**Augustine Vs. Thankamma Thomas**

**Augustine Vs. Thankamma Thomas**

**SooperKanoon Citation** : sooperkanoon.com/728662

**Court** : Kerala

**Decided On :** Sep-30-2005

**Reported in** : 2005(4)KLT653

**Judge** : R. Bhaskaran and; K.P. Balachandran, JJ.

**Acts** : Merged Territories Miscellaneous Alienation Abolition Act, 1955; Evidence Act - Sections 68

**Appeal No.** : A.F.A. No. 102 of 2002

**Appellant** : Augustine

**Respondent** : Thankamma Thomas

**Advocate for Def.** : N.N. Sugunapalan, Sr. Adv.,; N. Madhavan,; K.R. Balasubr

**Advocate for Pet/Ap.** : V. Giri, Adv.

**Judgement** :

**R. Bhaskaran, J.**

1. This appeal is filed against the judgment of a learned single Judge of this Court in A.S.No. 308 of 1995. The 1st defendant in a suit for partition is the appellant in the A.F.A. The trial court dismissed the suit finding that the 1st defendant has prescribed title by adverse possession and limitation with regard to plaint A-

schedule properties and has obtained valid title on the basis of a gift deed executed by his mother with regard to plaint B-schedule properties. In appeal, the learned single Judge reversed the findings on both points and has granted a decree for partition of both A and B-schedule properties.

2. The plaintiff is the sister of the 1st defendant. Plaint A-schedule properties belonged to the father of the plaintiff and 1st defendant and plaint B-schedule properties belonged to their mother. The defence to the claim for partition of plaint A-schedule properties is adverse possession and limitation and for B-schedule properties is a gift deed executed by the mother of the plaintiff and 1st defendant in favour of the 1st defendant.

3. Ouseph Ouseph the father of the 1st defendant died on 10-7-1976. The parties are Syrian Christians in Kottayam District. There is no dispute that after the decision of the Supreme Court in Mary Roy v. State of Kerala : [1986]1SCR371 , female children are also entitled to claim share in the properties of their parents. The points for consideration are (1) whether the claim of adverse possession and limitation set up by the 1st defendant is sustainable, and (2) whether the gift deed executed by the mother of the plaintiff and 1st defendant in favour of the 1st defendant is proved to be a valid gift deed.

Point No. 1

4. With regard to the claim of adverse possession and limitation, the pleading of the 1st defendant is contained in paragraph 9 of the written statement. The relevant portion of the pleadings read as follows:

'From the date of death of the father in 1956 and at least from the date of the marriage of the plaintiff in 1960, the defendant had been in exclusive possession of the plaint 'A' schedule properties, asserting absolute title to them to the knowledge of the plaintiff. He has made improvements thereon in his own right and has dealt with them accordingly. He has executed documents with regard to the same, asserting absolute title to them. He has been taking income from the properties from the dates above mentioned and appropriating it to himself. Plaintiff knew about all those hostile acts and assertion of hostile title as against her from

the inception. She has not only objected to such acts, but has acted always accepting and conceding defendant's absolute title and possession over the properties. From the open, continuous, peaceable and as of right enjoyment as stated above of the plaint 'A' schedule properties for more than the statutory period, the defendant has perfected a valid title by prescription. Hence, plaint 'A' schedule items are not partible.'

This has to be read along with the contention in paragraph 2 of the written statement wherein the 1st defendant has stated that as per the long established custom, practice and accepted personal law of the parties, the plaintiff was given sthreedhanam amounting to Rs. 7,500/- and gold ornaments worth 41 sovereigns and that was received as share of the assets due to the plaintiff. It is stated that the plaintiff accepted the above-said money and gold ornaments and considered the same as payment in satisfaction of the plaintiff's claim against her father's estate as well as regarding the properties of the mother.

5. After the pronouncement of the law by the Supreme Court in Mary Roy's case : [1986]1SCR371 , the daughter is in the position of a co-owner along with the son with respect to the properties left behind by the parents. In such cases, mere exclusive possession by one of the co-owners for any length of time by itself will not enable the co-owner to claim adverse possession. Therefore the question to be considered is whether the 1st defendant has succeeded in pleading and proving ouster of the plaintiff. The learned Counsel for the appellant heavily relied on the decision of this Court in Sooppi v. Moosa (1969 KLT 121). In particular, reference is made to the Illustration given in page 128 of the judgment which reads as follows:

'Again, if X died leaving Y and Z as heirs but Y and Z bona fide though that Y was the sole heir and under that bona fide belief Y got into possession of the estate left by X and continued to be in possession thereof for the statutory period, Z will not thereafter be entitled to claim that Y's possession was under a mistake regarding heirship and he did not have the necessary hostile animus to oust Z. In this case also, while Y was in possession, his hostile animus was to exclude the whole world including the real owner, if any.'

The above Illustration, no doubt, supports the contention of the appellant. The learned senior counsel appearing for the respondent on the other hand relied on the decision of the Supreme Court in Mohd. Mohammad Ali v. Jagadish Kalita : (2004)1SCC271 . In that decision, the Supreme Court has made it clear that it was obligatory on the part of the respondents who were claiming by adverse possession to specifically plead and prove as to since when their possession became adverse to the other co-sharers. The Supreme Court in that case relied on its earlier decision in Annasaheb Bapusahed Patil v. Balwant : [1995]1SCR88 wherein it is stated that where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that Other's title make his possession adverse so as to give himself the benefit of the statute of limitation. The Supreme Court also relied on the decision in Vidya Devi v. Prem Prakash : AIR 1995 SC1789 wherein the concept of ouster is discussed. The judgment reads as follows:

'Ouster' does not mean actual driving out of the co-sharers from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.'

