfer of the co-owner's interest, and have no bearing.

On principle, and in accordance with the weight of judicial pronouncements, I come to the conclusion, that the possession of a transferee from a co-owner, of the whole property, is adverse to the other co-owners from the moment of his entry. If so, the possession of the 1st defendant has been adverse for more than twelve years, and has extinguished the title of the plaintiffs. The decree passed by the learned Judge is vacated, and that passed by the learned Munsiff is hereby restored. The appeal is allowed, but there will be no order for costs in the appellate court, and in this court.

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