In Deva v. Sajjan Kumar (2003 AIR SCW 4501), it was held that when the animus to hold the land adversely to the title of the true owner can be said to have started only when the defendant derived knowledge that his possession over the suit land had been alleged to be an act of encroachment on plaintiff's survey number and that knowledge was after filing of the suit, the claim for adverse possession and limitation is not sustainable. It is also held that mere long possession of defendant for a period of 12 years without intention to possess the suit land adversely to the

possession of the plaintiff and to latter's knowledge cannot result in acquisition of title by the defendant to the encroached suit land.

6. In this case, though in the written statement, it is stated that eversince the death of the father in 1956 and at least from the date of the marriage of the plaintiff in 1960 the defendant had been in exclusive possession of the plaint 'A' schedule properties asserting absolute title to them to the knowledge of the plaintiff. There was no declaration of hostile animus to the knowledge of the plaintiff. Till the decision of the Supreme Court in Mary Roy's case : [1986]1SCR371 , there was no occasion for male children of the deceased to make any such declaration of hostile animus as the parties were under the impression that the female children who have been given in marriage after the payment of Sthreedhanam are not entitled for share in the property, of the parents. In Arundhathi Misra v. Sri Ram Charithra Pandey : (1994)2SCC29 the Supreme Court has held that the plea based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. If a person does not renounce his title nor admitted the title of the other person and asserted adverse possession to the knowledge of the other person, he cannot succeed in establishing adverse possession.

7. In Annasaheb Bapusaheb Patil's case : [1995]1SCR88 , the properties were originally held as watan properties attached to the office of Patel and by rule of primogeniture became impartible. After the abolition of the watan under the Merged Territories Miscellaneous Alienation Abolition Act, 1955 and after regrant in the name of defendants, it was claimed as their exclusive property and mutation was effected in their name. When the other members of the Joint Family claimed partition, they set up a plea of adverse possession and limitation. In that context, the Supreme Court held that when the defendants referred their possession to lawful title it will not be considered to be adverse. A person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. In this case also, the 1st defendant was under the bona fide impression that he alone was the owner of the plaint schedule properties and the plaintiff has no right in it. It was only in 1986 that the law was declared by the Supreme Court virtually enabling the female children to claim right in the property

of the deceased father. Therefore, till then the sons were not keeping possession of the property with any hostile animus.

8. The Full Bench decision of this Court in Cicily v. Sulaikha Beevi (1968 KLT 779 (FB)) also declared in unequivocal terms that open assertion of hostile title coupled with exclusive possession by one co-owner to the knowledge of the other is required to establish ouster and adverse possession in the case of co-owners.) Therefore, the finding of the learned single Judge with regard to plaint A schedule properties is not liable to be interfered with and this point is found against the appellant.

Point No. 2

9. With regard to plaint B-schedule properties, the prayer in the plaint itself is to declare the gift deed alleged to have been executed by the mother in favour of the 1st defendant as null and void and not binding on the plaintiff. The total extent of B-schedule properties is 2.12 acres. Out of it, 1.73 acres was purchased by the Government for rehabilitating certain flood victims. 34 cents was also sold by the 1st defendant to Ravindran on 14-2-1981 by Ext.B4 sale deed and 10 cents was given as Kudikiddappu as per Ext.B5 purchase certificate. According to the 1st defendant, two cents more only remains with him which may show that the extent shown in the gift deed is not fully correct. Though Government is made a party to the suit the persons to whom the lands are allotted are not made parties. Similarly, Ravindran and Kudikidappukaran are not made parties to the suit. The trial court held that the plaintiff has failed to prove that the gift deed was not executed by the mother fully knowing about its contents. The learned single Judge has found that the gift was attested by only one witness and there was no proper attestation and it was not proved by examining at least one of the attesting witnesses. Under Section 68 of the Evidence Act only if the execution of the gift is specifically denied the necessity to examine the attesting witnesses arises. What is meant by specific denial is elaborated by a Division Bench of this Court in Kannan Nambiar v. Narayani Amma (1984 KLT 855). What is to be specifically denied is the execution of the document. In the plaint, the allegation 'is as follows: 'The said gift deed is void ab initio since the mother was at that time absolutely incapable of

understanding the nature of the contents of the document due to old age and illness and cannot have given her consent at all for the conveyance. The mother was bedridden and bereft of her senses for over an year due to acute rheumatism, diabetes and various other ailments. She had lost her eye sight also an year ago. The plaintiff is therefore entitled to a declaration that document No. 2912 of 1976 of Vaikom Sub Registry Office dated 7-7-1976 purporting to be gift of B-schedule properties in favour of the 1st defendant is null and void and inoperative and that she has one half right over the same with right to partition by metes and bounds.'

10. In view of the above, the learned Counsel for the plaintiff has submitted that the plaintiff is not interested in claiming any right in plaint B-schedule property in so far as the entire property is already alienated and are in the possession of third parties. Those third parties are not in the party array. Therefore even if the decree is passed in favour of the plaintiff it will be very difficult to get at possession of the property. Inasmuch as the learned Counsel for the plaintiff has given up the claim for partition of plaint B-schedule property, we find that it is unnecessary to consider the question whether there was proper proof of the gift deed. Therefore the claim for partition of plaint B-schedule property is denied.

In the result, the appeal is allowed in part setting aside the decree of the learned single Judge in so far as the plaint B-schedule property is concerned. The judgment of the single Judge in respect of plaint A-schedule property is sustained. The parties shall bear their costs in this appeal.